FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 28, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
v.	:	Docket No. LAKE 2018-0340
AMERICAN AGGREGATES OF MICHIGAN, INC.	: :	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY: Rajkovich, Chairman; Young and Althen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). It comes before us on interlocutory review of the decision of an Administrative Law Judge denying the Secretary's motion to approve settlement of a withdrawal order issued pursuant to section 104(g)(1) of the Mine Act.[1] The Order asserted that American Aggregates of Michigan, Inc. ("American Aggregates") failed to provide a miner "the MSHA-required 4-hours new miner training prior to beginning work at the mine." Ex. A at 11 (Order 8952500, May 17, 2018).

The Judge concluded that the Secretary had not presented sufficient facts to support the proposed settlement. 41 FMSHRC 382 (May 2019) (ALJ). Upon denying the settlement, the Judge recused himself, requested that the case be reassigned to another Judge for hearing, and certified his ruling for interlocutory review. The Commission granted interlocutory review.

[1] Section 104(g)(1) of the Mine Act states:

If, upon any inspection or investigation pursuant to section 103 of this Act, the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training as determined under section 115 of this Act, the Secretary or an authorized representative shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required by section 115 of this Act.

30 U.S.C. § 814(g)(1).

As set forth below, we find that the Judge failed to apply the correct standard for consideration of settlement proposals and that the proposed settlement is fair, reasonable, appropriate under the facts, and in the public interest. Therefore, we reverse the Judge's denial of the settlement motion and approve the settlement.

I.

Factual and Procedural Background

MSHA's regulations contain detailed instructions for training new miners. 30 C.F.R. § 46.5(a) requires that each new miner must be provided "with no less than 24 hours of training as prescribed by paragraphs (b), (c), and (d)." However, it permits miners to begin work before receiving the full 24 hours of training provided they work "where an experienced miner can observe that the new miner is performing his or her work in a safe and healthful manner." *Id.*

In turn, subsection (b) permits miners to begin work with no less than 4 hours of training and sets forth 7 general topics that must be covered during those 4 hours. 30 C.F.R. § 46.5(b). The 4-hour requirement of subsection 46.5(b) is at issue in this case.

On May 17, 2018, an MSHA inspector issued a section 104(g)(1) withdrawal order to American Aggregates, the operator of the Ray Road Plant, a surface sand and gravel mine in Oakland County, Michigan. Ex. A at 11. The order alleged that Matthew Weaver, a driller operator/helper, "had not received the MSHA-required 4-hour new miner training prior to beginning work at the mine . . . [and] had no previous mining experience." 41 FMSHRC at 382; Ex. A at 11 (Pet. for Civil Penalty). The order directed the operator to withdraw the miner from the mine until he received the requisite training. The inspector designated the violation as significant and substantial ("S&S") and found the likelihood of injury as "reasonably likely" and the expected injury to be "fatal." He also marked the negligence as "high." 41 FMSHRC at 383; Ex. A at 11. MSHA applied the penalty point schedule set forth in 30 C.F.R. § 100.3 and proposed a penalty of $2,007.[2]

American Aggregates contested the order. It replied that Weaver was not a driller, but rather a driller helper. It attached exhibits to its answer setting out factual details of Weaver's training, including classroom training under the Occupational Safety and Health Administration's (OSHA) regulations and on-the-job training performing the same work at other non-mining sites. American Aggregates disputed the Secretary's allegations of the violation and asserted that the injury was unlikely to occur, would only result in lost work days if it occurred, and that there was no negligence. It also responded that the violation was not S&S.

[2] Upon first impression, a penalty of $2,007 seems remarkably low for an allegedly high negligence, S&S, high gravity violation. However, we recognize that the operator was small and had no prior violation history. While we are not bound by 30 C.F.R. Part 100, we note that the MSHA penalty point criteria assigned the operator only 8 penalty points before the addition of points for negligence and gravity.

A. **Settlement Motion**

On February 14, 2019, the Secretary filed a motion to approve settlement. In that motion, American Aggregates accepted the violation. The parties agreed to the removal of the S&S designation; modification of the likelihood of occurrence of injury from "reasonably likely" to "unlikely;" modification of the level of gravity from "fatal" to "lost work days or restricted duty;" and reduction of negligence from "high" to "moderate." The Secretary modified the proposed penalty from $2,007 to $132. In doing so, the Secretary applied his regulatory penalty criteria and penalty point formulation to the terms of the violation as accepted by American Aggregates. In other words, $132 would have been the prescribed penalty under MSHA's regulations if the violation had been cited as it was proposed to be settled.

The motion stated that American Aggregates offered the following facts to support its position:

> Respondent asserts that Matthew Weaver was not a driller but was a Driller's Helper. Respondent contends that Weaver had received, at the time the order was issued, 19.5 hours of OSHA related classroom training, had received 4 hours of New Miner Training and had received on-the-job training working directly with its driller. Respondent concedes that on the day of the inspection Weaver had not received training on all seven subject[s] required by 30 C.F.R. 46.5 including 46.5(b)(4) 46.5(b)(5), 46.5(b)(6) and 46.5(b)(7), and the MSHA training that Weaver had received had not been properly documented. Respondent stated that although Weaver had no previous mining experience, he did have approximately one month of experience working with its driller as a Driller's Helper taking core samples at a non-mine property being considered for purchased [sic] for future mining. Respondent avows that Weaver's work off mine property was the exact same work conducted with the same drill rig the day the withdrawal order was issued. Respondent maintains that Weaver worked directly with and [sic] closely supervised by its driller.

