FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 30 2019

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. LAKE 2017-52
SOLAR SOURCES MINING, LLC	:	

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

DECISION

BY: Rajkovich, Chairman; Young and Althen, Commissioners

This proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act") comes before us on interlocutory review of the decision of an Administrative Law Judge denying the Secretary's motion, with which the operator agreed, to approve settlement of three citations. 39 FMSHRC 2052 (Nov. 2017) (ALJ).

Two of the citations were regularly assessed and one was specially assessed. Each regularly assessed citation was for $4,548. The special assessment on the third citation was for $68,300, making the total assessment $77,396 for all three citations. Under the terms of the proposed settlement, the operator, Solar Sources Mining, LLC ("Solar Sources"), would accept responsibility for all three violations as written, including negligence and gravity, and would pay a penalty of $13,644, equivalent to the regular assessment total for all three violations. *Id.* at 2054-55.[1]

The Judge concluded that the motion presented "no facts" in support of the settlement and that the Secretary's refusal to provide copies of the inspector's notes and photographs prevented him from being able to discern whether the proposed settlement was appropriate. 39 FMSHRC at 2059.

[1] The proposed reduction is exactly the difference between the regular and special assessments for the third citation. *See* 30 C.F.R. § 100; MSHA General Procedures of Special Assessments. The Commission is not bound by the Secretary's proposed assessments and has a duty to assess penalties independently. *The American Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016) ("*AmCoal Special Assessments I*").

The parties filed a joint motion to certify issues for interlocutory review and a motion to suspend the hearing pending Commission review. The Judge granted both motions, and the Commission granted review of the following issues:

(1) Whether the Secretary of Labor possesses unreviewable discretion to withdraw a specially assessed proposed penalty;

(2) Whether the Judge erred by requiring the Secretary to produce the inspector's notes and photographs during the settlement process and before a hearing on the merits; and

(3) Whether the Judge abused his discretion in denying the settlement motion.

We conclude that the Judge abused his discretion in considering the settlement. Therefore, we reverse the Judge's decision and approve the settlement.

I.

Facts and Proceedings Below

A. Background

The three citations involved in this case were issued after an accident at Solar Sources' Antioch Mine, a surface coal mine located in Davies County, Indiana. On July 8, 2016, a miner was injured severely when he fell from a catwalk on a Euclid 3500 end dump truck due to an obstruction on the catwalk and the failure of a chain he relied upon for support.

A rope tied from the truck's cab to the rear-view mirror, extending along the length of the catwalk at a height of about 57 to 59 inches, made it awkward for the miner to exit from the cab. When the miner bent down to pass under the rope, he lost his hard hat. Then, when he bent down to retrieve the hard hat, he leaned onto a severely corroded handrail chain. The chain broke, and the miner fell nearly 14 feet to the ground below. 39 FMSHRC at 2054.

MSHA conducted an accident investigation on July 25, 2016, and issued the following citations to the operator:

- Citation No. 9102709 alleged a violation of 30 C.F.R. § 77.1606(c)[2] because the handrail chain with defects affecting safety was not corrected before the equipment was used.

[2] 30 C.F.R. § 77.1606(c) provides that "[e]quipment defects affecting safety shall be corrected before the equipment is used."

- Citation No. 9102711 alleged a violation of 30 C.F.R. § 77.1601(a)[3] because the same equipment's safety defects were not recorded in the pre-op record book on the second shift on July 7, 2016.

- Citation No. 9102710 alleged a violation of 30 C.F.R. § 77.1101(c)[4] because the operator's plans for escape and evacuation did not include proper maintenance of adequate means for the exit of all areas where persons are required to work or travel.[5]

The MSHA inspector designated each violation as "significant and substantial" and the result of the operator's moderate negligence. With regard to gravity for each violation, the inspector designated the injury as "occurred," reasonably expected to result in lost work days or restricted duty, and one miner affected. As stated, MSHA proposed regular penalty assessments of $4,548 each for Citation Nos. 9102709 and 9102711 and proposed a special assessment of $68,300 for Citation No. 9102710.

