FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710

MAR 05 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. LAKE 2009-35
v.	:	
THE AMERICAN COAL COMPANY	:	

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

ORDER

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), and is presently before the Commission a second time on review. On October 30, 2017, the Secretary of Labor filed a motion to settle the case pursuant to a settlement agreement he had reached with the operator, The American Coal Company ("AmCoal"). For the reasons expressed in their separate opinions herein, two Commissioners would grant the motion and two would deny. The motion, therefore, is denied in effect, and the Secretary is ordered to file a response brief in the case within 30 days of the date of the Order.

I.

General Factual and Procedural Background

The case involves two orders issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging violations of 30 C.F.R. § 75.400[1] at AmCoal's then Galatia Mine (now its New Era Mine) during a week in September 2007. MSHA cited AmCoal for loose coal and float coal dust accumulations at two separate belt transfer points and designated both violations as significant and substantial ("S&S") and attributable to AmCoal's unwarrantable failure to comply with section 75.400.[2] Significantly, both violations were also

[1] Section 75.400 provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

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

subsequently assessed as "flagrant" under section 110(b)(2) of the Mine Act, 30 U.S.C. § 820(b)(2), which provides for greatly enhanced penalties.[3]

Following a hearing on the merits, the Judge affirmed both orders, upheld the designation of each as S&S and attributable to AmCoal's unwarrantable failure, and found that both were flagrant violations. 35 FMSHRC 2208 (July 2013) (ALJ).

MSHA proposed a $179,300 penalty for Order No. 7490584 ("the first order"). The Judge modified the first order to reduce the gravity from "Highly Likely" to "Reasonably Likely" and from "Fatal" to "Lost Workdays or Restricted Duty." He assessed a final penalty of $101,475.

MSHA proposed a $164,700 penalty for the other order, No. 7490599 ("the second order"). The Judge modified it to reduce the gravity from "Highly Likely" to "Reasonably Likely" and the negligence from "High" to "Moderate, and assessed a final penalty of $77,737.

The Commission granted AmCoal's petition that it review the ALJ's decision and the Secretary's petition that it review the Judge's reduction in the level of negligence and the reduction of the penalty in the second order. The Commission unanimously affirmed the Judge in all respects with regard to the first order, but a majority remanded the second order for further consideration of the negligence finding, the flagrant designation, and the penalty. 38 FMSHRC 2062 (Aug. 2016). On September 26, 2016, the Commission in an unpublished order denied AmCoal's petition for reconsideration.

On remand, the Judge, again, determined that the operator's violation was flagrant and re-determined the negligence as High. 39 FMSHRC 1247 (Jun. 2017) (ALJ). As a result, the Judge

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unwarrantable failure terminology is taken from the same section, and establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[3] Section 8(a) of the Mine Improvement and New Emergency Response ("MINER") Act amended section 110 of the Mine Act to create a "flagrant" violation designation and to provide for the assessment of an enhanced penalty. Pub. L. No. 109-236, 120 Stat. 493, 500 (2006). Thus, section 110(b)(2) of the Mine Act now provides that

> [v]iolations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.

30 U.S.C. § 820(b)(2).

imposed a penalty of $112,380 for the second order. American appealed the Judge's remand decision.

Following AmCoal's submission of its opening brief, the Secretary moved to settle the case. The motion states that the parties agree to end all current appeals and forego further appeals based on the two premises to the settlement agreement:

> (1) AmCoal agrees to accept the Commission's previous decision in this case affirming the "flagrant" and other designations accompanying Order No. 7490584 from [the Judge's initial decision] and not disturbing the [Judge]'s penalty assessment of $101,475; and (2) the Secretary agrees to delete the "flagrant" designation accompanying Order No. 7490599, to change the gravity of the violation from serious injury or death to lost work days or restricted duty and from six (6) persons affected to two (2) persons affected, and to regularly assess a penalty for this violation as modified.

Mot. at 3. The regularly assessed penalty for the second order would be $11,307. *Id.*

II.

The Commission's Authority to Approve Penalty Settlements Under the Mine Act

Under section 110(k) of the Mine Act, "[n]o proposed penalty which has been contested before the Commission . . . shall be compromised, mitigated, or settled, except with the approval of the Commission." 30 U.S.C. § 820(k). Settlements are committed to the "sound discretion" of the Commission and its judges. *See Madison Branch Mgt.*, 17 FMSHRC 859, 864 (June 1995) (citing *Medusa Cement Co.*, 12 FMSHRC 1913, 1914 (Oct. 1990)). The Commission is not bound by the parties' settlement agreement and may reject a settlement "based on principled reasons." *Knox County Stone Co.*, 3 FMSHRC 2478, 2480 (Nov. 1981). In exercising its discretion, the Commission evaluates whether a proposed reduction in a penalty or penalties "is fair, reasonable, appropriate under the facts, and protects the public interest." *Am. Coal Co.*, 38 FMSHRC 1972, 1982 (Aug. 2016).