41 FMSHRC at 383; S. Settlement Mot. at 3-4.

For his part, the Secretary asserted:

> In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. . . . The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the

> enforcement perspective than the settlement, in which all alleged violations are resolved and violations that are accepted can be used as a basis for future enforcement actions. A resolution of this matter in which all violations are resolved is of significant value to the Secretary and advances the purposes of the Act.[3]

S. Settlement Mot. at 2.

After reviewing the settlement, the Judge requested clarification from the parties on several points. The Secretary responded that he relied on the settlement motion as filed, consistent with the standards articulated by the Commission in *The American Coal Co.*, 38 FMSHRC 1972 (Aug. 2016) ("*AmCoal I*").

B. **The Judge's Decision**

The Judge concluded that the motion did not support settlement because the operator acknowledged that it did not provide mandatory training on all topics set forth in 30 C.F.R. § 46.5(b) such as section 46.5(b)(4) (hazard task training) and (b)(7) (rules and procedures for reporting hazards), and that an injury resulting from the violation was "likely to result in lost work days or restricted duty." To a great extent, the Judge focused on the removal of the S&S designation finding that "the admitted facts do not support removal of the S&S designation." 41 FMSHRC at 386. The Judge further noted that the settlement proposed a significant percentage reduction of the penalty—about 94%.[4]

The Judge rejected the Secretary's contention that the settlement served any future enforcement benefit. He concluded that the settlement was not fair, reasonable, appropriate or in the public interest and rejected the settlement. He certified, on his own motion, his ruling for interlocutory review. Finally, having essentially taken a position upon reviewing the settlement motion that the violation was S&S, in an act of judicial statesmanship, the Judge recused himself from the case and requested that it be assigned to an alternative Judge.

On June 6, 2019, the Commission directed review of whether to uphold the Judge's denial of the settlement.

[3] This is standard language used by the Secretary in many settlement agreements. It states concerns for the Secretary in arriving at settlement—namely, the risk of litigation and the importance of obtaining admission of alleged violations without the necessity for a contentious hearing.

[4] The Judge did not mention the conformance of the penalty with MSHA's regulatory penalty point system in light of the agreement of the parties.

II.

Disposition

A. Parties' Arguments

In concert, the parties argue that the Judge erred by failing to apply the appropriate standard for reviewing proposed settlements as articulated by the Commission in *AmCoal I* and *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*"). Specifically, they assert that the Judge failed to consider the settlement holistically, and instead, engaged in a piecemeal review of aspects of the settlement in isolation, focused almost exclusively on the S&S designation that the operator contested in its Answer.

The Secretary also contends that the Judge erred by discounting the future enforcement value of the modified order. Further, the Secretary contends that the significant penalty reduction in this case was a direct product of reassessing the penalty under the Part 100 standards for regular assessments based on the penalty criteria that fairly and appropriately reflected the modified designations of negligence and gravity the parties agreed to in the settlement motion. As re-evaluated by the Secretary, the violation would result in penalty points significantly below the point value that results in the minimum penalty.[5]

American Aggregates argues that the terms of the settlement reflect a compromise the parties reached after negotiation, with both parties making concessions. In particular, it contends that it agreed to accept the violation despite providing documentary evidence that the miner received more training than required under section 46.5, including extensive OSHA training, 4 hours of new miner training, and on-the-job training. Thus, American Aggregates argues that the violation is for the failure to cover some of the seven expressly prescribed topics during the 4 hours of new miner training it did provide. It further argues that it covered several of the required topics and had already provided 19.5 hours of training in accordance with OSHA regulations.[6]

American Aggregates further contends that the parties' settlement was not an admission of adverse facts as asserted by the Judge, and that the Judge erred by characterizing the parties'

[5] The minimum penalty under the Secretary's regulation for penalty point assessments at 30 C.F.R. § 100.3 at the time of the violation was $132 for a violation with 60 or fewer penalty points. As found in the Order, and under the Secretary's penalty point criteria, the violation parameters totaled 94 points for the $2,007 assessment. As agreed upon in the settlement, the violation parameter reductions would render a point value of 44 points, which is far below the regulation's 60 point threshold.

[6] The settlement motion submitted by the parties states the operator's assertion that it provided 19.5 hours of OSHA training whereas the operator's Answer to the penalty petition states it provided 19.25 hours of training on a long list of topics. The operator further asserts, in its brief to us, that it provided over 30 hours of OSHA and MSHA training. In the interest of consistency, and while not making a fact-finding on this point, we use 19.5 hours as noted in the settlement motion that was before the Judge.

settlement as an agreement to "fundamental, undisputed facts." 41 FMSHRC at 388. American Aggregates asserts a continuing disagreement with certain factual allegations, as reported in the settlement agreement, but that it agreed to accept the violation and related designations in order to settle the proceeding.

American Aggregates also argues that the Judge erred in mischaracterizing its position on several matters in his order denying settlement.[7] Specifically, it points to the Judge's error in stating that American Aggregates "acknowledge[d] that the injury would still potentially result in lost work days or restricted duty," noting that it disputed both in its Answer and the settlement motion. *Id.* at 384. American Aggregates also agrees with the Secretary that the Judge's characterization of the penalty reduction was exaggerated because he focused on a percentage but failed to take into consideration that the reduced proposed penalty reflected a new assessment amount based on calculations using the Secretary's Part 100 regulations as applied to the settled terms of the violation.

