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 2019-0149
HOPEDALE MINING, LLC	:	

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

DECISION

BY: Rajkovich, Chairman; Young, and Althen, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). It involves the review of a Commission Administrative Law Judge's denial of a proposed settlement between the Secretary of Labor and Hopedale Mining, LLC, regarding four citations, and the Judge's subsequent convening of a hearing rather than ruling on a motion seeking interlocutory review of the denial. 41 FMSHRC 322, 339 (Jun. 2019) (ALJ).

For the reasons that follow, we reverse the Judge's denial of the motion seeking interlocutory review, and vacate that portion of the Judge's decision reaching the merits of the citations. We further reverse the Judge's denial of approval of the settlement motions and approve the settlement.

I.

Factual and Procedural Background

At issue in the proposed settlement are four citations issued to Hopedale on December 4, 2018, at its underground coal mine located in Harrison County, Ohio. All four citations alleged a significant and substantial ("S&S")[1] violation of 30 C.F.R. § 75.370(a)(1)[2] for failure to follow

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

[2] Section 75.370(a)(1) provides in part that, "[t]he operator shall develop and follow a ventilation plan approved by the district manager." 30 C.F.R. § 75.370(a)(1).

the mine's ventilation plan. More specifically, Citation No. 8055975 alleged that the operator failed to follow the ventilation plan in an area where the roof bolter was operating because an air reading behind a line curtain measured 2,792 cfm rather than the required measurement of 3,000 cfm. Citation No. 8055976 alleged that the operator failed to follow the ventilation plan because the operator failed to drop a tail curtain in an intake entry while cutting into intake air. Citation No. 8055977 alleged that only 19 of 30 water sprays on a continuous miner were operating, while the ventilation plan requires a minimum of 27 of 30 sprays to be operating. Citation No. 8055978 alleged that the roof bolter's vacuum measured only 10 inches of mercury (Hg), while the ventilation plan requires 12 inches.

The Department of Labor's Mine Safety and Health Administration ("MSHA") proposed civil penalties in the sum of $18,093 for the four violations. Hopedale contested the penalties, and the matter was assigned to the Judge.

On March 25, 2019, the Secretary filed a motion to approve settlement stating that the operator agreed to pay $3,339 of the $18,093 penalty proposal total. The penalties agreed to in settlement were calculated in accordance with 30 C.F.R. Part 100 based on agreed upon reduced levels of gravity for two citations and reduced negligence for all four citations. The parties agreed that negligence of three of the four citations should be reduced from moderate to low, that negligence of one of the four citations should be reduced from high to moderate, and that the gravity of two citations should be reduced from highly likely to result in injury to reasonably likely to result in injury.

That same day, the Judge sent an email to the parties stating that she could not approve the settlement as submitted because of the seriousness of the violations and the operator's history of ventilation violations. Mot. for Recon., Ex. B. The Judge thereafter set the matter for hearing on April 24, 2019, and ordered the parties to submit a list of witnesses and exhibits if the matter did not settle. On April 5, 2019, the Secretary submitted an amended motion to approve settlement, providing additional information with respect to each citation.

Five days later, on April 10, the Judge, sua sponte, issued a subpoena directing the MSHA inspector who issued the citations to appear and testify at the hearing on April 24, and to bring materials related to issuance of the citations. Subsequently, Hopedale and the Secretary filed prehearing submissions in response to the Judge's hearing notice, identically stating that they did not intend to present witnesses during the hearing and that the proposed exhibits they intended to introduce were joint stipulations.

On April 17, 2019, the Judge issued an order denying the amended motion for settlement. On April 22, the Secretary filed a Motion for Reconsideration of Denial of Settlement Agreements, or, alternatively, Motion to Revoke Subpoena, or alternatively, Motion to Certify for Interlocutory Review and for Stay Pending Interlocutory Review.[3]

[3] Hopedale later joined the Secretary's motion for reconsideration and alternative grounds of relief.

On April 24, the parties and Judge met at the hearing site. The Judge provided the parties with an opportunity to argue about the appropriateness of the settlement and the pending motion prior to the actual start of the hearing. Tr. 5-8, 19, 20-23. The Judge denied the motion for reconsideration, but did not rule on the motions pertaining to the subpoena or interlocutory review. The Judge informed the parties that they were expected to call witnesses if they wanted facts in the record and not stipulations. Tr. 27. The Secretary submitted revised stipulations into the record, which were admitted. Tr. 15, 29, 33. Although the inspector was present, the Judge did not ask him any questions. Tr. 39-40. Rather, the Judge dismissed the case on the basis that the Secretary failed to meet his burden of proving the violations. Tr. 39-40.

On June 24, 2019, the Judge issued the decision, vacating the citations and dismissing the case. First, the Judge concluded that prior to hearing, the settlement proposals were rejected because they were not fair, reasonable, appropriate under the facts, or in furtherance of the public interest. The Judge explained that the facts presented in the amended settlement motion and both sets of the joint stipulations were insufficient to support the reductions in penalties proposed. More specifically, the Judge found that the Secretary had failed to prove lower negligence as to the four citations and a lowering of gravity as to two citations. The Judge explained that for each citation, the parties presented insufficient information or "information that had little to no bearing" on the designation of gravity or negligence for which they sought modification. 41 FMSHRC at 325.

Second, the Judge denied the Secretary's motion for reconsideration and its alternative grounds for relief.

Finally, the Judge considered the merits of the four citations. The Judge accepted the agreed upon facts contained in the stipulations, including that the four violations had occurred. However, the Judge concluded that the Secretary had failed to meet his burden of establishing all four violations as alleged in the citations. She then vacated the citations, and dismissed the proceeding.

The Secretary filed a petition for discretionary review, which the Commission granted. The Secretary and Hopedale filed opening briefs contending that the Judge made four legal errors. They contend that the Judge erroneously: (1) convened a hearing that denied the parties the right to seek interlocutory review; (2) issued a subpoena to obtain evidence in connection with settlement; (3) failed to apply or incorrectly applied the standard set forth in *American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016) ("*AmCoal I*"); and (4) vacated the citations even though the parties stipulated that the violations occurred.

For the reasons discussed below, we conclude that the Judge erred in convening a hearing and failed to correctly apply the *AmCoal I* standard.

II.

Disposition

A. The Judge erred in convening a hearing rather than ruling on the motion seeking interlocutory review.

The Commission reviews a Judge's management of a case, including pre-trial rulings, under an abuse of discretion standard. *Marfork Coal Co.*, 29 FMSHRC 626, 634 (Aug. 2007). We conclude that the Judge abused discretion in convening a hearing in this case before ruling on the Secretary's pending motion seeking interlocutory review.

The Judge's error involves in part the timing of key pre-trial rulings under the circumstances of this case. In the Judge's April 17 decision denying the amended motion to approve settlement, the Judge stated that the parties would be given one additional opportunity to explain why the settlement should be approved, but that if the settlement were rejected, the parties should move forward to present witnesses and exhibits.

Five days later, on April 22, the Secretary filed a motion requesting that the Judge reconsider the denial of the settlement agreements. The Secretary's motion alternatively requested that the Judge revoke the subpoena issued to the inspector. As a final ground of alternative relief, the Secretary requested that if the Judge did not reconsider the denial of settlement or revoke the subpoena, the Judge should certify both matters for interlocutory review. The Secretary requested that the proceedings be stayed pending interlocutory review.

The Judge did not reschedule the April 24 hearing in order to first rule on the Secretary's extant motion. Rather, consistent with the Judge's statement in the April 17 order, the parties met at the hearing site on April 24 and were given an opportunity to argue regarding the appropriateness of the proposed settlement. Tr. 5-6. In addition, the Judge permitted the parties an opportunity to argue the pending motion. Tr. 20-23.

Although the Judge again rejected the settlement during the proceedings on April 24, she did not explicitly rule on the motion to revoke the subpoena or the motion seeking certification for interlocutory review. Tr. 18-19, 34-35. Rather, the Judge disposed of the Secretary's motion in the June 24 decision, which also covered the post-hearing merits of the citations.

In the June 24 decision, the Judge denied the motion seeking interlocutory review on the basis that it was moot since the matter had already proceeded to hearing. 41 FMSHRC at 329. The Judge reasoned that, in any event, the questions of whether she correctly denied the settlement motions and issued a subpoena to the inspector did not involve controlling questions of law and that the questions were not "novel" or did not involve "unresolved questions of law." *Id.* at 330.

Commission Procedural Rule 76 describes the requirements for interlocutory review and provides two alternative paths by which parties may gain interlocutory review. Under section 2700.76(a)(1)(i), the Judge may certify that the interlocutory ruling involves a controlling

question of law and that immediate review will materially advance the final disposition of the proceeding. Alternatively, under section 2700.76(a)(1)(ii), if the Judge denies a party's motion for certification of the interlocutory ruling, the party must file a petition for interlocutory review within 30 days of the Judge's denial of such motion for certification. 29 C.F.R. § 2700.76(a)(1)(i) & (ii).

The Judge erroneously foreclosed the opportunity for the parties to avail themselves of the protections afforded by Rule 76(a). Even if the Judge determined implicitly that it was appropriate to deny the motion for interlocutory review before proceeding to a hearing on the merits, Procedural Rule 76(a)(1)(ii) requires that the parties be allowed the opportunity to appeal that ruling to the Commission. The issue of whether the issues should be certified for interlocutory review became moot only as a result of the Judge's abuse of discretion in convening the hearing rather than ruling on the motion and allowing the parties to seek interlocutory review directly.