III.

Separate Opinions of Commissioners

Acting Chairman Althen and Commissioner Young, in favor of approving the settlement and granting the motion:

Through the settlement submitted by the Secretary, the Secretary prevails on all disputed legal issues and the operator foregoes any further contest of such issues. The operator pays a substantial penalty to dispose of a case that is more than 10 years old and involves a mine that, although producing millions of tons of coal in 2007, has not produced any coal for the last 15 months. The alternative is continued litigation, perhaps for years. As set forth below, the

Secretary correctly judges that the settlement achieves the public interest. We would approve the settlement.

It is important to note at the outset that, in reviewing settlements, "[t]he Commission does not review the Secretary's *decision to settle.* Rather, the Commission reviews the proposed reduction of civil penalties in settlements." *Am. Coal*, 38 FMSHRC at 1980 (emphasis in original). We look at the total penalty amounts that are subject to the settlement, and evaluate "whether the proposed reduction of penalties is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* at 1982; *see, e.g., Aracoma Coal Co.*, 32 FMSHRC 1639, 1640-49 (Dec. 2010), *aff'g* 30 FMSHRC 1160 (Dec. 2008) (ALJ).

Here, the parties have agreed to settle two orders, designated as subject to penalties for "flagrant" violations under the Mine Act, for a reduced total penalty amount. As detailed in the motion for approval of the settlement (Mot. at 3), the Secretary originally proposed a total of $344,000 in penalties for the two violations. The Judge in his first decision agreed with the Secretary that both violations were flagrant and thus subject to enhanced penalties, but assessed a total penalty amount of $179,212.

The Commission affirmed the Judge with respect to his flagrant determination and the penalties he assessed as to the first order, but remanded the second order to him for further consideration of whether it qualified as a flagrant violation as well as the operator's negligence with respect to the violation. The Judge on remand again found the violation to be flagrant, increased the level of negligence from moderate to high, and increased his total penalty assessment for the second order by $34,643, resulting in a new total assessment of $213,855.

The Commission granted AmCoal's petition for discretionary review as to the Judge's decision on remand, and the operator filed its opening brief. Thereafter, upon the parties' motion, the Commission delayed further briefing to permit the parties to submit their settlement motion. The primary focus of the proposed settlement is that AmCoal will not further appeal the Commission's decision as to the first order, while the Secretary will delete the flagrant designation of the second order, and instead it will be subject to a regular penalty assessment of $11,307.

Thus, AmCoal will be subject to a total penalty of $112,782 for the two violations. This is approximately a 37% reduction of the penalty the Judge assessed in his initial decision, and a 47% reduction of the penalty the Judge assessed in his remand decision, which is presently the subject of Commission review.

As to whether this proposed reduction in penalties is "fair, reasonable, appropriate under the facts, and protects the public interest," we take into account the following. First and foremost, AmCoal is foregoing its right under section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1), to pursue an appeal of the Commission's decision upholding the first order as a flagrant violation subject to a greatly enhanced penalty under the Mine Act. Our colleagues, in questioning the reduction in the gravity of the second order and ultimately refusing to approve the settlement, do not view AmCoal's forfeiture of its right to a court appeal as "adequate consideration" for the reduction in penalties. Slip op. at 8 n.1. We disagree.

Our colleagues cite the Commission's unanimity in its decision as to the first order, but unanimous Commission decisions are hardly immune to court vacatur or even reversal. *See, e.g., Maxxim Rebuild Co. v. FMSHRC*, 848 F.3d 737 (6th Cir. 2017), *rev'g* 38 FMSHRC 605 (Apr. 2016); *Noranda Alumina, L.L.C. v. Perez*, 841 F.3d 661 (5th Cir. 2016), *vacating and remanding* 37 FMSHRC 2731 (Dec. 2015); *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161 (D.C. Cir. 2013), *vacating and remanding* 33 FMSHRC 2373 (Oct. 2011); *see also North Shore Mining Co. v. Sec'y of Labor*, 709 F.3d 706 (8th Cir. 2013), *vacating* 34 FMSHRC 663 (Mar. 2012) (ALJ) (petition for discretionary review not granted by Commission). Our colleagues also characterize as "fully[ ]considered" the Commission's decision with respect to the first order. Slip op. at 8 n.1. We agree, but do not conclude that the thoroughness of our consideration will necessarily inoculate the Commission's decision from attack on appellate court review.