Both parties assert that the settlement satisfies the standard set forth in *AmCoal* and ask the Commission to vacate the Judge's decision and approve the settlement.

B. Commission Review

Under section 110(k) of the Mine Act, Congress vested the Commission with authority to approve settlements of contested assessments. 30 U.S.C. § 820(k); *AmCoal I*, 38 FMSHRC at 1975. While such authority is internally delegated to the Commission Administrative Law Judges in the first instance, the Commissioners retain full authority regarding settlements.[8]

We have held that in reviewing settlements, "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. That is the legal standard governing settlements.[9] In turn, the decision whether a settlement is fair, reasonable, appropriate

[7] In its brief to the Commission, American Aggregates points out that it submitted documentary support of the extensive training it did provide the miner, which included section 46.5(b)(4) topics. It also disputes the Judge's statement questioning the alleged contention that it was "'unaware that the training the miner received' was not sufficient." 41 FMSHRC at 384.

[8] Section 110(k) of the Mine Act 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." 30 U.S.C. § 820(k). 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.'" *AmCoal I*, 38 FMSHRC at 1976 (quoting *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1862 (Aug. 2012)).

[9] The dissent eschews any review of the settlement in favor of advocating, thankfully in a more temperate manner than in *Hopedale*, their focus upon granting Judges carte blanche to deny settlements. We do not agree with the dissent's contention that the Judge has such "wide discretion" (slip op. at 13-15, 18) or that "there must be a demonstration that no reasonable Judge

under the facts, and protects the public interest is made on the basis of a submission by the Secretary to which the operator has agreed. *See Hopedale Mining, LLC*, 42 FMSHRC ___, No. LAKE 2019-0149 (Aug. 28, 2020)

During the review of a proposed settlement, the Judge is not to engage in fact finding as he would post-hearing. *See Solar Sources, LLC*, 41 FMSHRC 594, 602 (Sept. 2019) ("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."). Judges may not "assign[] probative value to some facts without the benefit of an evidentiary hearing." *AmCoal II*, 40 FMSHRC at 991. Hence, the analysis of *submitted facts* in a settlement proposal is markedly different from an analysis of *admitted evidence* in a hearing.[10]

Whether a violation is S&S is a matter in the first instance of prosecutorial discretion. The Mine Act, therefore, recognizes the particular expertise of MSHA in judging whether a violation is S&S. Indeed, if MSHA does not charge an S&S violation, the Commission cannot make an S&S finding. *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996). Commission Judges do not have the discretion to make such elevated finding unless it is asserted in the first instance by MSHA. The Judge therefore should not have applied the *Newtown Energy, Inc.*, 38 FMSHRC 2033 (Aug. 2016), test for S&S determinations to a settlement.

C. The Judge Erred By Denying the Settlement

As the Commission articulated in *AmCoal*, 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 must review the Judge's determination to ensure that "a Judge's approval or rejection of a settlement is 'fully supported' by the record, consistent with the statutory penalty criteria, and not otherwise improper." However, "abuses of discretion or plain errors are subject to reversal." *Black Beauty*, 34 FMSHRC at 1864 (citing *Knox County Stone Co.*, 3 FMSHRC 2478, 2480 (Nov. 1981)). Here, the Judge plainly erred by denying the settlement on the basis of an inappropriate legal determination on S&S on an undeveloped record and in contravention to the facts presented by the parties in support of the settlement.

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would have any grounds for denial [of the settlement] . . . in application of the *AmCoal* standard" (*id.* at 18) in order to vacate a Judge's denial. The standard of review of a Judge's settlement determination is not a deferential one, but one of whether the Judge has complied with the law and whether his determination is supported by the record before him. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864 (Aug. 2012).

[10] In this respect, the review of a settlement bears a resemblance to a ruling on cross motions for summary judgment. The parties present a factual basis and ask for a legal conclusion. Regarding settlements, the Judge ultimately reaches a legal conclusion whether the joint position of the parties satisfies the established legal basis for settlement. Thus, a settlement decision fundamentally is a legal decision based upon an undisputed and joint submission. Of course, an important difference is that for cross motions for summary judgment, the facts must be uncontested whereas, in a settlement, differences regarding the facts and the ability of each party to sustain its position may be a driving force for settlement.

In denying the settlement, the Judge concluded that "the admitted facts do not support removal of the S&S designation," 41 FMSHRC at 386, focusing on the lack of training and the "reasonable likelihood that the untrained-miner hazard contributed to by the violation [would] result in an injury that would result in lost workdays or restricted duty." *Id.* at 388. Not only is the Judge's analysis not supported by the facts presented by the parties, but it is an erroneous exercise of judicial decision making at this preliminary stage of the proceeding.