Immediate review of the question would have advanced the final disposition of this proceeding because resolution of the question could have resulted in settlement. The Commission has repeatedly granted interlocutory review of orders denying approval of settlement motions. *See, e.g., Solar Sources, LLC*, 41 FMSHRC 594 (Sept. 2019); *Am. Aggregates of Michigan, Inc.*, 41 FMSHRC (Jun. 2019); *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018); *American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal II*"); *Amax Lead Co. of MO*, 4 FMSHRC 975 (Jun. 1982). In such instances, the Commission concluded that the standard set forth in section 2700.76 had been satisfied. *See, e.g, Ohio Cty Coal Co.*, 40 FMSHRC 1096 (Aug. 2018).

The Judge's decision raises further concerns, particularly regarding the longstanding principle of party presentation. It is not appropriate for a Judge to assume a role as an investigating attorney, prosecuting attorney, or defense counsel. This prohibition is underscored by the unanimous decision of the U.S. Supreme Court in *United States v. Sineneng-Smith*, 140 S.Ct. 1575 (2020). Justice Ginsburg, in delivering the opinion of the Court, stated it very succinctly:

> In our adversarial system of adjudication, we follow the principle of party presentation. As this Court stated in *Greenlaw* v. *United States*, 554 U. S. 237 (2008), "in both civil and criminal cases, in the first instance and on appeal . . ., we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Id.* at 243.

140 S.Ct. at 1579. In quoting Justice Scalia in *Castro v. United States*, 540 U. S. 375 (2003), Justice Ginsburg went on to reiterate the "general rule" that:

> [O]ur system "is designed around the premise that [parties represented by competent counsel] know what is best for them, and are responsible for advancing the facts and argument entitling them

> to relief." *Id.*, at 386 (Scalia, J., concurring in part and concurring in judgment).
>
> In short: "[C]ourts are essentially passive instruments of government." *United States v. Samuels*, 808 F. 2d 1298, 1301 (CA8 1987) (Arnold, J., concurring in denial of reh'g en banc)). They "do not, or should not, sally forth each day looking for wrongs to right. [They] wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *Ibid.*

Sineneng-Smith, 140 S.Ct. at 1579.

Our dissenting colleagues, in complete disregard of the controlling law of *Sineneng-Smith*, would mandate Judges to take on the role of supervisory prosecutors. While our colleagues may disagree with *Sineneng-Smith*, it is undoubtedly applicable to "our adversarial system of adjudication" of Mine Act cases.

At the onset of these events, insistence of convening a substantive hearing without affording the parties the opportunity to avail themselves of the process set forth in Procedural Rule 76 was error. Accordingly, we reverse the Judge's denial of the Secretary's motion seeking interlocutory review and vacate that portion of the Judge's decision disposing of the merits of the citations.

We need not discuss at length additional errors – the Judge's issuance of a subpoena for witness at the hearing and dismissal of violations admitted by the operator. Nevertheless, we emphasize that Judges' conduct must conform to the principle of party presentation as reiterated in *Sineneng-Smith*. For the Judge to: schedule an almost immediate substantive hearing, deprive the parties of their right to seek interlocutory review of the denial of the proffered settlement, issue a subpoena for a witness attendance at the rushed hearing, and then cap it off by vacating admitted violations, was the type of "radical transformation of the th[e] case" that the Supreme Court rejected as judicial action that "goes well beyond the pale." *Sineneng-Smith*, 140 S.Ct. at 1581-82. Likewise, we need not discuss at length the Judge's clearly erroneous post-hearing dismissal of citations with respect to which the operator had stipulated its liability.

Thus, we now consider the question presented in the Secretary's petition for discretionary review which should have been the subject of interlocutory review, that is, whether the Judge erred in denying the proposed settlement.

B. The Judge erred in denying the settlement.

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

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

30 U.S.C. § 820(k). 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)). In "effectuating this Congressional mandate, the Commission and its Judges consider whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *AmCoal I*, 38 FMSHRC at 1976.

The Commission and its Judges must have information sufficient to carry out this responsibility. 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). The Commission has recognized that parties may submit factual support consistent with the penalty criteria factors found in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), as well as facts supporting settlement that fall outside of the section 110(i) factors. *AmCoal I*, 38 FMSHRC at 1982.

During the review of a proposed settlement, the Judge is not expected to engage in fact finding as she would post-hearing. *See Solar Sources*, 41 FMSHRC at 602 ("At the pre-hearing settlement stage of a Commission proceeding, no evidence has been adduced into the record and the Judge is not required to engage in fact finding."). Judges are "expected to consider the facts as alleged by the parties in their settlement, evaluate such information under the applicable Commission standard for review, and determine whether the facts support the penalty agreed to by the parties." *Id.* Consideration of facts *as alleged by the parties* is entirely consistent with *Sineneng-Smith.*

Contrary to our dissenting colleagues' misrepresentation, our holding does not "instruct[] our Judges to ignore whole sections of the record before them." Slip op. at 22. It does not find that "Judges may no longer probe gaps or inconsistencies in the explanation offered in support of a settlement motion." *Id.* Our holding simply follows our own precedents in a manner consistent with the Supreme Court's unanimous mandate regarding litigation.

We have held that 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 at the settlement stage must be on the *facts stipulated to by the parties* in support of their settlement motion. A Judge may request additional facts, if the parties have not provided a sufficient basis for evaluation under the standard we articulated in *AmCoal I.* The Judge, however, may not reject stipulated facts that do not comport with the Judge's personal view of what should or must have happened at the time of the violation.

This settlement, like most, was submitted on facts stipulated by the parties. There was no testimony to review. Under such circumstances, it is unnecessary and inappropriate to make a credibility determination regarding the stipulated facts, directly or indirectly, unless the record before the Judge positively demonstrated that a stipulated fact is not correct.[4]

In prior cases, the Commission has applied an abuse of discretion standard in reviewing the denial of a settlement. *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014). Notably, however, in a settlement, the Judge does not weigh conflicting evidence or make credibility determinations. The "facts" are the representations made by the parties in the settlement motion. The issue is whether, given the representations and stipulations of the parties, the settlement meets the Commission's standard for a settlement. Thus, there is no element of support for findings of fact based upon substantial evidence.

If taking those representations into account, the settlement meets the standard we articulated for approval in *AmCoal I* (fair, reasonable, etc.), the settlement should be approved. Although the Commission gives weight to the experience gained by ALJs through the handling of many settlements, the denial of a settlement that comports with the standard we have established is an abuse of discretion, and the Commission may exercise its discretion to accept the settlement. The facts of the settlement come to the Commission in exactly the same form and relevance as before the Judge.

In sum, it is an abuse of discretion to deny a settlement when agreed-upon or stipulated facts satisfy the standard for approval. We must review the facts and the conclusions the Judge draws from those facts against an objective standard, because one of the elements of the standard requires the settlement to be "reasonable."[5] Under the Mine Act, it is the responsibility of the

[4] For example, the parties' Joint Stipulation 8(f) states, "The section foreman was at the continuous miner as it cut through the E to F Crosscut, but was unaware the ventilation curtain had not been adjusted per the requirements of the plan prior to cutting through." The Decision, on this point, and without examination of actual witness testimony, states, "The argument that the foreman was unaware that the line curtain had not been advanced is wholly unpersuasive and does not comport with the reasonably prudent miner standard of care." 41 FMSHRC at 335.

[5] Consistent with this, we previously recognized that the public interest inquiry is not to determine "whether the resulting array of rights and liabilities 'is one that will *best* serve society,'" but only to show that the resulting "settlement is 'within the *reaches* of the public interest.'" *Armstrong*, 36 FMSHRC at 1103-04 (citations omitted) (emphasis in original).

Commission to be the final authority of the compliance of a settlement with the standards we have established.

Although the Judge correctly articulated the *AmCoal I* standard for reviewing proposed settlements, the denial of the settlement motions was based on a misunderstanding of the law and a misapplication of *AmCoal I* and its progeny.

The Judge misapprehended the distinction between the type of factual support necessary to support penalty assessment *after a hearing* with the type of factual support that would satisfy the *AmCoal* standard *before a hearing and before any evidence has been adduced*. That is, the Judge erred by requiring the parties to provide evidence to support findings that would be appropriate after a hearing, rather than during a settlement review.

Indeed, the distinction between how factual support should be handled by the Judge during settlement review versus how a penalty is set after a hearing is set forth in the Commission's procedural rules. During a Judge's consideration of reduced penalties in settlement, a Judge need not make factual findings with respect to each of the section 110(i) factors.[6] *AmCoal I*, 38 FMSHRC at 1982; *AmCoal II*, 40 FMSHRC at 991. Rather, Commission Procedural Rule 31(g) provides that a Judge's decision approving settlement need only "set forth the reasons for approval and shall be supported by the record." 29 C.F.R. § 2700.31(g). In contrast, Commission Procedural Rule 30(a) provides that in assessing a penalty after a hearing, a Judge "shall determine the amount of penalty in accordance with the six statutory criteria contained in section 110(i) of the Act," and that the decision "shall contain findings of fact and conclusions of law on each of the statutory criteria." 29 C.F.R. § 2700.30(a).