B. Motion to Approve Settlement

The operator contested three citations. As stated above, the motion to approve settlement provided that the operator agreed to accept all aspects of Citation Nos. 9102709 and 9102711 as written and pay the $4,548 regular penalty assessments for each citation. Additionally, the operator agreed to accept all aspects of Citation No. 9102710 as written, including negligence and gravity, and to pay $13,644, a total reflecting the regular assessment calculated for all three citations. In the settlement motion, the Secretary agreed to apply the regular penalty assessment under 30 C.F.R. Part 100. Consequently, Solar Sources would accept the violation in its entirety and pay the regular penalty for the violation.

Regarding Citation No. 9102710, the motion asserted that there were factual and legal issues in dispute. These included the operator's contentions that the cited standard at 30 C.F.R. § 77.1101(c) related to emergency escapes and evacuations in case of fire, and thus arguably was

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[3] 30 C.F.R. § 77.1606(a) provides that "[m]obile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation" and that "[e]quipment defects affecting safety shall be recorded and reported to the mine operator."

[4] 30 C.F.R. § 77.1101(a) requires operators to establish and keep current a specific escape and evacuation plan to be followed in case of a fire. In turn, the cited standard, 30 C.F.R. § 1101(c), provides that "[p]lans for escape and evacuation shall include the designation and proper maintenance of adequate means for exit from all areas where persons are required to work or travel including buildings and equipment and in areas where persons normally congregate during the work shift." There was no fire from which escape or evacuation was necessary.

[5] The citation was abated by posting an evacuation plan for the truck, which instructed the driver to leave the cab by one of two doors, use the walkway outside the cab, and walk to the front of the truck to climb down the ladder to the ground. This was the only means of exit. SS Br. at 2-3.

not applicable to the cab of mobile equipment or to the circumstances of the violation, and that, in any event, a heightened special assessment was not justified. The Secretary asserted that the citation was valid as written, but agreed that the facts did not support the special assessment. Noting his interest in "maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement was not appropriate," the Secretary maintained that the settlement was "reasonable" and served "to effect the intent and purpose of the Mine Act."

On November 6, 2017, the Judge requested via email that the Secretary submit a copy of the MSHA inspector's notes and photographs. The Secretary responded the same day declining the Judge's request. On November 13, the Judge advised the parties that he could not properly review the settlement without the requested evidence and informed the parties that if the Secretary continued to withhold them, he would issue a denial of the proposed settlement. On November 15, the Secretary responded that he had reconsidered the Judge's request and still declined to provide the demanded information, resting on his settlement motion.

C. The Judge's Decision

In denying the motion to approve the settlement, the Judge stated that the parties provided "*no facts*" to support the settlement. 39 FMSHRC at 2052 (emphasis in original). The Judge held that "it is within the Court's prerogative to require the Secretary to submit the [MSHA] inspector's notes and photos, if the Court believes that such information is necessary in determining if a compromise or mitigation in a settlement motion is appropriate." 39 FMSHRC at 2057.

Given the Secretary's failure to provide the specifically demanded documents, the Judge opined that he lacked the ability to perform his "Congressionally delegated responsibility under 30 U.S.C. § 820(k)." *Id.* The Judge rejected the Secretary's willingness to settle by applying its regular penalty formula. *Id.* at 2058. The Judge invited the Secretary to submit a "properly supported" motion, along with the requested documents. Otherwise, the case would be set for hearing.

D. Motion for Reconsideration and Request for Interlocutory Review

On January 18, 2018, the parties filed a Joint Motion to Reconsider Decision Rejecting Proposed Settlement. The parties noted that in *AmCoal Special Assessments I*, 38 FMSHRC at 1991, the Commission held that MSHA had unreviewable discretion as to whether to propose a regular or special assessment. The parties argued that Commission decisions supported the conclusion that MSHA's decision to withdraw the special assessment is wholly within the agency's discretion. The parties also argued that the Judge's demand for the inspector's notes and photographs raised policy concerns involving compromise of the Secretary's litigation position should the case go to hearing. They explained that such evidence may reveal potential weaknesses in the Secretary's case and that such information could likewise be required of the

operator, thereby compromising its litigation position and tainting the Judge's view of the issues in the case prior to hearing.[6]

On April 3, 2018, the Judge issued an order denying the parties' motion for reconsideration. The Judge acknowledged the parties' argument that the settlement motion detailed several factors in support, including the citation's issuance for a non-fatal accident, the parties' disagreement as to the applicability of section 77.1101(c), and the propriety of a special assessment, but concluded that these factors did not constitute facts and thus did not support the settlement. The Judge rejected the parties' argument that MSHA has unreviewable discretion to withdraw a special assessment. The Judge also dismissed the Secretary's policy concerns regarding his demand for the inspector's notes and photos asserted that any matters discussed in settlement could not be considered in a hearing on the merits and, in any event, such evidence would be discoverable.