It was undisputed that the miner received 4 hours of new miner training, but that he did not receive all 7 modules that are to be covered during those 4 hours. The violation in this case is, then, the absence of certain modules that an individual must have before working as a miner.[11]

In settling, the parties essentially agree on the following facts as provided by American Aggregates in its Answer and as noted above. The miner received 4 hours of new miner training, but missed certain modules. MSHA does not contest that he previously received 19.5 hours of safety training. The miner worked as a helper rather than a driller. During the prior month of work, he was doing the same job, on the same remote terrain, and under the supervision of the same driller. S. Settlement Mot. at 3. The parties further agree that this violation involved moderate negligence with the unlikely possibility of a lost work day injury. Given American Aggregates' acceptance of the violation, and based upon the foregoing, both parties agree that the settlement is justified.[12]

In evaluating the settlement, the Judge misapprehended the correct standard for reviewing settlements, opting instead to conduct a private, unsupported S&S analysis under the *Newtown* test. At the pretrial settlement phase of litigation, Judges may not "assign[] probative value to some facts without the benefit of an evidentiary hearing." *AmCoal II*, 40 FMSHRC at 991. Hence, any fact finding or legal conclusions made based on the facts supplied by the parties in support of their settlement motion is not appropriate in the Judge's review of a proposed settlement.

The Judge ignored most of the information relevant to the reasonableness of the settlement under the *AmCoal I* criteria. The Judge failed to take into consideration the many elements of the agreement of the parties, specifically, those included in paragraph 6 of the Secretary's settlement motion cited above. These facts are directly applicable to consideration of

[11] The order asserts that the miner "had not received the MSHA-required 4-hour new miner training prior to beginning work at the mine." Ex. A at 11. The issue in this case is the 4 hours of new miner training before beginning work required by 30 C.F.R. § 46.5(b).

[12] If, in undertaking a post-citation or order review, MSHA learns a violation was over-cited, we do not consider it a failure for MSHA to reconsider the appropriate designations for a violation. While a Judge may require a satisfactory explanation for the reconsideration, we obviously would not require MSHA to obstinately support cited conditions after it has determined, in the proper exercise of its prosecutorial discretion, not to be appropriate.

the proposed settlement under the proper standard of review articulated in *AmCoal I*. In sum, the Secretary provided significant factual information to support the proposed settlement.[13]

Of course, even in a settlement, the parties may not be amenable to "admitting" the correctness of the other party's position on an issue of law or that a party erred in its evaluation of the facts. Therefore, settlements must be read with a realistic eye to the positions of the parties in moving toward settlement.

In his S&S-focused analysis, the Judge disregarded a host of circumstances demonstrating errors by the inspector and other factors supportive of acceptance of the settlement:[14]

- Contrary to the inspector's belief, the miner was not a driller, but rather, was a helper. The significance is that he was continuously under the control and direction of the driller.

- As a driller helper, the miner was working in open virgin areas drilling ground samples to evaluate for possible future mining. Thus, he did not work near a quarry or pit face or around such mining equipment.

- The miner had 4 hours of new miner training. The violation was for not covering all the modules set forth in subsection 46.5(b).[15]

[13] Our dissenting colleagues make the same mistake that the Judge did below, focusing almost exclusively on the percentage of the penalty reduction without regard to the abundance of factual support provided by the parties to support modification of the order and subsequent reduction of the penalty. Slip op. at 15-16 & n.3. These facts are significant not for establishing findings of fact in the record, but for explaining the basis of the parties' settlement. In evaluating the settlement, the Judge and Commission must meaningfully consider and assess the factual explanation provided by the parties without making credibility determinations or resolving conflicts in the record. Neither the Judge below nor the dissent engages in such evaluation of the facts pertaining to the violation at issue in this settlement. We consider such facts for the limited purpose of ascertaining whether the proposed settlement is "fair, reasonable, appropriate under the facts, and protects the public interest."

[14] In reciting these points, we do not make findings of fact. Instead, we recite these points as those made by the operator, with supporting documentation, which the Secretary validly could consider in reaching settlement and that, in turn, the Commission must consider in reviewing the settlement.

[15] The Respondent claims 30 C.F.R. § 46.5(b)(4) training was completed. AA Br. at 5; AA Answer at 4-5, Ex. B (attached). It admits subsections (b)(5), (6), and (7) were not completed. These are: (b)(5) Instruction on the statutory rights of miners and their representatives under the Act; (b)(6) A review and description of the line of authority of supervisors and miners' representatives and the responsibilities of such supervisors and miners' representatives; and (b)(7) An introduction to rules and procedures for reporting hazards.

- With regard to topics bearing upon safety, the driller was not "untrained." In fact, the parties accepted that the miner had received 19.5 hours of training that covered virtually all aspects related to safe operations.

- Further, the miner had a full month of on-the-job experience as a driller helper doing the same work at the mine site during the preceding month.

- During that same preceding month working as a driller helper, the miner worked on the same type of terrain as when the drill moved onto a mine site.

- During that same preceding month as a driller helper, the miner worked under the same driller who was supervising him on the mine site.

- Section 46.5(e) provides "Practice under the close observation of a competent person may be used to fulfill the requirement for training on the health and safety aspects of an assigned task in paragraph (b)(4) of this section, if hazard recognition training specific to the assigned task is given before the miner performs the task." 30 C.F.R. § 46.5(e). Because the miner previously performed the same tasks and worked for a month under the supervision of the same driller, there is evidence the miner may have had experience with the health and safety aspects of being a driller helper as described in subsection 46.5(b)(4).[16]

- Having reviewed these facts, MSHA considered that the occurrence of an injury was "unlikely." The motion expressly stated the contention that "because of the training that Weaver had received, the experience Weaver had obtained working as a Driller's Helper and the close supervision by it[s] driller, it was 'unlikely' that Weaver would incur an[] injury.'" S. Br. at 6, n.2 (citation omitted). The parties' agreement that an injury was "unlikely" (S. Settlement Mot. at 4) is reasonable based on the miner's status as a helper, close supervision, prior significant training, receipt of new miner training, prior on the job training, and remoteness of the area from danger from proximity to a pit or other operational area. The Secretary explained in his brief that "no reading of the settlement agreement can support the judge's view." S. Br. at 6, n.2.