In the proposed settlement, the parties provided facts supported by the record with respect to the four ventilation plan violations supporting one-gradient reductions in gravity regarding two of the citations and in negligence regarding all four. In addition, in response to the Judge's statement that the operator had a "significant" history of violations, the parties provided specific facts related to the operator's ventilation plan violation history. Tr. 30-32; Jt. Ex. 2 at ¶¶ 4, 7(a), 8(a), 9(a), 10(a).

Although Hopedale agreed to accept the fact of violation as to all four citations, the parties provided facts supporting the penalty reduction that showed partial compliance with the relevant portions of the ventilation plan. With respect to Citation No. 8055975, the 2,792 cfm air reading taken by the inspector behind the line curtain was 93% of the level required by the plan (3,000 cfm). Jt. Ex. 2 at ¶ 7(f). The parties agreed that the section supervisor's air reading, which was taken just prior to the inspection, showed over 3,200 cfm of air behind the line curtain, and that the inspector's notes confirmed that the foreman stated he had over 3,000 cfm prior to roof bolters installing roof bolts. *Id*. at ¶¶ 7(e), (g).

[6] In fact, the Commission amended Rule 31 to delete a requirement that decisions approving settlement must include a discussion of the section 110(i) factors in order "to enhance the flexibility of the judges to approve settlements." *AmCoal II*, 40 FMSHRC at 991 & n.12 (citations omitted).

With respect to Citation No. 8055977, approximately two-thirds of the water sprays on the continuous miner were functional, and the inspector's contemporaneous notes reflected that the water sprays had been checked after the miner completed the third cut of the shift. *Id.* at ¶ 9(g).

With respect to Citation No. 8055978, the parties stated that the inspector's notes reflected that the roof bolter parameters had been in compliance at the start of the shift, and that the roof bolter's vacuum later measured 10 inches of the 12 inches of mercury required under the ventilation plan. *Id.* at ¶ 10(e); Amended Set. Mot. at 5 ¶ 7(d).

Related to the level of negligence, Hopedale also provided facts demonstrating that the violative conditions were not obvious or readily known to the operator. Jt. Ex. 2 at ¶ 7(h); Amended Set. Mot. at 3-5 ¶¶ 7(a), (b), (c), (d). The Secretary agreed to accept such facts in mitigation of the penalties. Amended Set. Mot. at 5-6 ¶ 8.

As to Citation No. 8055975, the parties agreed that "[a]s the continuous miner advances through the section, it moves further away from the source of ventilation, potentially resulting in an air volume reading lower than what is required by the ventilation plan, but at a variation in volume not readily discernable to a miner." Jt. Ex. 2 at ¶ 7(h). With respect to Citation No. 8055977, Hopedale provided that the location of the plugged sprays made it difficult for the miner operator to recognize that the sprays were plugged, and that dust was not observed "rolling" over the miner operator or shuttle car operators.[7] Amended Set. Mot. at 4 ¶ 7(c). As to Citation No. 8055976, "the Secretary agree[d] the section foreman was at the continuous miner as it cut through from E to F but was unaware the ventilation curtain had not been adjusted per the requirements of the plan prior to cutting through." *Id.* at 3 ¶ 7(b). Similarly, Hopedale contended with respect to Citation No. 8055978, that the difference in 10 inches and 12 inches of mercury was not easily detected by the roof bolter operator. *Id.* at 5 ¶ 7(d).

Although Hopedale agreed to accept the S&S designations for all four violations, it provided facts related to a lowering of gravity as to Citation Nos. 8055976 and 8055977, and the Secretary agreed to accept such facts in mitigation of the penalties. The parties agreed that the inspector's contemporaneous notes reflected that the respirable dust parameters were in compliance at the start of the shift. Jt. Ex. 2 at ¶ 9(g). Hopedale provided results of Continuous Personal Dust Monitoring samples that were taken from the shuttle car operators on the section at the time the citations were issued that showed readings below the 1.5 mg standard. Amended Set. Mot. at 3 ¶¶ 7(b), (c). In addition, the Secretary stipulated that he was "aware of no evidence that respirable dust exposures experienced by other miners, including the roof bolters and the continuous miner operator, exceeded the standard." Jt. Ex. 2 at ¶ 8(g).

In concluding that the Secretary had failed to justify the lowering of negligence as to the four citations and the lowering of gravity for two of those citations, the Judge erred in applying an overly-stringent standard. The Judge erroneously considered the proposed penalties in

[7] "Rolling" of dust is an observation that can be used to evaluate whether the water sprays are effectively controlling dust. Jt. Ex. 1 at ¶ 9(f).

settlement against the section 110(i) factors in a similar manner that would be required *after a hearing*. For instance, in the Judge's April 17 settlement denial, the Judge noted that facts showing no violation of the dust standard with regard to the shuttle car operators did not support the reduction because "the continuous miner operator and the roof bolter do not have the same exposure as shuttle car operators." Unpublished Order at 3 (April 17, 2019). In the portion of the June decision considering the merits of the citations after hearing, the Judge similarly reasoned that the likelihood of injury for Citation No. 8055976 should not be modified based upon the shuttle car operators' samples because shuttle car operators do not receive the same or similar dust exposure as the continuous miner operators. 41 FMSHRC at 335.

The Judge also concluded that the levels of negligence should not be reduced in settlement because a foreman had been in the area at the time that the citations were issued. 41 FMSHRC at 328. The Judge appears to make a credibility determination that the foreman's lack of knowledge was not credible, but there is no basis to make such a determination because there is no record to support such speculation.

Moreover, the Commission has considered the absence of a foreman as a factor supporting a reduced penalty in settlement. *Ohio Cty Coal*, 40 FMSHRC at 1098-99 & n.3. The Commission's recognition that the absence of a foreman supports a penalty reduction in settlement does not necessarily lead to the conclusion that the presence of a foreman prohibits the reduction of penalty in settlement, particularly under the facts provided by Hopedale and the Secretary to support the penalties agreed to in settlement.

Similarly, the Judge erred by essentially requiring the parties to prove a particular level of negligence in the context of settlement, much as would be required *after a hearing*. Fact-finding against various legal standards of negligence and gravity is not appropriate during settlement review when no evidence has been adduced, although such fact-finding is required following a hearing on the merits. Rather, during a settlement review, a Judge need only review the proposed penalty reduction to see if it is "fair, reasonable, appropriate under the facts, and protects the public interest." *AmCoal I*, 38 FMSHRC at 1976.

Furthermore, the Judge made a fundamental error in the application of *AmCoal II* in stating that the citations would retain their enforcement value only if Hopedale had accepted them as they had been written at issuance. 41 FMSHRC at 327. Under the Judge's faulty reasoning, any proposed penalty reductions modified in accordance with Part 100 during settlement would have no enforcement value.

Giving "due consideration to the entirety of the proposed settlement package, including both its monetary and nonmonetary aspects," we conclude that the non-monetary aspect of the proposed settlement, that is, the enforcement value of the citations, is significant. *AmCoal II*, 40 FMSHRC at 989 (citations omitted). Hopedale agreed to accept the fact of violation as to all four citations, that all four violations were S&S, and that all four violations were a result of the operator's negligence. The important nature and quality of the violations has been preserved for enforcement purposes.

As the Commission recognized in *AmCoal I*, "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." 38 FMSHRC at 1984 (citation omitted). Thus, the four citations have enforcement value in that they may be considered as part of Hopedale's history of violations in the calculation of civil penalties for future violations.

In such future assessments, Hopedale may not benefit from the reduced penalties it paid in settlement. The Commission has explained that the amount of penalties assessed in the context of a settlement may not be used to arrive at penalties assessed in a decision on the merits after a hearing. *Newmont USA, Ltd.*, 37 FMSHRC 499, 506 (Mar. 2015).[8]

The Judge also erred to the extent she concluded that the settlement should not be approved because of the operator's history of violations. In the March 25 denial, the Judge noted in part that the operator had a "significant history of ignoring the ventilation requirements." Mot. for Recon., Ex. B. The Judge later based the April 17 rejection of the settlement in part on "the operator's significant history of similar violations for failure to adhere to ventilation plan requirements." Unpublished Order at 2 (Apr. 17, 2019). The Judge observed that the parties had failed to address that history and attached the operator's two-year history of violations to the order. *Id.* at 2-3. The Judge later incorporated the earlier decisions in the June 24 decision (41 FMSHRC at 324), but did not appear to address the operator's history of violations in the Judge's June evaluation of the settlement.[9]

As previously noted, primary authority to approve settlements of contested proposed assessments is vested by Congress in 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 find a proposed settlement is otherwise fair, reasonable, appropriate under the facts, and protects the public interest.