On April 16, 2018, the parties filed a joint motion to certify the case for interlocutory review and a joint motion to suspend proceedings pending interlocutory review. The Judge granted both motions. On May 16, the Commission directed review of the case.

The Commission also stayed briefing pending its consideration of *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal Settlement II*"). On September 10, 2018, the Commission issued a briefing order directing the parties to address the Commission's decision in *AmCoal Settlement II*.

II.

Disposition

A. Parties' Arguments on Appeal

The parties argue that the Secretary possesses unreviewable discretion to withdraw a specially assessed penalty. They also argue that the Judge erred by requiring the Secretary to produce the inspector's notes and photographs during the settlement process and before the case proceeded to a hearing on the merits. They contend that the Judge abused his discretion by denying the settlement motion because of the Secretary's refusal to provide the requested documents and because the Secretary allegedly presented no facts to support the settlement. They assert that the Judge also erred by failing to apply the appropriate standard articulated by the Commission in *The American Coal Co.*, 38 FMSHRC 1972 (Aug. 2016) ("*AmCoal Settlement I*") and that the Commission's decision in *AmCoal Settlement II* mandates approval of

[6] The Secretary's argument appears to have been based on principle rather than on prejudice in this case. *See* Oral Arg. Tr. at 11, 50-52 (acknowledgment that the requested documents had been provided to the defendant in discovery). We note that there are other considerations here, including the fact that the documents in question would be reviewed without explanation, exposition, or cross-examination. As discussed *infra* at slip op. at 9-10, we disapprove of what amounts to a general discovery request by the Judge.

the settlement in this case. They ask the Commission to vacate and reverse the Judge's decision and approve the settlement motion.[7]

B. Standard of Review

The Commission reviews a Judge's denial of a proposed settlement under an abuse of discretion standard. *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014); *see also Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 475 (3d Cir. 2003) ("If an agency 'announces and follows — by rule or by settled course of adjudication — a general policy by which its exercise of discretion will be governed,' that exercise may be reviewed for abuse."). An abuse of discretion may be found where there is no evidence to support the Judge's decision or if the decision is based on an improper understanding of the law. *Shemwell*, 36 FMSHRC at 1101. In reviewing settlements, "the Commission and its Judges consider whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *AmCoal Settlement I*, 38 FMSHRC at 1976.

C. The Judge's Denial of the Settlement Motion Constituted an Abuse of Discretion.

Section 110(k) of the Mine Act sets forth the Commission's authority to approve settlements of the Secretary's proposed assessments once contested and 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 concluded that under the clear language of section 110(k), "the Commission has the exclusive responsibility for approving all proposed settlements of contested civil penalties." *AmCoal Settlement I*, 38 FMSHRC at 1975. The Commission 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.'" *Id.* 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" (38 FMSHRC at 1976) and "must have sufficient information to fulfill their duty" (*AmCoal Settlement II*, 40 FMSHRC at 987). The Commission has required parties to submit facts supporting a penalty amount agreed to in settlement. This requirement is not limited

[7] In the alternative, the Secretary asks the Commission to vacate the Judge's settlement denial and remand the case to him to evaluate the motion under the appropriate legal standard.

to facts affecting the factors contained in section 110(i) of the Mine Act, but may also embrace facts outside of the section 110(i) factors that support settlement. *AmCoal Settlement I*, 38 FMSHRC at 1981-82.[8]

The parties contend that the Judge abused his discretion in denying their settlement. We agree. There are three principal errors in the Judge's decision denying the settlement:[9]

(1) He failed to apply the standard articulated by the Commission in the *AmCoal* settlement cases.

(2) He erred in denying the settlement solely based on the Secretary's refusal to provide a copy of the inspector's notes and photos.

(3) He erred in finding that the Secretary failed to provide any facts to support the settlement.

Because the Judge erred in his analysis of the parties' settlement motion, he abused his discretion in denying the settlement motion. Thus, we reverse his decision and approve the settlement.