Instead of focusing on the above points, the Judge concentrated on his finding, without a hearing, that the violation was S&S. Again, it is not appropriate to make such a finding during a settlement review.

[16] The dissent accuses us of making an argument not raised by the parties in noting the potential applicability of section 46.5(e) to the circumstances of this case. Slip op. at 17. However, we note this specific provision of the Secretary's training regulations because it is particularly relevant to the circumstances of this case. We cannot and do not make a legal conclusion as to whether the operator was in compliance with the Secretary's training requirements. However, we have the right and duty to consider the law in determining whether the Judge's decision was correct. In fact, the Judge should have considered that part of the law in evaluating the true character of the offense, but did not.

In general, when the Commission's review of the record demonstrates a proper consideration by a Judge of a motion and legal standard for settlements, the Commission sustains the Judge's action. However, when a motion, including admissions and concessions of the parties demonstrate the Judge erroneously failed to accept a settlement that meets the legal standard for approval, the denial of a settlement must be reversed.[17]

In reaching our decision in this case, we emphasize the importance of all aspects of training, and most definitely, the mandatory 4 hours of training before commencing any work. This training is important for the avoidance of accidents and injuries when a worker becomes a miner for the first time. It is for this reason, of course, that the regulations require that such an employee must work under the watchful eye of an experienced miner who can observe the new worker's performance for health and safety reasons. Our holding, here, is not a diminution by us of the importance of training.

In this case, American Aggregates admits that the regulation was violated—but this is a settlement case. The Secretary's evaluation toward settlement apparently led him to accept that the involved miner had received many more hours of training than the necessary hours required by subsection 46.5(b) with a significant focus on safety and health. The Secretary gave credence to the fact that the inspector had misidentified the employee as a driller when, in fact, he had a lesser job as a driller helper under supervision of a driller. The Secretary further gave recognition to the month of experience by the new miner in performing the same work, with the same driller/supervisor, on the same type of terrain as at the mine—and removed from the danger of active mining equipment in his job.

In evaluating the violation under the totality of these circumstances, which the Judge failed to do, the Secretary acted reasonably in agreeing to acceptance of the violation in return for a settlement entailing modification of gravity and negligence. It is a fair compromise to hold the operator accountable for its actual failures and to allow the Secretary to proceed with efficient use of his resources. In addition, the Secretary benefits from reliance on this violation in the operator's violation history for future enforcement.

Regarding the Secretary's use of its penalty point system for purposes of settlement in this case, we reiterate that it is the right and duty of the Commission to assess penalties, irrespective of any system that the Secretary may use. That being said, we note that in settlements, the Judge is not *setting* the penalty, but instead, is *evaluating* whether the proposed penalty is part of a fair and reasonable settlement.

[17] We disagree that reversal of a Judge's denial of a settlement may occur only when "no reasonable Judge would have any grounds for denial under the numerous criteria to be considered in application of the *AmCoal* standard." Slip op. at 18. The Commission has recently, and unanimously, reversed a Judge's denial of a settlement without applying the standard suggested by the dissent. *The Ohio County Coal Co.*, 40 FMSHRC 1096, 1098-1100 (Aug. 2018) (reversing a Judge's denial of the settlement based on his failure to apply the appropriate standard and because his reasoning that "an internal inconsistency in the settlement terms that undermines the parties' agreement" was "unsound").

Primary authority to approve settlements of contested proposed assessments is vested by Congress to the Commission. 30 U.S.C. § 820(k); *AmCoal I*, 38 FMSHRC at 1976. While such authority may be delegated to the Judges, the Commissioners retain such full authority to approve such settlements. Accordingly, we find the proffered penalty to satisfy *AmCoal*.

III.

Conclusion

Based upon a careful review of the settlement motion and entire record, we conclude that the settlement is fair, reasonable, appropriate, and in the public interest. Therefore, we vacate the Judge's decision, approve the settlement motion, and assess a penalty of $132.[18]

Marco M. Rajkovich, Jr., Chairman

Michael G. Young, Commissioner

William I. Althen, Commissioner

[18] Commissioner Young believes that remand of improper settlement rejections would ordinarily be more appropriate than approval by the Commission, in light of our Judges' experience in reviewing settlements. But we have approved such settlement agreements here, when appropriate. *See, e.g.*, *Solar Sources*, 41 FMSHRC at 600; *Ohio County*, 40 FMSHRC at 1100. In this case, we would be required to remand to a different Judge, who would need to begin the consideration process anew. That fact, and the marginal likelihood that a significantly greater penalty would be assessed by a new Judge on the facts provided by the parties here, compel him to agree with the decision to approve the settlement.