Contrary to the Judge's determination, the facts provided by the parties in regard to the operator's violation history supported the penalty reduction agreed to in settlement. The parties submitted facts that: (1) in the two years prior to the instant citations, the operator was cited for violations of 30 C.F.R. § 75.370(a)(1) on 10 occasions, seven of which were not classified as S&S; and (2) during calendar year 2018, only four 30 C.F.R. § 75.370(a)(1) violations were issued prior to the subject citations. Jt. Ex. 2 at ¶ 4. The parties also provided information regarding how often the Hopedale Mine had been cited for the violations that were cited in the subject citations during the prior two years. They stipulated: (1) Citation No. 8055975 - only one previous violation (Aug. 28, 2018); (2) Citation No. 8055976 – no previous violations; (3)

[8] Moreover, since all four violations are S&S, they could be relevant for pattern of violations consideration. *Brody Mining, LLC*, 36 FMSHRC 2027, 2038 (Aug. 2014) (holding that section 104(e) of the Mine Act encompasses S&S violations including non-final orders).

[9] Rather, it appears that the Judge considered the operator's history of violations in reviewing the merits of Citation No. 8055975. 41 FMSHRC at 333. We have vacated that portion of the Judge's decision reaching the merits of the citations.

Citation No. 8055977 – two previous violations (on April 24, 2017 and on Dec. 18, 2017); and (4) Citation No. 8055978 - one previous violation (Nov. 13, 2017). *Id.* at 2-7 at ¶¶ 7(a), 8(a), 9(a), 10(a). These four citations, and this compliance history, are wholly inconsistent with our dissenting colleagues' characterization of the operator as "cavalier – almost indifferent – to the need to comply with these important safety standards." Slip op. at 15.

In sum, the Judge misapplied our precedents governing settlements. The Judge erroneously reviewed the facts submitted by the parties to support settlement against the more stringent standard that applies after a hearing on the merits. The Judge further failed to reconcile the Judge's earlier holding that the operator's history of violations supported rejection of the settlement with additional facts submitted by the parties that supported the settlement. Finally, the Judge erred by concluding that the violations lacked enforcement value because they had not been accepted as written.[10] 41 FMSHRC at 327.

The Commission and its Judges may not look behind the Secretary's decision to settle or behind the decision to choose a particular amount for settlement. *See AmCoal I*, 38 FMSHRC at 1980 ("The Commission does not review the Secretary's *decision to settle*. Rather, the Commission reviews the proposed reduction of civil penalties in settlements.") (emphasis in original); *Tazco, Inc.*, 3 FMSHRC 1895, 1897 (Aug. 1981) (noting that the Commission's and its Judges powers are limited by the Mine Act). Instead, we review the proposed penalty reductions in settlement with the facts submitted by the parties against the *AmCoal I* standard.

Upon reviewing the facts submitted by the parties in the amended motion to approve settlement and amended joint stipulations, we conclude that the proposed reduction of penalties is fair, reasonable, appropriate under the facts, and protects the public interest. Because the parties presented sufficient facts to support the reduced penalties agreed to in settlement, we conclude that remand is unnecessary. *See, e.g., Solar Sources*, 41 FMSHRC at 605.[11]

[10] No case would ever be settled on such a literal application of "as written" because accepting all of the Secretary's findings and conclusions would render a reduction in the penalty untenable. Agreeing *in toto* to an opponent's case in chief is not a settlement but a capitulation.

[11] Commissioner Young notes that, in contrast to our decision in *American Aggregates of Michigan, Inc.*, Docket No. LAKE 2018-0340, issued on the same day as our decision in this case, the Judge here did not fail to consider entirely an evidentiary argument made by the operator, which arguably could have been the subject of further questioning on remand. The settlement in this case was a commonplace proposal to reduce negligence and gravity, the usual means through which the parties compromise similarly unremarkable disputes, and remand in this case would be unproductive.

Our dissenting colleagues cite, with apparent approval, that 99.96% of all settlement agreements were granted in the years 2011 to 2016 – that is, about 1 in approximately every 2,200 motions. Slip op. at 16 n.2. Nevertheless, their dissent would make one think that the exercise of our discretion to grant the settlement places the settlement process on the verge of collapse.

In fact, however, the rarity of disapproval suggests that the defects of a properly-rejected settlement should be self-evident, and easily explained. The Judge's role is as an adjudicator not as an investigator or as a prosecutor. The rejection in this case was contrary to stipulated facts, mischaracterized the operator's compliance history, and failed to give weight to the considerable non-monetary value preserved by the settlement. The rejection therefore does not conform to the standards we have established for the evaluation of settlements, consistent with our precedents and the directives of Congress.

III.

Conclusion

For the reasons set forth above, we reverse the Judge's denial of the motion seeking interlocutory review, and vacate that portion of the Judge's decision reaching the merits of the citations. We reverse the Judge's denial of the settlement motions and approve the settlement.

Marco M. Rajkovich, Jr., Chairman

Michael G. Young, Commissioner

William I. Althen, Commissioner

Commissioners Jordan and Traynor concurring in part and dissenting in part:

I.

Introduction

This case involves serious violations of ventilation regulations that could lead to dust exposure. The inspector arrived at the mine and saw that at every phase of mining there was something wrong. When the four violations are reviewed together, it appears that the operator was cavalier – almost indifferent – to the need to comply with these important safety standards. Almost the entire mining cycle was affected – the curtain, the continuous miner, the roof bolter, the air flow.

The original penalty assessment was $18,093. The proposed settlement amount was $3,339. As the Judge noted, this was a major reduction of almost 81.5%.

It is significant that the foreman was present on the section when these violations occurred. It was his job to make sure that the curtain was moved properly, and that the water sprays on the continuous miner were properly maintained. It was certainly not mitigating to allege that the foreman simply was not aware of some of these violations. A "should have known" analysis is reasonable here, and not inconsistent with our caselaw examining the section 110(i) negligence criterion. And the Judge's application of that analysis is not outside the boundaries of her wide discretion. 41 FMSHRC 322, 328 (Jun. 2019) (ALJ).

The Judge concluded that the proposed penalty amount was not an adequate deterrent. She reviewed the facts provided by the parties and concluded that they had not persuaded her to grant the motion.

This is not an abuse of discretion – one must keep in mind that this is an extremely deferential standard. The majority's focus on deciding for themselves whether there is enough there to approve the settlement is far afield from our precedents emphasizing that our Judges have *wide* discretion that may not be reversed by a Commission that simply wishes to substitute its own preferred outcome. This is not consistent with the deference owed a Judge's exercise of discretionary judgment.

In short, the Judge's denial of the motion is supported by the factual record and is the product of a reasonable determination, a determination made within the boundaries of her discretion. Thus, her denial should be affirmed.

The majority decision ends meaningful substantive review of agreements between the government and mine operators to reduce the penalties the government originally proposes in connection with mine safety violations, enabling nearly frictionless and potentially unwarranted reduction of such penalties. The Commission has in multiple decisions recognized that this is not what Congress intended. Our precedents recognize that under the statutory enforcement framework preceding the 1977 Mine Act,[1] the government's compromise of proposed penalties without oversight or transparency had seriously undermined safety enforcement. And that

[1] The Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976).

Congress responded in the Mine Act of 1977 by requiring the Commission to review and, only if warranted, approve the Secretary's compromise of a proposed penalty in an agreement to settle an operator's contest of a citation. Yet today, the majority, substituting its view of the case for that of the Judge, finds that she erred by undertaking a meaningful evaluation of the parties' contention that the penalty reduction is justified.

The Commission and its Judges have for decades fulfilled their settlement review responsibility by requiring the Secretary to publicly demonstrate that the penalty reductions are warranted by addressing in his settlement motions, among other things, the amount of the Secretary's original penalty proposal and those facts justifying Commission approval of a lesser penalty. Our Judges have then exercised wide discretion, referencing the section 110(i) penalty criteria and other factors, to determine whether the compromising parties had provided in their motion a full set of accurate facts and information sufficient to publicly demonstrate that the reduced penalty is "fair, reasonable, appropriate under the facts, and protects the public interest." *American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016) ("*AmCoal I*"). *See also* 40 FMSHRC 983, 984 (Aug. 2018) ("*AmCoal II*").

The majority's decision in this case cuts the heart out of unanimous decisions in the *American Coal* case and in other prior precedents governing transparent settlement approval, making major changes to this area of law.[2] First, the majority strips our Judges of the power and responsibility to look beyond the self-serving presentation of select facts and legal conclusions in the parties' settlement motion to determine in their own discretion whether the alleged facts and proffered conclusions, examined in light of the record as a whole, demonstrate the proposed penalty reductions are actually "fair, reasonable, appropriate under the facts, and protects the public interest." *AmCoal I*, 38 FMSHRC at 1976. In a sharp departure from settled precedent, the majority prohibits our Judges from assessing whether a penalty reduction the parties attempt to justify by reference to agreed upon modifications to the contested citations is warranted by application of section 110(i) and other factors we have recognized as relevant to our penalty assessment role.[3]

[2] The majority provides no policy reason or explanation for making such radical breaks with our precedent addressing our obligation to review penalty reductions, such as our decisions in the *American Coal Co.* case and in *Black Beauty Coal Co*., 34 FMSHRC 1856, 1870 (Aug. 2012) (requiring the Secretary to provide such factual support to demonstrate the applicability of the penalty criteria as they relate to the penalties contained in the settlement proposal presented to her for review). This is an especially glaring omission in light of the fact our judges applying this precedent are able to approve 99.96% of settlement motions submitted for their review. *See AmCoal I*, 38 FMSHRC at 1977 n.7 (noting that in a five-year period from approximately 2011 to 2016, Commission Judges approved 38,501 settlements and denied only 17).