1. The Judge Erred by Failing to Apply the Correct Standard for Reviewing Proposed Settlements.

The Judge failed to apply the standard articulated by the Commission in *AmCoal Settlement I*.[10] Not only did the Judge not mention *AmCoal Settlement I* at all in his decision but

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[8] Commission Procedural Rule 31 requires that a motion to approve penalty assessment include for each violation the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties. 29 C.F.R. § 2700.31(b)(1). Rule 31 also requires "[a]ny order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record." 29 C.F.R. § 2700.31(g).

[9] The parties requested that the Commission determine whether the Secretary possesses unreviewable discretion to withdraw a specially-assessed penalty, and the Commission granted review of this issue. However, we conclude that the issue is not ripe for consideration in this case. From the record and statements made by the Secretary's counsel during oral argument, it appears that the Secretary has not filed a motion for leave to amend his petition for assessment of penalty, and therefore has not revised the proposed special assessment or re-proposed a new assessment. Rather, the parties have submitted a proposed settlement, which they support with the rationale that the special assessment was not appropriate and that a penalty calculated under MSHA's regular assessment formula would be fair and appropriate. We need not address this issue to resolve the ultimate question of whether the Judge abused his discretion in denying the settlement in this case, and decline to do so.

[10] The Judge in this case was also the Judge whose decision we reviewed in *AmCoal Settlement I*.

he also failed to state the applicable standard for review of settlements as articulated by the Commission in that case. Moreover, he did not substantively comply with the *AmCoal Settlement I* standard of review in his decision denying the settlement.

By failing to apply the correct legal standard, the Judge neglected to consider significant factors the Commission has highlighted as relevant to the consideration of a proposed settlement. As more fully discussed herein, the motion actually presented relevant facts and potential litigation concerns in support of the settlement. The Judge failed to consider these factors and erroneously concluded that the parties presented no facts to support the settlement. In reviewing the settlement, he failed to apply the *AmCoal* standard and consider whether the proposed settlement was "fair, reasonable, appropriate under the facts, and protects the public interest." Accordingly, the Judge erred.

Our decision in *AmCoal Settlement I* addressed on interlocutory review whether the Judge abused his discretion in denying the Secretary's motion for settlement between the Secretary and the operator because the parties allegedly did not provide factual support for an across-the-board 30% penalty reduction for each of the 32 citations issued to AmCoal by the Secretary. 38 FMSHRC at 1972. The Commission held that it and its Judges review a settlement motion to determine "whether the settlement of a proposed assessment is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* at 1976.

Agreeing in that case that the Secretary provided no facts to support the proposed penalty reductions, we affirmed the Judge's denial of the motion to approve the settlement. *Id.* at 1985. In remanding the case to the Judge for further proceedings, the Commission noted that section 110(i) of the Mine Act identifies the bases for such factual support. *Id.* at 1981. Additionally, we further held that the parties may submit facts supporting a settlement that fall outside of the section 110(i) factors. *Id.* at 1982.

In his decision in this case, the Judge failed to articulate the standard he was applying in reviewing the settlement. The Judge summarily denied the settlement motion, incorrectly asserting that the motion presented "*no facts*." 39 FMSHRC at 2057 (emphasis in original). The motion, though, did set forth numerous facts, including those agreed upon by the parties and a summary of the operator's arguments as related to those facts. The Secretary also made what amounts to a binding admission that there was no factual basis for the original special assessment.[11]

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[11] We recognize that one might argue that the Secretary's agreement with Solar Sources that the penalty should have been regularly assessed rather than specially assessed arose in the context of settlement. However, there is no indication in the Secretary's pleadings before the Judge or the Commission that his agreement was "for purposes of settlement." Rather the agreement that a regular assessment was appropriate is set forth as a straightforward statement of fact.

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 Settlement I.* That was not done so here. In particular, the Judge did not explain what type of facts he deemed necessary in order to review the settlement properly. He simply stated that it was his "prerogative to require the Secretary to submit . . . such information [he deems] is necessary in determining if a compromise or mitigation in a settlement motion is appropriate." *Id.* at 2057.