Commissioners Jordan and Traynor dissenting:

American Aggregates of Michigan, Inc. ("American Aggregates") was charged with failing to provide required training to a miner. The parties agreed to settle the case for a $132 penalty (a reduction of more than 93%). The Judge denied the settlement motion. Because we conclude that it was well within the Judge's discretion to refuse to approve such a significant penalty reduction, we would affirm his decision.

We would affirm the decision of the Judge under the abuse of discretion standard we have long applied to review of our Judges' exercise of discretionary authority to approve or deny settlement pursuant to section 110(k) of the Act, 30 U.S.C. § 820(k). We have long held "[t]he judge's front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion." *Knox County Stone Co*., 3 FMSHRC 2478, 2479 (Nov. 1981). The Commission "has stated repeatedly, if a Judge disagrees with a stipulated penalty amount or believes that any questionable matters bearing on the violation or appropriate penalty amount need to be clarified through trial, he is free to reject the settlement and direct the matter for hearing." *Pontiki Coal Corp.*, 8 FMSHRC 668, 675 (May 1986). Thus, if a Judge's approval or rejection of a settlement is "'fully supported' by the record, consistent with the statutory penalty criteria, and not otherwise improper, it will not be disturbed, but . . . abuses of discretion or plain errors are subject to reversal." *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1864 (Aug. 2012). An abuse of discretion may be found if there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Id.* at 1863 (citing *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991) (citations omitted)).

Our precedents governing our proper review of our Judges' discretion to approve or deny settlements is reviewed at length in our dissent in *Hopedale Mining, LLC*, 42 FMSHRC ___, slip op. at 18-22, No. LAKE 2019-0149 (Aug. 28, 2020), issued on the same day as our decision in this case. Though application of those precedents in this case should result in affirmance of the Judge's decision to deny the parties' settlement motion, his decision is nonetheless vacated by the majority. The decision below should have been affirmed as a reasonable exercise of the Judge's discretion. When the government and an operator seek Commission approval of their agreement to compromise a penalty, they have the burden of persuading a Judge exercising reasonable discretionary judgment that the proposed penalty reduction is "fair, reasonable, appropriate under the facts, and in the public interest." *The American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016) ("*AmCoal I*").

As a threshold matter, we are obliged to address the majority's decision to discard the abuse of discretion standard, and its assertion that "[t]he standard of review of a Judge's settlement determination is not a deferential one." Slip op. at 7-8, n.9. In fact, the Commission has repeatedly used abuse of discretion review in analyzing Judges' decisions regarding settlement motions. *See, e.g.*, *The American Coal Co.*, 40 FMSHRC 983, 987 (Aug. 2018) ("*AmCoal II*"); *Rockwell Mining, LLC*, 40 FMSHRC 994, 996 (Aug. 2018); *Black Beauty*, 34 FMSHRC at 1869. And abuse of discretion review is, at the core of its essence, a highly deferential standard. *See, e.g.*, *Gall v. U.S.*, 552 US 38, 56 (2017) ("The Court of Appeals gave virtually no deference to the District Court's decision . . . [and] [a]lthough the Court of Appeals correctly stated that the appropriate standard of review was abuse of discretion, it engaged in an

analysis that more closely resembled *de novo* review of the facts presented . . . ."); *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997) ("In applying an overly 'stringent' review to [a discretionary] ruling, [the Court of Appeals] failed to give the trial court the deference that is the hallmark of abuse-of-discretion review."); *In re Lupron Mktg. & Sales Practices Litig.*, 677 F.3d 21, 30-31 (1st Cir. 2012) (citations omitted) ("We review a district court's approval of a proposed class action settlement for abuse of discretion. . . . The abuse of discretion standard is highly deferential and 'not appellant-friendly'").

Our Judges have wide discretion to reject the parties' proposal to compromise a penalty, provided the Judge has considered each of these *American Coal* factors, the section 110(i) penalty criteria, and other factors we have held relevant to the discretionary determination.[1] Here, the Judge did just that.

The training standard at issue, 30 C.F.R. § 46.5, requires, in relevant part, that each new miner must be provided "with no less than 24 hours of training." 30 C.F.R. § 46.5(a).[2] Subsection (b) sets forth the general topics that must be covered in the 24 hours of new miner training prior to a miner beginning work at the mine. The settlement motion conceded that the operator failed to train the miner on the topics contained in sections 46.5(b)(4)-(7), which mandate training on:

> (4) [i]nstruction on the **health and safety aspects of the tasks** to be assigned, including the safe work procedures of such tasks, the mandatory health and safety standards pertinent to such tasks, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program;
>
> (5) Instruction on the **statutory rights of miners** and their representatives under the Act;
>
> (6) A review and description of the line of **authority of supervisors and miners' representatives** and the responsibilities of such supervisors and miners' representatives; and
>
> (7) An introduction to . . . **rules and procedures for reporting hazards**.

[1] These other factors for consideration include the future enforcement value of accepting violations as written, *AmCoal II*, 40 FMSHRC at 989; the possibility of criminal penalties, *Aracoma Coal Co*., 32 FMSHRC 1639, 1641 (Dec. 2010); settlement provisions requiring operator implement personnel changes or training improvements, *AmCoal I*, 38 FMSHRC at 1982; and deterrence, *Black Beauty*, 34 FMSHRC at 1864-65.

[2] The order alleged a violation of this provision – section 46.5(a). It specified that the miner had not received the MSHA-required 4-hour new miner training prior to beginning work at the mine.