[3] Factors we have recognized that a Judge may rely upon to determine in his or her discretion whether the parties' motion demonstrates a penalty reduction is "warranted" include, for example: 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 that the operator implement personnel changes

Second, though they do so only implicitly, the majority reviews the Judge's decision on each of the *AmCoal* elements – fairness, reasonableness, appropriateness to the facts, and the public interest – under a *de novo* rather than an abuse of discretion standard. This break from precedent undertakes a nearly total elimination of our Judges' discretion to determine whether a penalty reduction is warranted. And does so in a case where no arguments against such a significant change were litigated, the parties' positions were fully aligned and no party before the Commission presented argument in opposition. In this non-adversarial proceeding, both sides sought the same outcome and the majority delivered it, along with the apparent reversal of the foundational precedents applying section 110(k) of the Mine Act, 30 U.S.C. § 820(k).[4]

While we concur that the Judge erred in vacating the citations, we disagree with the majority's decision to usurp the Judge's discretion by granting the motion to approve settlement.[5] We conclude that the Judge's rationale for rejecting the parties' proposed settlement is consistent with our well settled and deferential standard of review. Accordingly, we would remand this proceeding to the Judge, with instructions to the parties to reconsider their settlement agreement and to file a new motion. If the parties do not agree to settle, and they continue to stipulate to the violations, we would have the Judge assess a penalty (which could necessitate a hearing).

Below, we recount the origin and development of the legal standard our Judges apply for settlement approval decisions and our own standard for review of the same. Then, we highlight how much the majority's decision departs from these precedents, before concluding with an application of those precedents to the facts of this case.

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or training improvements, *AmCoal I*, 38 FMSHRC at 1982; and deterrence, *Black Beauty*, 34 FMSHRC at 1864-65.

[4] Commissioner Traynor separately observes that in the *AmCoal* cases, representatives of the regulated community participated as intervenors and a member of Congress as *amicus curiae* in opposition to the Secretary and another operator's arguments in favor of curtailing the Commission's settlement review authority. In similar circumstances, appellate courts on occasion take steps to ensure adversarial presentation. *See, e.g., Beckles v. United States*, 137 S. Ct. 886, 892 (2017) ("Because the United States, as respondent, agrees with petitioner that the Guidelines are subject to vagueness challenges, the Court appointed [an attorney] as amicus curiae to argue the contrary position."). Unfortunately, the Commission in this case did not receive arguments on "the contrary position." And neither party will appeal the Commission's approval of their settlement motion. Thus, the departures from precedent in this case are fully insulated from appellate review.

[5] We concur with the majority's conclusion that the Judge abused her discretion when she convened a hearing without first ruling on the Secretary's pending motion for interlocutory review that was filed pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76. However, as we are now providing appellate review, this issue is now moot.

II.

Discussion

A. The Commission and its Judges' Settlement Review Obligation

Once the penalties which the government proposes for mine safety violations have been contested before the Commission, the Mine Act does not permit the government and mine operators to settle or compromise such penalties unless and until they obtain Commission approval. Section 110(k) of the Act provides:

> No proposed penalty which has been contested before the Commission under section 815(a) of this title 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). Some of the earliest cases in which the Commission exercised its settlement approval authority under section 110(k) recognized that "[t]he judges' front line oversight of the settlement process is an adjudicative function that ***necessarily involves wide discretion***." *Knox Cty. Stone Co.*, 3 FMSHRC 2478, 2479 (1981) (emphasis added). These early cases emphasized the degree to which we must defer to the reasonable exercise of our Judges' discretion to accept or reject proposed penalty settlements. *See, e.g.*, *Pontiki Coal Corp*., 8 FMSHRC 668, 675 (May 1986) ("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").

Our precedents have continued to hold that our Judges' wide discretion is a fundamental aspect of our settlement review under section 110(k), observing more recently:

> [The] statutory language [in the Mine Act] ***contains no explicit restrictions on what a Commission Judge may consider when reviewing a settlement proposal***. Thus, Congress provided a broad mandate to the Commission (and its Judges), charging it with reviewing and approving all settlements of penalty cases pending before it and imposing no explicit limits on what should be considered in this review.

Black Beauty Coal Co., 34 FMSHRC at 1865 (emphasis added).

In *Black Beauty*, the Commission affirmed that section 110(k) and the Mine Act's legislative history make clear that Congress requires the Commission to scrutinize the settlement of contested penalties "[i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest." *Id*. at 1862 (citations omitted). In order to carry out that function, the Commission in *Black Beauty* expressly rejected the Secretary's contention that "it has no authority to review the underlying modification of the citation." *Id*. at 1860. Observing that under section 110(i) of the Act, only the Commission has authority to "assess all

civil penalties provided in this Act," *id*. at 1862, the Commission held that "if a Judge's approval or rejection of a settlement is 'fully supported' by the record, consistent with the [section 110(i)] statutory penalty criteria, and not otherwise improper, it will not be disturbed, but . . . abuses of discretion or plain errors are subject to reversal." *Id*. at 1864.[6]

In addition to holding that a Judge must review the underlying modification of a citation offered as justification for a penalty reduction to ensure, *inter alia*, that it is consistent with the 110(i) penalty criteria, the Commission in *Black Beauty* was also very clear that a Judge had wide discretion to require information from the parties demonstrating the same, holding that its Judges are "clearly authorized by the Mine Act to review a proposed settlement of a contested penalty and to require the parties to submit the factual support necessary for that review." *Id*. at 1860. Thus, the Commission in *Black Beauty* concluded, "[t]he 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 [and] . . . [o]n remand, the Judge shall ***take such further evidence as she reasonably requires*** to consider the six statutory criteria [in section 110(i)] in reviewing the motions for settlement." *Id.* at 1864, 1869 (emphasis added).[7]

In carrying out the Congressional mandate to oversee and ensure transparent justification of penalty settlements, the Commission and its Judges regularly request that the parties provide additional information – *e.g*., explanations as to how the facts in the record, in light of applicable caselaw, justify the penalty reduction proposed in the motion. Often, depending on how the parties attempt to justify their settlement, such information pertains to the statutory criteria for assessment of civil penalties set forth in section 110(i). *See, e.g., Knox County Stone Co*., 3 FMSHRC at 2480 (stating that "the judge issued to the parties a notice of hearing and pretrial order requiring in two phased responses extensive information relevant to the six penalty criteria specified in section 110(i) of the Mine Act").

After issuing *Black Beauty*, the Commission in subsequent cases faithfully applied its ruling to require Judges to determine that information provided by the parties in light of the record as a whole justifies the proposed reduction in penalty in accordance with the section 110(i) penalty criteria. *See Big Ridge, Inc*., 38 FMSHRC 1348, 1349 (June 2016) ("In light of the factual justifications provided by the parties, we determine that the penalty is appropriate under the criteria set forth in section 110(i) of the Mine Act . . . [and] further find that the terms of the settlement are supported by the record, in accordance with Commission case law."); *see also UMWA, on behalf of Franks v. Emerald Coal Res*., 38 FMSHRC 935, 938 (May 2016)

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[6] The six section 110(i) statutory criteria by which all penalties must be assessed are "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." 30 U.S.C. § 820(i).

[7] Though the majority decision is directly contrary to this, a central and unanimous holding in *Black Beauty*, the majority does not express intent to overrule it either in whole or in part, or identify subsequent authority that does so.

(finding that the information provided demonstrates that a reduction in penalty is appropriate under the criteria in section 110(i)).

In 2016, the Secretary chose *American Coal* "to be the 'test case' for advancing his position that the Commission's authority to review settlements of contested penalties under Section 110(k)… is much more limited than that described in *Black Beauty Coal Co.*" *AmCoal I*, 38 FMSHRC at 1972-73. We issued two unanimous decisions in the *American Coal Co.* case that comprehensively addressed the substance of our Judges' responsibility to obtain sufficient information to decide whether a proposed penalty reduction is warranted and to ensure that the penalty reduction is transparent. To prompt the test case, the Secretary attached to its motion to approve settlement in *AmCoal I* (and subsequently in other cases) boilerplate referencing a unilateral "professional judgment" and a desire to conserve "resources that the Secretary would need to expend in going through a trial" in lieu of the substantive factual support traditionally provided to justify a penalty reduction.[8] *Id*. at 1973-74. The Secretary took the position that section 110(k) review is perfunctory and limited to "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." *Id.* at 1983. The operator agreed.

The Commission rejected the Secretary and operator's position, concluding adoption of their proposed "standard would effectively render section 110(k) meaningless," *id*. at 1983, and "is completely inconsistent with the need for transparency that Section 110(k) was enacted to address." *Id*. at 1984. The Commission, in a unanimous opinion, elaborated on this basis for our decision by reciting key excerpts of the legislative history of section 110(k), as it did in its *Black Beauty* decision, including Congress's finding that under the predecessor to the Mine Act, "to a great extent the compromising of assessed penalties [did] not come under public scrutiny" and 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*. at 1975-76 (quoting *Legis. Hist.* at 632-33).

The Commission in *AmCoal I* reaffirmed Congress's clear explanation 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*. at 1976. (emphasis added in *AmCoal I*). It also affirmed "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*.