In requesting specific documents, the Judge did not explicitly identify any missing facts, explain why the documents he demanded were necessary under the *AmCoal Settlement I* standard, or otherwise provide a rational basis for his request. Not only did his order fail to apply the Commission's *AmCoal* settlement decisions, those cases — the controlling precedent on this issue — were not mentioned at all in his order denying settlement.[12]

2. The Judge Erred by Denying the Proposed Settlement Based Solely on the Secretary's Refusal to Produce the Inspector's Notes and Photos.

The Commission has held that a Judge who properly determines that a settlement motion lacks sufficient information may permissibly request further facts from the parties. *See Black Beauty*, 34 FMSHRC at 1863. Ultimately, the facts presented must be sufficient to permit the Judge to determine if the penalty reduction protects the public interest. However, requesting additional facts is different from requesting specific documentary evidence, as the Judge did here. 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. Rather, the Judge is expected to consider the facts as alleged by the parties in their settlement, evaluate such information under the applicable Commission standard for review, and determine whether the facts support the penalty agreed to by the parties. *See* Commission Procedural Rule 31, 29 C.F.R. § 2700.31.

Similar to the Judge's error in concluding that the Secretary presented no facts, the Judge likewise erred by denying the settlement on the basis that he was not provided specific documents.

The Judge's review of the settlement was overly stringent. The Secretary agreed to reduce the proposed assessment by withdrawing it from the special assessment procedure without changing any of the underlying findings of the citation, thereby causing the Judge to question the basis of the decision to withdraw the high dollar penalty. However, the Secretary's decision was not devoid of reason as the Judge purported. Rather, the Secretary pointed to numerous factors that influenced and informed his settlement decision. We do not agree with the Judge's characterization that the Secretary's refusal to provide the documents amounted to a failure to provide any facts to support the proposed penalty reduction. As the Commission has

[12] The Judge was obviously aware of the Commission's decision in *AmCoal Settlement I* because the Commission's initial decision setting forth the applicable standard was remanded to him more than a year before the motion and denial in the present case.

identified, facts can be an agreement of the parties that they disagree about certain aspects of the violation or proposed penalty. *AmCoal Settlement II*, 40 FMSHRC at 991. The parties are not required to make concessions, as long as they "provide mutually acceptable facts that demonstrate the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* The Judge should have considered and addressed these facts in his decision.

While the Judge may identify gaps in the parties' explanations or specific information he may need to review and approve the settlement, he erred here by directing the Secretary to submit specific documents and denying approval of the settlement based on the Secretary's refusal to supply such documents.

3. The Judge Erred By Finding that the Motion Lacked Facts to Support the Settlement.

While we could remand the case to the Judge to apply the correct standard and correct his legal errors, as noted above, we conclude that remand is unnecessary because the parties presented sufficient facts to support that the settlement is fair, reasonable, appropriate, and serves the public interest. Thus, we reverse the Judge's denial of the settlement and approve the settlement.

The Judge summarily stated that the settlement motion, which proposed the application of the regular assessment, was "without explanation," providing "no new facts . . . while simultaneously not changing any of the underlying findings in the citation." 39 FMSHRC at 2058. Review of the motion refutes this and makes clear that the Judge simply disregarded the facts and arguments set forth in support of the settlement motion.

During settlement negotiations, the parties disagreed as to the applicability of the cited standard, 30 C.F.R. § 77.1101(c). Section 77.1101(c) falls under Subpart L of MSHA's regulations, entitled "Fire Protection," a topic with no apparent connection to the defective chain that resulted in an injury in this incident.[13] Subsection (a) of section 77.1101 provides that "each operator of a mine shall establish and keep current a specific escape and evacuation plan to be followed in the event of a fire." Section 77.1101(c) is a further provision to assure the efficient implementation of escape and evacuation plans when necessary. The parties acknowledged a dispute over whether the regulation is aimed at (1) mobile vehicles — that is, preparing drivers how to get out of their trucks by going out one of only two doors — or (2) establishing general maintenance obligations for mobile vehicles.

Additionally, settlement focuses upon the fact that the violations all involved the same truck, and more specifically, maintenance of the truck in a condition free from safety defects.

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[13] There was no fire, and we cannot perceive that training consisting of instruction to exit the cab and descend from the vehicle via the only feasible means of egress would have been helpful to the miner in this case.

The other two citations involved in this proceeding arise from standards directly related to the standing duty to inspect mobile equipment and repair safety defects.

Section 77.1606(a) provides, "Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator." 30 C.F.R. § 77.1606(a).