30 C.F.R. § 46.5(b)(4)-(7) (emphasis added).

The training requirements in section 46.5 are based on the language of the Mine Act. Section 115(a) of the Act requires operators to have a health and safety training program approved by the Secretary. 30 U.S.C. § 825(a). The new miner training requirements in section 115(a)(2) of the Act formed the basis for much of the specific training mandates in 30 C.F.R. § 46.5. The statutory training provision states that each training program shall provide as a minimum that:

> [n]ew miners having no surface mining experience shall receive no less than 24 hours of training if they are to work on the surface. Such training shall include instruction in the **statutory rights of miners and their representatives** under this Act, use of the self-rescue device where appropriate and use of respiratory devices where appropriate, **hazard recognition**, emergency procedures, electrical hazards, first aid, walk around training and the **health and safety aspects of the task** to which he will be assigned.

The Mine Act also requires each operator to verify that the miner has received the specified training in each subject area of the approved training plan. 30 U.S.C. 825(c). In addition, Congress was so emphatic about the importance of miner training that it included in the Mine Act a provision that a miner who has not received the requisite training must be deemed "a hazard to himself and to others" and immediately withdrawn from the mine and prohibited from re-entering until the miner has received the required training. 30 U.S.C. § 814(g)(1).

MSHA's original proposed assessment for this violation was $2,007. The Secretary's settlement motion proposed a reduction of the proposed penalty to $132.[3] It was entirely within the Judge's discretion to conclude that the parties had failed to demonstrate that such a dramatic reduction of a penalty imposed for a violation of the critical training requirements outlined above met the *American Coal* standard. We fail to see how this slap-on-the-wrist penalty amount could possibly serve to deter mine operators from future violations of safety standards. We strongly suspect that paying this penalty (which is less than the amount of some traffic tickets) would be less expensive for the operator than the costs involved in properly training this miner. How the public interest in ensuring miner safety is satisfied by this penalty is a mystery. And even if we disagreed with the Judges' conclusions that such a large penalty reduction was not fair or reasonable, we cannot see (and the majority does not explain) how and why these conclusions fall outside the boundaries of the Judge's wide discretion.

[3] Under the Secretary's penalty regulations in effect at the time the settlement motion was filed, $132 was the minimum amount the Secretary could assess for a violation. 30 C.F.R. § 100.3 (2018). Of course, Commission Judges are not bound by the Secretary's penalty regulations set forth at 30 C.F.R. Part 100. *The American Coal Co.*, 40 FMSHRC 1011, 1015 (Aug. 2018).

Our colleagues reverse the Judge's denial of the settlement and approve it. In so doing, they entirely mischaracterize his decision. If one reviewed only their opinion and failed to read the Judge's, the reader would come away with the impression that the Judge's ruling was based almost entirely on his view that the S&S designation should not have been deleted as part of the settlement. *See* slip op. at 8, 9. This gives short shrift to the fact that this dramatic decrease in the penalty – in addition to several other factors – motivated the Judge's denial. In his nine-page decision, he stated three times that the 93.5% reduction in the penalty was troubling. *See* 41 FMSHRC 382, 386 (May 2019) ("While a significant reduction in the proposed assessment amount is not impermissible as part of a proposed settlement agreement, the steep reduction invites closer scrutiny of the facts presented to ensure that the settlement is 'fair, reasonable, appropriate under the facts, and in the public interest,' consistent with Commission precedent"); *see also id.* at 388, 389.

The majority claims that the Judge failed to view the settlement as a whole, but the Judge's own words belie that charge:

> In the present settlement agreement . . . the parties seek to modify the likelihood of occurrence, the severity of injury, the S&S designation, and the negligence of the underlying Order. In addition, the parties seek to reduce the proposed penalty by well-nigh 94%. Almost any future enforcement benefit . . . has been almost completely eliminated. . . . The Secretary asks that I approve a 93.5% penalty reduction, as well as modifications to nearly every portion of the original Order issued for violation of a mandatory training standard, enshrined in the text of the Mine Act, on the basis of admitted facts that bear no interpretation other than the fact that [the operator] violated the Act.

Id. at 388-89.[4]

Abandoning all pretense of "abuse of discretion" review, the majority attempts to persuade us that the settlement deserves approval by convincing us of their own view that the *admitted* lack of miner training was not really that bad.[5] Despite the parties' concession in the settlement motion that the miner "had not received training on all seven subject[s] required by 30 C.F.R. § 46.5 including 46.5(b)(4)–(7) (S. Settlement Mot. at 3),[6] our colleagues find solace in

[4] In addition, the Judge explicitly included in his written opinion the section of the Secretary's settlement motion (paragraph 6) setting forth the facts in support of settlement. 41 FMSHRC at 383.

[5] They do not even attempt to explain away the operator's concession that it did not have the appropriate documentation of the miner's training. AA Br. at 6.

[6] We note with interest our colleagues' apparent acceptance of a claim made in the operator's brief (AA Br. at 5) that section (b)(4) training (instruction in the health and safety aspects of the job) was completed (slip op. at 9 n.15) when the settlement motion clearly states otherwise. This, despite the fact that they emphasize a Judge "is not to engage in fact finding,"

the fact that he was drilling ground samples in an open area (slip op. at 9), "removed from the danger of active mining equipment" (*id.* at 11), which, we suppose, leads them to conclude that the lack of training would not be hazardous. In stating that "the parties accepted that the miner had received 19.5 hours of training" (*id.* at 10), they fail to take into account that this was not training pursuant to the mine's approved training program, but instead was OSHA training. They appear to equate OSHA training with mine safety training, despite the fact that the record does not demonstrate that the two are the same. Did not the Judge have discretion to come to a different conclusion?