[8] In recognition of the legislative history of the Mine Act, we have held that "for the purpose of encouraging operator compliance with the Act's requirements, the need to save litigation and collection expenses should play no role in determining settlement amounts." *Black Beauty*, 34 FMSHRC at 1866 (quoting S. Rep. No. 95-181, at 41-45 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 629-33 (1978) ("*Legis. Hist.*").

The Congressional transparency mandate has always meant the Judge's decision must include a substantive explanation as to how the penalty reduction submitted for approval is (or is not) warranted by the facts and legal contentions the parties claim as support for their motion. *See, e.g., Co-Op Mining Co.*, 2 FMSHRC 3475, 3475 (Dec. 1980) ("[S]ettlement should not have been approved [where t]he parties' stipulation shows that the alleged violation did not occur."); *Madison Branch Mgmt.*, 17 FMSHRC 859, 864 (Jun. 1995) ("[T]he Commission will not disturb a Judge's approval or rejection of a settlement if it is supported by the record, is consistent with the six statutory criteria specified in section 110(i) of the Act for the assessment of civil penalties, and is not otherwise improper."). Referencing its holding in *Black Beauty*, the Commission in *AmCoal I* held "[t]he requirements to provide factual support in the settlement proposal and for the [J]udge'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" and "standards for such factual support may be found in section 110(i)." *AmCoal I*, 38 FMSHRC at 1981. Indeed, the Commission expressly rejected the Secretary's argument that "it is inappropriate for a Judge to consider section 110(i) factors when considering whether to approve a proposed penalty settlement" and reaffirmed that the reach of section 110(i) "clearly includes contested penalties that are the subject of a settlement agreement." Id. at 1981-82 (internal quotations omitted).

In *AmCoal I*, we affirmed the centrality of the section 110(i) factors to all penalty assessments, whether they result from contest or compromise. In recognition of our Judges' wide discretion, including our precedents requiring them to consider certain factors outside of section 110(i) penalty criteria when presented in a motion to approve settlement, Judges are not required to "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." *Id*. at 1982.

We affirmed the Judge's rejection of the settlement agreement in *AmCoal I* and remanded the case. The Secretary and operator filed a second settlement motion, which was also rejected by the same Judge. We took review of an interlocutory appeal from that decision in *AmCoal II*. The resulting unanimous decision fully affirmed the above described holdings in *AmCoal I* and *Black Beauty*, including the requirement that "the parties provide mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest." *AmCoal II*, 40 FMSHRC at 991. The Commission also held that a full explanation as to how the Judge concluded that the penalty reduction was warranted serves to protect the "public interest in evaluating whether a settlement should be approved." *Id*. at 987-88. The Judge's decision was vacated for a variety of errors, *inter alia*, a mistaken interpretation of our decision in *AmCoal I* as prohibiting consideration of any factors outside of section 110(i), a failure to consider nonmonetary aspects of the settlement, etc. But, importantly, it was remanded back to him for reconsideration of the settlement motion.

Commission decisions issued contemporaneous with and subsequent to *AmCoal II* have reinforced our Judges' active role in verifying, noting inconsistencies and filling gaps in the factual representations and legal contentions parties make to justify settlement motions. For example, in *The Ohio County Coal Company*, a Judge denied a motion claiming a penalty reduction was warranted because the section 110(i) negligence level should be reduced from

"moderate" to "low." 40 FMSHRC 1096 (Aug. 2018). The parties' motion sought to justify the reduction by explaining that a foreman was not present at the time of the violation, pointing out that the foreman's absence was recorded in the inspector's contemporaneous notes. The Judge denied the settlement for the sole reason that he mistakenly perceived an inconsistency in the facts offered to support the motion that was not adequately explained. The Commission reversed, acknowledging that such inconsistencies are certainly germane to the Judge's analysis, but explaining at length how the Judge misconstrued the facts and concluding in this case the Commission "do[es] not discern an internal inconsistency in the settlement terms that undermines the parties' agreement." *Id.* at 1099.

Recently, the Commission emphatically reaffirmed the authority of our Judges to request additional facts when presented with a settlement motion. In *Solar Sources Mining, LLC*, the Commission stated that "a Judge who properly determines that a settlement motion lacks sufficient information may permissibly request further facts from the parties" and that "the Judge *may identify gaps in the parties' explanations or specific information he may need to review and approve the settlement.*" 41 FMSHRC 594, 602-03 (Sept. 2019) (emphasis added).[9]

In sum, we have consistently protected our Judges' exercise of wide discretion in evaluating motions for settlement in light of the record as a whole to determine whether the movants have demonstrated that proposed modifications to the underlying citation are consistent with our caselaw applying the penalty criteria in section 110(i) and the *AmCoal* standard. And that discretion only exists to the extent Commission majorities have deferred to its exercise rather than reversing and substituting their own view as to whether the parties' factual presentation and legal contentions justify the penalty reduction.

B. The Majority Decision is Contrary to Our Precedents.

The majority decision instructs our Judges to ignore whole sections of the record before them when considering whether a settlement motion contains complete and accurate facts and legal contentions sufficient to transparently demonstrate, as the public interest requires, that the penalty reduction is "fair, reasonable and appropriate under the facts." *AmCoal I*, 38 FMSHRC at 1982. Judges may no longer probe gaps or inconsistencies in the explanation offered in support of a settlement motion, yet must now somehow determine whether a penalty reduction is "appropriate under the facts" by relying solely and uncritically on the parties' joint presentation of facts and legal contentions. The decision also eliminates abuse of discretion review in all but

[9] Additionally, we find it notable that in *Solar Sources*, the Commission examined the totality of the facts as alleged by the parties and found, *sua sponte*, that the parties' proposed settlement was justified in part because two of the citations at issue may have been duplicative. 41 FMSHRC at 594, 603-04 (Sept. 2019). However, in the case at hand, the majority criticizes the Judge for examining the totality of the facts at issue and considering, *sua sponte*, reasons why the parties' proposed settlement may *not* be justified under our caselaw. Slip op. at 8-13. Here, of course, the Judge found that the proposed reduction in negligence was not appropriate because the presence of a foreman in this section of the mine, at the time of the issuance of these four citations, suggests that an agent of the operator either knew or should have known of the violative conditions, which is inconsistent with the "low" negligence the parties agreed to in the settlement motion. 41 FMSHRC at 338.

name only. It removes our Judges' discretion to determine whether the parties have demonstrated that a proposed penalty reduction is warranted, by reviewing *de novo* our Judges' application of a multi-factored standard that has long been committed to their wide discretion.

1. Judges must continue to examine whether the proposed penalty reduction is appropriate to the facts of the case and should not be prohibited from doing so.

Our Judges are not required to blind themselves to the full record on their docket or refrain from reasonable legal analysis when evaluating factual and legal claims in the compromising parties' motion that a penalty reduction is "fair, reasonable and appropriate under the facts" by reference to the section 110(i) factors. Rather, they start with the factual allegations in the citation attached to the penalty petition initiating the case as well as the Secretary's initial penalty proposal grounded on those facts. They then look to the parties to provide additional facts and explanations in the settlement motion that could demonstrate a penalty reduction is warranted, often pertaining to the parties' agreement to modify the underlying citation by tinkering with the section 110(i) factors in light of subsequently discovered facts, contextual information or legal uncertainties. The Judge is *not* bound to blindly accept legal contentions the parties make in an effort to demonstrate a penalty reduction is supported by the record viewed in light of the section 110(i) factors.

Our precedents consistently require submission of facts in support of settlement motions. This is not so that the Judge might make formal 'findings of fact' to establish or disprove the violations alleged or any characteristic of such violations. Rather, such facts are essential to any substantive evaluation of the parties' claim that their penalty compromise is warranted under the *AmCoal* standard.[10] And to satisfy the public interest in transparency, a decision to reduce a penalty must include a written explanation as to how such facts demonstrate the penalty reduction is warranted. While no party is required to 'prove' any facts included in the motion to justify the settlement, the Judge does need to meaningfully evaluate (not blindly accept) any claim by the parties that the penalty reduction is justified by modifications to the underlying citation – e.g. deleting an S&S designation, or 'lowering' one of the section 110(i) criteria, such as negligence or gravity. And that judicial evaluation, summarized in the Judge's written published decision, is what "protects the public interest in evaluating whether a settlement should be approved." *AmCoal II*, 40 FMSHRC at 984.[11]

[10] To the extent the majority purports to prohibit our judges from requesting information that goes beyond the factual and legal contentions in the parties' motion, their holding precludes the proper exercise of discretion to require factual support demonstrating the proposed penalty reduction is warranted by reference to the section 110(i) penalty factors, in addition to other relevant criteria, which is directly contrary to our unanimous precedential decision in *AmCoal I*.

[11] A Judge's written evaluation of the parties' factual and legal contentions as to why a penalty reduction is supported by modifications to an underlying citation does not serve the public interest if it uncritically overlooks gaps and inconsistencies with the full record or our case law applying the section 110(i) factors.