Section 77.1606(c) provides, "Equipment defects affecting safety shall be corrected before the equipment is used." 30 C.F.R. § 77.1606(c).

These sections under Subpart Q address "Loading and Haulage" and clearly are applicable to the mobile equipment that is the subject of the citations. They explicitly require the inspection of mobile equipment and the repair of any defects affecting safety before use. In addition to arguments over whether section 77.1101 is applicable in the first place, this commonality creates the possibility of an argument that the citations for violation of the directly applicable regulation are primary and a citation under section 77.1101(c) is duplicative or "piling on" of citations.[14]

While the Secretary asserts that the citation was proper but agrees the penalty should have been regular, he also concedes he would bear the burden of demonstrating the applicability of the fire protection standard for escape and evacuation in addition to the other directly-applicable standards. Further, he would need to establish the basis for a heightened penalty, and he would bear the burden of doing this in a context where he assessed the directly-applicable standards as regular assessments. Moreover, the Secretary highlighted the enforcement benefits from the operator accepting the citations as written, with no changes to the findings.

Even were the Secretary completely confident of success in sustaining the violation, therefore, the parties have stated a substantial reason for accepting the settlement. All penalty criteria of the three alleged violations are identical, including the negligence and gravity findings. The assessed penalties of the other two violations are regular penalties for alleged

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[14] Section 77.1101(c) requires the "designation and proper maintenance of adequate means for exit" in a fire evacuation plan. In essence, the operator is being cited for the same conduct or omission for this citation as for the failure to correct the defective handrail chain citation and failure to inspect mobile equipment citation. The only abatement taken for this evacuation plan citation was to instruct the truck driver to exit from the only means available and to post this exit plan. Hence, the operator was not required to take any further actions to either "designate" or "maintain" an adequate means of exit beyond what the operator was already doing as a general practice. Furthermore, the operator repaired the defective handrail chain in abating the failure to correct citation. Thus, there was no further action taken to "maintain" the means of exit. The Commission has found that when an operator is cited for both general and specific standards involving the same facts, the general citation is duplicative. *See Western Fuels-Utah, Inc.*, 19 FMSHRC 994, 1004-05 & n.12 (June 1997) ("Had MSHA put on evidence of additional deficiencies that violated the general regulation, instead of relying on the identical evidence . . . used to support the violation of the specific standard, we would not have found them duplicative.").

violations of sections that are directly applicable to the incident. The Secretary alleges "moderate" negligence for all three citations. Moreover, the incident involved in the citation did not arise in the context of an escape or evacuation — the type of event that section 77.1101(c) addresses.

Abatement of the alleged violation of section 77.1101(c) did not involve repair, modification, or work on the end dump. Instead, the operator abated the violation by posting instructions regarding how to exit the cab. The abatement had nothing to do with the event that caused the injury and the failure to have an escape plan telling the operator to go through a door did not play any role in the accident or injury. Therefore, the Secretary has agreed that the alleged violation supports only a regular penalty — the same penalty the Secretary proposed for the alleged violations of directly applicable sections 77.6016(a) and (c).

Under these circumstances, it is entirely reasonable for the Secretary to settle for the penalty he deems appropriate,[15] obtaining the same penalty he seeks for the directly applicable sections, while avoiding the risk of trial on an alleged violation that faces legal challenges, and securing a result valuable for future enforcement purposes. The Judge should have considered all these factors. In *AmCoal Settlement II*, the Commission explained that the Judge must "accord due consideration to the entirety of the proposed settlement package, including its monetary and non-monetary aspects." 40 FMSHRC at 989 (quoting *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC at 1103). The Commission recognized that significant non-monetary value flows from "accepting the citations as written." *AmCoal Settlement II*, 40 FMSHRC at 989. Accordingly, the Judge erred by not taking into consideration the foregoing factors submitted by the parties in support of the settlement. His failure to do so led to the denial of a settlement in which the Secretary essentially would receive everything to which he now asserts entitlement.

In summary, in the proposed settlement the Secretary accepts a penalty he now agrees is appropriate and prevails for all three citations on the findings of violation, negligence, and gravity without a hearing, and obtains future enforcement benefits. We hold that the Secretary has demonstrated that the settlement is fair, reasonable, appropriate under the facts, and protective of the public interest. There is no logical reason to deny acceptance of the settlement, and we reverse the Judge's decision and approve the settlement.