They also make a legal argument on behalf of the parties – one not included in the settlement motion or in briefs to the Commission – that the operator actually *was* in compliance pursuant to section 46.5(e) ("practice under the close observation of a competent person").[7] Slip op. at 10. They conclude – on the basis of no record evidence – that his work under the supervision of a driller "appear[ed]" to provide him with the precise health and safety aspects of being a driller helper as described in subsection 46.5(b)(4). *Id.*[8] In short, their vigorous arguments for approving the motion run counter to the letter and the spirit of abuse of discretion review of settlements.

Moreover, the Secretary's argument that the Judge erred by discounting the future enforcement value of the modified order barely passes the laugh test. S. Br. at 7. The future enforcement value of an order modified from "fatal" to "lost workdays or restricted duty," from high negligence to moderate, with the likelihood of occurrence changed from "reasonably likely" to "unlikely" and with a deleted S&S designation, can hardly be viewed as a potent weapon of mine safety enforcement.[9] More importantly, by what measure, other than their own personal

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and must analyze the "*submitted facts* in a settlement proposal." *Id.* at 7 (emphasis in original). We question, how, given these constraints, our Judges and the Commission can heed the majority's mandate to "meaningfully consider and assess the factual explanation provided by the parties." *Id.* at 9, n.13.

[7] The majority attempts to conjure a non-existent distinction between the error in stating "a legal conclusion" in a settlement case (slip op. at 8) as opposed to "the right and duty to consider the law," where it chastises the Judge for failing to consider this provision "in evaluating the true character of the offense." *Id.* at 10, n.16. Were the majority decision susceptible to appellate review, such flawed reasoning would not survive scrutiny.

[8] We are at a loss to reconcile this analysis with what our colleagues meant in their *Hopedale* opinion where they claim principles of "party presentation" prohibit a Judge evaluating a settlement motion from looking beyond the facts and explanations presented in the parties' motion. *Hopedale Mining, LLC*, 42 FMSHRC at ___, slip op. at 5-6, No. LAKE 2019-0149 (Aug. 28, 2020).

[9] The Judge properly compared the enforcement value of the modified order with those of the unmodified order and the unmodified citations in *AmCoal II.* 41 FMSHRC at 388-89. The Secretary's argument that the Judge was suggesting that only citations preserved as written have substantial enforcement value completely misreads the Judge's analysis. S. Br. at 7.

views to the contrary, do our colleagues determine the Judge's conclusion with respect to enforcement value of the modified order is outside the bounds of the Judge's discretion?

The majority reverses the Judge's denial of the settlement motion because it concludes that the settlement is "fair, reasonable, appropriate, and in the public interest." Slip op. at 12. However, it fails to demonstrate that there is "no evidence" to support the Judge's decision or that it was based on a misunderstanding of the law.[10] *Black Beauty*, 34 FMSHRC at 1863. Our colleagues reverse the Judge and approve the settlement, not even attempting to comply with or distinguish black letter case law providing our Judge's wide discretion. These precedents mandate an abuse of discretion review of our Judges' application of the multi-factor standard for approval of settlements, which is fundamentally inconsistent with the majority's use of *de novo* review to substitute its preferred conclusions and outcome. The majority decision erroneously forecloses the possibility that on remand, the Judge "(like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason." *Fed. Election Com'n v. Akins*, 524 U.S. 11, 25 (1998). Unfortunately, our colleagues have plainly lost sight of the proper application of the deferential abuse of discretion standard. *See Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 266-67 (1981) (noting that the appellate court "expressly acknowledged that the standard of review was one of abuse of discretion," but chastising it because "the Court of Appeals seems to have lost sight of this rule, and substituted its own judgment for that of the District Court.").

Although our colleagues state that the Secretary "acted reasonably" in agreeing to the settlement and that the settlement was a "fair compromise," this is not dispositive. Slip op. at 11. It is simply their personal view. A Judge may, within the Judge's discretion, deny a settlement motion that others might argue is reasonable or fair. But for the Commission to reverse the Judge and approve the settlement, the bar is high – there must be a demonstration that no reasonable Judge would have any grounds for denial under the numerous criteria to be considered in application of the *AmCoal* standard for settlement review. Such a showing has not been made.

[10] The majority states that the Judge's decision was based on a misunderstanding of the law because he found that the admitted facts did not support the deletion of the S&S designation and because he concluded that there was a reasonable likelihood of injury, which goes to the 'gravity' of the violation for consideration under the penalty factors in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). Slip op. at 8. Even if these rulings were deemed erroneous, it would constitute harmless error, as the Judge's decision sets forth other well supported grounds for his conclusion the proposed settlement does not meet the *American Coal* standard. But the majority's approach is to reverse the decision below by identifying its disagreement with the application of only one of the numerous criteria used to evaluate a settlement, and then substituting its own judgement to reach its favored result without regard for whether there are other grounds for denying the motion.

In conclusion, we would affirm the Judge's denial of the settlement and remand the case.

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