A Judge must actually evaluate – probe for gaps and inconsistencies and not blindly accept – the facts and legal contentions in any settlement motion asserting a penalty reduction is warranted. A part of that evaluation requires a determination of what the parties claim in their motion, i.e., that the penalty reduction is justified because of modifications to the underlying citation, is reasonable and appropriate under all of the facts alleged and provided in the motion, and those facts alleged in the original pleadings. Pursuant to this holding, our Judges often request additional factual support for such modifications, or a full explanation of why they were agreed upon – *e.g.*, recognition of some uncertainty as to the applicability of a certain point of law, reconsideration of the strength of the factual allegations made in the pleadings in light of subsequently discovered information or explanation, or, "a description of an issue on which the parties have agreed to disagree." *AmCoal II*, 40 FMSHRC at 991.[12]

The responsibility to ensure a penalty reduction is reasonable or appropriate under the facts cannot be met by a Judge compelled to ignore gaps in the explanation, including unexplained inconsistencies between the Secretary's version of the alleged facts set forth in the

[12] Like the majority, we do not consider the Judge's issuance of a subpoena, scheduling a hearing prior to a decision on the parties' motion for interlocutory review, or vacature of the citations. However, the majority claims our Judges may not probe the veracity, consistency and completeness of the facts and legal claims the parties include in their motion to justify approval of their motion, relying in part on the concept of "party presentation" discussed in *United States v. Sineneng-Smith*, 140 S.Ct. 1575 (2020). Slip op. at 5-6. But the Supreme Court in that decision expressly observed that the concept of "party presentation" – the idea that Judges should maintain a passive role allowing the parties to develop the factual record and arguments – is a feature of an "adversarial system of adjudication." *Id*. at 1579. Obviously, proceedings under section 110(k) to consider the parties' jointly proposed penalty reduction are non-adversarial – even cooperative. Nothing in *Sineneng-Smith* supplies any coherent rationale for contravening our precedents and the Act's legislative history to curb our Judges' responsibility to ensure that penalty reductions in compromises struck by cooperating parties are both warranted and transparent.

Because *Sineneng-Smith* does not address the unique administrative processes under section 110(k) of the Mine Act, in which Commission Judges review jointly proposed settlement motions to determine if the parties' penalty compromise is warranted, it does not control. It is not even persuasive, given the uniquely non-adversarial nature of proceedings under section 110(k). Claiming otherwise, our colleagues maintain an obvious fiction that section 110(k) proceedings are indistinct from penalty contests, discrimination proceedings and the other types of cases in our "adversarial system of adjudication" under the Mine Act. Slip op. 6. Accepting this claim would require that we ignore that in section 110(k) settlement review cases the interests of the parties before our Judges are totally aligned, and neither engages the other in argument or examination or any of the other tools used in an adversarial system to bring forward truth. Most significantly, neither party rebuts the factual claims and arguments that are jointly presented to our Judges for approval of a penalty reduction in section 110(k) proceedings. They are indisputably non-adversarial and thus *Sineneng-Smith* – the *only* authority the majority cites as justification for its departure from our precedents – is unquestionably irrelevant to interpretation of section 110(k).

case pleadings and a revised version of facts the parties agree to include in their motion. In settlement review, such gaps and inconsistencies in the factual presentation do not require a full hearing for conclusive resolution, do not implicate the need for testimony to make credibility determinations, and do not require a final determination of the merits of the citations. Instead, they simply inform the Judge's decision – left to her wide discretion – as to whether the parties have demonstrated that the penalty compromise is fair, reasonable and "appropriate to the facts." And they form the basis of the explanation for approving or denying the penalty reduction that the Judge must include in a written decision. A Judge may request from the parties additional information explaining or providing context to omissions or inconsistencies. Or she might decide that despite gaps or inconsistencies in an explanation regarding one criterion, the proposed reduction is warranted by comparatively complete and consistent factual support relating to another of the section 110(i) factors, or factors outside of those in section 110(i) we have held justify penalty reduction. This is what is meant by wide discretion and is how our Judges have been successfully doing this job for many years.

2. Our Judges must continue to have meaningful discretion to perform "front line oversight" of settlement agreements

The Commission has long held that settlements are committed to the sound discretion of the Commission and its Judges, and that Judges are not "bound to endorse all proposed settlements." *Madison Branch Mgmt.*, 17 FMSHRC at 864 (quoting *Knox County Stone*, 3 FMSHRC at 2480); *see also Wilmot Mining Co.*, 9 FMSHRC 684, 686 (Apr. 1987) ("The Commission has held repeatedly that if a judge disagrees with a penalty proposed in a settlement he is free to reject the settlement and direct the matter for hearing."); *Pontiki Coal Corp.*, 8 FMSHRC at 675. We have never expressly overruled or limited these holdings.

Instead, in our latest cases addressing our Judges' discretionary settlement review function, we affirm that the concept of "wide discretion" articulated in our precedents has real substance. We have held:

> A Judge's approval or rejection of a proposed settlement must be based on principled reasons. Thus, the Commission has held that 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 that abuses of discretion or plain errors are subject to reversal.

Black Beauty, 34 FMSHRC at 1864 (citations omitted). Under this formulation, the Commission may not reverse a decision that meets these standards simply because the Judge evaluated the parties' factual presentation and legal contentions differently from the approach preferred by a majority of Commissioners on review. Application of the multifactor *AmCoal* standard – incorporating the section 110(i) and other factors we have held relevant – will generally result in some factors pointing toward one result and others to the opposite result. And nothing in section 110(i) or our caselaw explains the relative weight to be given to them. But they do focus the Judge's analysis. If a Judge has faithfully applied each factor in a manner consistent with our

law and supported by the record, we have held her determination "will not be disturbed."[13] *Id*. By contrast, if the Judge has neglected to apply or erroneously misapplied factors that served as a basis for the decision, the Commission would have a basis for reversal.

But now, today's majority ends *Black Beauty/AmCoal I* discretion, announcing a standard that is "abuse of discretion" in name only, serving to confuse the state of our law and conceal the degree to which the majority decision is incompatible with precedent. Addressing the factual and legal "representation" the parties must include in their motion to demonstrate the penalty reduction is fair and appropriate, the majority states:

> If taking those representations into account, the settlement meets the standard we articulated for approval in *AmCoal I* (fair, reasonable, etc.), the settlement should be approved. Although the Commission gives weight to the experience gained by ALJs through the handling of many settlements, the denial of a settlement that comports with the standard we have established is an abuse of discretion, and the Commission may exercise its discretion to accept the settlement. The facts of settlement come to the Commission in exactly the same form and relevance as before the Judge.
>
> In sum, it is an abuse of discretion to deny a settlement when agreed-upon or stipulated facts satisfy the standard for approval.

Slip op. at 8. Nowhere in this standard of review is there room for a Judge to make a decision with respect to application of the *AmCoal I* elements that differs from the preferred outcome of a majority of Commissioners but is nevertheless insulated by a standard that requires deference to a decision that "is 'fully supported' by the record, consistent with the statutory penalty criteria, and not otherwise improper." *Black Beauty*, 34 FMSHRC at 1864. Simply put, the majority takes an elaborately obscured path to ending abuse of discretion review, and with it, our Judges' discretion.[14]

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[13] It must be noted in the context of the majority's curbing of our Judges' wide discretion, this phrase, "consistent with our law," means not contrary to any precedential decision of the Commission and reviewing courts, which is very different from "consistent with the views of what our law should be, as espoused by a majority of Commissioners who will review the settlement approval decision *de novo*."

[14] The majority is profoundly confused as to the Commission's role in this and other cases in which we are asked to review the exercise of discretion by one of our Judges. At one point, the majority writes that the "dissent would make one think that the exercise of *our* discretion to grant the settlement places the settlement process on the verge of collapse." Slip op. at 14 (emphasis added). Elsewhere, they write "the *Commission* may exercise *its* discretion to accept the settlement." Slip op. at 8 (emphasis added).

Of course, with the discretion we have long granted our Judges comes a corresponding obligation to fully explain the basis of its exercise. "While Judges have the duty to consider the sufficiency of facts submitted in support of a settlement, the proper exercise of their discretion in doing so requires them to articulate with some particularity any deficiencies against the standard we set forth in [*AmCoal I*]." *Solar Sources*, 41 FMSHRC at 601-02. But the majority has turned the *AmCoal* standard on its head. In *American Coal*, we required our Judges to exercise true discretion to apply each of its elements – fair, reasonable, appropriate under the facts – and upheld their decisions so long as they were supported by the record. If not, or if the Judge misapplied our law in the course of her evaluation, we remanded to the judge with instructions as to how to properly exercise discretion.

Under the majority's approach, the Judge's application of each of these elements and criteria is no longer really a function of discretion. Now, the Judge can be reversed by the Commission, which will substitute its *own de novo* application of any and all elements of the standard. Rather than providing room for discretion and, where error is found, remanding to the Judge for exercise of wide discretion, the Commission now refuses remand as a matter of course, rather than rare exception. This arrogation of power—in this case, undertaking a *de novo* review of the parties' motion to approve a greater than 80% penalty reduction – is not consistent with the Commission's duty when reviewing under the abuse of discretion standard to defer to the Judge's exercise of wide discretion. *See Gall v. United States*, 552 U.S. 38, 56 (2007) ("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.").

The role the majority decision leaves for our Judges is now more clerical than judicial – taking the parties' representations at face value, uncritically approving them, and entering a decision neither party will appeal. Under the majority's newly contrived standard, it does not make sense to speak of our Judges having discretion or to pretend we are engaged in a proper review of such discretion. "Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction." Ronald Dworkin, *Taking Rights Seriously* 48 (Bloomsbury Academic 2013) (1977). True discretion is gone.