[15] Essentially, the Secretary is stating that he is not making a concession on the penalty amount but rather is acknowledging that, especially in light of the other assessments, he is obtaining the appropriate penalty for an alleged violation that could have an uncertain fate at hearing.

III.

Conclusion

The Judge abused his discretion in denying the settlement as stated in this decision. For the foregoing reasons, we reverse the Judge's decision 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:

We concur with our colleagues in concluding that the Judge abused his discretion when he failed to review the terms of the proposed settlement agreement according to the standard articulated in *AmCoal Settlement I*, 38 FMSHRC 1972, 1976 (Aug. 2016). We also concur with their finding that under the proceeding's current posture, we are not able to review whether the Secretary has the ability to withdraw a specially-assessed penalty.

Furthermore, we would find that the Judge's act of sending an email to the parties threatening denial of their settlement motion as a sanction for refusing to comply with his request for the inspector's relevant notes and photographs was an abuse of his discretion. 39 FMSHRC 2052, 2055 (Nov. 2017) (ALJ). While we believe that a Judge has the discretion to request information from the parties, a Judge must always review the parties' motion to approve settlement under the *AmCoal Settlement I* standard in good faith.

However, we write separately specifically because we disagree with our colleagues' ultimate conclusion: that the parties have demonstrated that their settlement "is fair, reasonable, appropriate under the facts, and protective of the public interest." Slip op. at 12-13.

The motion to settle the proposed penalty of $68,300 for Citation No. 9102710 for a $4,548 penalty contains minimal factual support beyond Solar Sources' agreement to accept the citation as written. In the motion, the Secretary makes the cursory assertion that "the facts do not support the special assessment and the citation should have been regularly assessed," but fails to identify any particular facts or circumstances explaining why the 93% penalty reduction comports with the *AmCoal Settlement I* standard. Mot. at 3.

The majority has surmised a variety of reasons as to why, nevertheless, the settlement *might be* fair, reasonable, appropriate, and protective of the public interest. For example, the majority suggests that Solar Sources may have argued to the Judge that the section 77.1101(c) citation is duplicative of another citation at issue. Slip op. at 11. Yet, the settlement motion is devoid of any reference to a duplicative argument.

Moreover, the motion does not contain the majority's nuanced analysis of whether the requirements of section 77.1101(c) apply to mobile vehicles. Instead, the motion only contains the generic representation, common among settlement agreements, that the operator does not believe that the safety standard applies to the equipment at issue.

Section 110(k) of the Mine Act provides that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). Congress vested this power within the Commission "[i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest" and to prevent the unwarranted penalty compromises that had previously occurred as a result of off-the-record settlement negotiations. *AmCoal Settlement I*, 38 FMSHRC at 1976. Section 110(k) and Commission Procedural Rule 31 (governing settlements) require that motions to approve settlement agreements are to be presented on the record with factual support of the penalty agreed to by the parties.

We dissent from the majority's disposition because we believe that the proper disposition for this proceeding is to vacate the Judge's decision and remand the proceeding so that he may properly consider a settlement motion, including both the monetary and non-monetary aspects of the parties' agreement. We would advise the parties to revise their motion so that it contains a reasoned explanation, commensurate with the reduction in penalty, as to why their proposed settlement complies with the *AmCoal Settlement I* standard.[1]

On remand, the parties would be free to avail themselves of the assistance of one of the Commission's settlement counsels if they believe that disclosure of any specific information or argument would prejudice their case or would otherwise undermine the enforcement goals of the Mine Act.

Mary Lu Jordan, Commissioner

Arthur R. Traynor, III, Commissioner

[1] For example, if the parties have agreed to reduce the penalty because this is the first time that the requirements of 30 C.F.R. § 77.1101(c) have been applied to a rock truck, as Solar Sources represents in its brief to the Commission, that is a fact that should be presented to the Judge in the settlement motion. R. Br. at 8-9.

Distribution:

Mark Heath, Esq.
Spilman Thomas & Battle PLLC
300 Kanawha Boulevard, East
Charleston, WV 25301

Andrew Tardiff, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

Ali Beydoun, Esq.
Office of the Solicitor
US Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450

April Nelson, Esq.
Office of the Solicitor
US Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450

Melanie Garris
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

Administrative Law Judge William Moran
Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710