The majority mistakenly believes the question before us on review is whether the Commission *itself* has discretion to approve or deny the settlement agreement, which simply makes no sense in the context of a case where we are called to review the exercise of discretion by the lower court. The confused majority does not appreciate any difference between a case in which the settlement motion is filed initially with an ALJ, in which we review the Judge's exercise of discretion, and an entirely different case – not before us – in which the settlement motion is filed with the Commission, in which case we would exercise discretion and a reviewing Circuit Court would review our decision under an abuse of discretion standard.

C. Pursuant to our Precedents, the Judge Properly Exercised her Discretion to Determine that the Motion Failed to Demonstrate the Penalty Reduction is Warranted.

Each of the four citations alleges that Hopedale Mining failed to comply with its ventilation plan as required by 30 C.F.R. § 75.370(a)(1).[15] The Secretary originally proposed civil penalties totaling $18,093 for the four citations and agreed to settle the four citations for a total penalty of $3,339. The Judge denied the motions to approve settlement, finding that the information provided was not sufficient to support the proposed modifications to negligence and gravity, or the "drastic reduction" in penalty. 41 FMSHRC at 324-26. The Judge further elaborated:

> A full evaluation of the facts set forth in each citation reveals that all of the citations were issued within a relatively short period of time and in the same area of the mine. Each citation was issued for a violation of the ventilation plan and the mine foreman was in the area when the citations were issued. While the Secretary asserts that the negligence of three of the violations should be reduced from moderate to low largely because the foreman or an "agent of the operator" was not aware of the violations, the facts paint a different view . . . . [T]he mine foreman is held to a higher standard and the negligence inquiry centers around whether he "knew or should have known." For all of these reasons, I deny the Secretary's request to reconsider the denials of settlement.

Id. at 328. In addition, the Judge found that the operator had a history of not complying with its ventilation plan and the Secretary failed to explain his cursory assertion that the granting of the settlement motion would aid his future enforcement efforts. *Id.* On the whole, the Judge found that the parties failed to carry their burden to demonstrate that the proposed reduction was appropriate under the facts, reasonable, fair or in the public interest. To summarize with more specificity, the Judge ruled as follows with respect to each citation:

Citation No. 8055975 alleges that the operator failed to ensure that adequate air was provided behind the line curtain in the active section where the roof bolter was operating. In settlement, the parties proposed reducing the penalty from $1,031 to $462, the penalty that results from reducing the negligence attributable to the operator from "moderate" to "low."[16]

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[15] Section 75.370(a)(1) requires the operator to "develop and follow a ventilation plan approved by the district manager." 30 C.F.R. § 75.370(a)(1).

[16] According to the Secretary's own Part 100 guidelines, "moderate negligence" occurs when "the operator knew or should have known of the violative condition or practice, but there are mitigating circumstances" and "low negligence" occurs when "the operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." 30 C.F.R. § 100.3(d). While a Commission Judge may consider the Secretary's Part 100 regulations, the Secretary's definitions are not controlling. Commission Judges undertake a traditional negligence analysis.

The Judge found that the parties failed to justify that a lower negligence designation was appropriate and reasonable, in part, because a foreman was present and "an operator's actual or constructive knowledge is a key component of a negligence evaluation. *Id*. at 333 (citing *Ohio Cty. Coal*, 40 FMSHRC at 1099). The Judge determined the parties' presentation failed to demonstrate how it would be "reasonable" and "appropriate to the facts" that a penalty reduction is warranted by the alleged absence of a foreman who should know that as mining advances farther from the ventilation source, adequate steps must be taken to ensure continued compliance with the ventilation plan. *Id.* at 333-34; *cf. Black Beauty*, 34 FMSHRC at 1863 n.6 ("[T]he explanation provided by the Secretary for a reduction in penalty related to a preshift violation was inconsistent with the inspector's description of the violation described in the order, but the inconsistency was not explained in the motion.").

Citation No. 8055976 alleges that the operator failed to remove the tail curtain in the entry intake, exposing miners to respirable coal dust and silica. In settlement, the parties proposed reducing the penalty from $12,321 to $1,666, reducing the alleged negligence from "high" to "moderate" and reducing the alleged gravity of the violation. The parties stated that a reduction in negligence is justified because the condition only existed for a short time and the foreman on the section was unaware of the violation. Assessing whether the proposed modifications are "reasonable" and "appropriate under the facts," the Judge found that these contentions do not support the modifications to the citation, citing the serious dangers presented by dust exposure and the high standard of care the Mine Act requires of a foreman. A reasonably prudent foreman would have taken proactive measures to ensure that the curtain was properly adjusted.[17] 41 FMSHRC at 335. The Judge found that paying approximately *14%* of the originally proposed penalty in settlement of this citation was not fair, reasonable, or in the public interest.

Citation No. 8055977 alleges that the continuous miner had plugged water sprays; 19 out of 30 water sprays were plugged. The ventilation plan requires a minimum of 27 sprays to be operational. In settlement, the parties proposed reducing the penalty from $3,710 to $749, reducing the negligence from "moderate" to "low" and reducing the gravity of the violation. The parties stated that management was not aware of the violative condition and the personal samples taken by the shuttle car operator showed that dusts levels were in compliance despite the violation. The Judge concluded that the compliant dust levels were not relevant to the operator's negligence in failing to abide by the water spray requirement. Furthermore, she noted that the record demonstrated that a high number of sprays were clogged, it took almost an hour to clean and repair and that a supervisor was in the area.

[17] In her analysis the Judge accepted the stipulated facts that the foreman was both present and unaware of the violative conditions. The Judge then considered how these stipulated facts affected the negligence attributable to the mine operator. The Judge recognized that a foreman may be considered to have constructive knowledge of conditions. It is a reasonable basis for her rejection of the parties' *legal* contention that the reduction in negligence was justified because the foreman had no *actual* knowledge of the violative conditions. The Judge certainly did not engage in any credibility determination as the majority inaccurately alleges. *See* slip op. at 8 n.4.

Citation No. 8055978 was issued for failing to maintain the roof bolter vacuum as required by the ventilation plan. To settle the citation, the parties proposed modifying the penalty from $1,031 to $462 and reducing the negligence from "moderate" to "low." The parties contended that a reduction in negligence was justified because the violation did not exist at the beginning of the shift, it was hard to detect a violation, and an agent of the operator was not aware of the violation. The Judge determined the parties failed to explain how these contentions warranted a penalty reduction given that a foreman was present and should have known of the violation.

We find no abuse of discretion in the aforementioned analysis. Rather, we conclude that the Judge properly considered the facts proffered by the parties *as alleged* and found that those alleged facts and the parties' explanations and legal contentions did not demonstrate under the *AmCoal* standard that the proposed modifications to the citations were "reasonable" "fair" or "appropriate under the facts" and therefore failed to demonstrate the reduction in penalty is warranted. *Cf. Black Beauty*, 34 FMSHRC at 1863 n.6 ("[T]he motion to approve settlement lists the same facts for the reduction in penalty for each roof control and accumulation violation, but the motion does not include facts necessary to evaluate whether a reduction in negligence was appropriate, or an explanation for why the number of persons affected by the violation should be modified."). The Judge's conclusions are consistent with the *AmCoal* standard of review, "fully supported by the record, consistent with the statutory penalty criteria, and not otherwise improper." *Black Beauty*, 34 FMSHRC at 1864 (internal quotations omitted).

III.

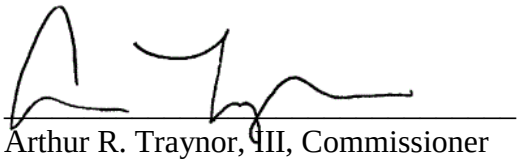
Conclusion

The majority provides no good reason for overturning the central holdings of at least three decisions in the *Black Beauty* and *AmCoal* cases – to completely rework a settlement review system that has performed admirably well. Principles of *stare decisis* are considered binding absent a strong reason, which should be provided in any opinion that changes or overrules precedent. Yet no policy or other reason is to be found in the majority's opinion explaining even one of multiple departures from our binding precedents. Other than an inapt quote from a Supreme Court case and misinterpretation of a few select quotes from precedential decisions to arrive at conclusions contrary to those decisions' essential holdings, the majority offers no reason – and certainly not a strong one – for departing from the rules of *stare decisis* to upend a demonstrably successful review process.

We are concerned that the majority's substantial yet unexplained departures from our precedent compromise the Commission's role as a check against abuses of power. Congress intended for Commission Judges to ensure that the information provided in support of settlement agreements is true and correct and that a penalty reduction based upon such information is warranted under the appropriate criteria. Without this oversight, it is possible a government Solicitor seeking to conserve litigation expenses and an operator looking to reduce penalties could cooperate to arrive at a mutually acceptable penalty amount and then backfill factual stipulations that would support modifications to the underlying citation needed to arrive at the desired Part 100 recommendation. Congress enacted the unique provision at section 110(k) for the express purpose of ensuring the Commission would not be a mere rubber stamp, opening the

door to the type of deal-making and unwarranted settlements that originally concerned them enough to delegate the Commission oversight authority in section 110(k).

Mary Lu Jordan, Commissioner



Arthur R. Traynor, III, Commissioner

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