The Commission issued a lengthy opinion that included an extended discussion of the background of the flagrant violation provision and broke it down into its multiple constituent parts in reviewing the Judge's decision on both legal and substantial evidence grounds. The Commission also addressed how the flagrant provision fits into the Mine Act's graduated enforcement scheme, particularly with respect to the Mine Act's designation of some violations as S&S in nature and some violations as attributable to an operator's unwarrantable failure. The thoroughness of the Commission's opinion was largely necessitated by the almost total lack of legislative history of the provision. 38 FMSHRC at 2064-76.

While we are confident our decision would withstand court review, in light of the complexity of the issues raised by the flagrant violation provision and the Judge's reliance on an interpretation of the provision different than that upon which the Secretary tried the case (*see id.* at 2064-65), we understand how the Secretary might not be nearly as sanguine as our colleagues are regarding the result of court review. In our opinion, the public interest is served by this settlement because it establishes as final the decision we reached on the flagrant provision with regard to the first order. Given the prospect of further litigation at both the Commission and court levels following denial of this settlement motion, it is uncertain as to when the Commission's decision will otherwise become final.

The connection between the first and second orders in this case provides further reason to look at the proposed reduction in penalties with respect to the *total* of both penalties, and not just the reduction with respect to the penalty assessed for the violation in the second order. A reduction of 37% or even 47% is not unheard of when the Secretary decides to forgo pursuing a flagrant violation case, as he proposes to do here with respect to the second order. *See id.* at 2064 n.8 (discussing remand of flagrant violation issue in *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013), which resulted in removal of the flagrant violation designation and assessment of a penalty of $70,000, or a little less than half of the $142,900 penalty that the Secretary had proposed).

Moreover, recent circumstances militate in favor of approving the settlement of the penalties in this case so as to bring this case to a conclusion. According to MSHA's Mine Data Retrieval System, the mine in question ceased producing coal in 2016 and had no production at all in 2017. In such circumstances the Commission has approved settlements that resulted in similar reductions in penalties including in a case involving a violation alleged to be S&S and

attributable to the operator's unwarrantable failure. *See Big Ridge, Inc.*, 38 FMSHRC 1348, 1349 (June 2016) (approving settlement of case reducing the penalty Secretary was seeking by 42% in instance in which mine had closed); *see also UMWA on behalf of Franks v. Emerald Coal Res., LP*, 38 FMSHRC 935, 937-38 (May 2016) (approving settlement that reduced total penalties assessed by Judge 50% in case where mine had later closed).

Taking an intervening mine closure into account is reasonable because, in determining whether a settlement of penalties is in the public interest, the Commission looks at whether the settlement is consistent with the Mine Act's objectives. *Tazco, Inc.*, 3 FMSHRC 1895, 1896 n.1 (Aug. 1981); *Knox Cty. Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981). The Commission has identified deterrence of operator noncompliance with health and safety standards as one of the objectives of the Mine Act's penalty scheme, and considers it when a reduction in penalties is proposed as part of a settlement. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1865-69 (Aug. 2012).

Where the mine in question has closed, there is much less reason to employ the penalty process as a way to deter operator noncompliance with the Act. That is particularly true in this proceeding, where the violations in question took place more than 10 years ago, and the delay in the resolution of the case is in no way the fault of the parties.

Our colleagues would nevertheless deny the motion for settlement, focusing on the large reduction in the penalty assessed for the second order. As we have stated, analyzing the reduction without considering AmCoal's agreement to pay the full amount of the penalty assessed for the first order is not appropriate here.

Moreover, the settlement amount for the second order, $11,307, does not substantially diverge from the penalties assessed against AmCoal for violations of section 75.400 during the two years preceding the two violations at issue here, including with respect to violations designated as S&S or attributable to the operator's unwarrantable failure. While our colleagues cite record evidence on the total number of final and non-final citations and orders issued to AmCoal for section 75.400 violations during the two years preceding the subject violations (slip op. at 9), they fail to note that same evidence establishes that, in almost all of those instances, the penalties paid were less than, and in many cases, substantially less than, $11,307. This includes all but three of the 75 citations and orders designated S&S, and three out of the four previous instances where the AmCoal had paid a penalty for a citation or order attributable to its unwarrantable failure. Tr. II 125-26; Gov't Ex. 1.

In light of the foregoing circumstances of this case, we would serve the public interest by approving the settlement agreement and granting the motion.

William I. Althen, Acting Chairman

Michael G. Young, Commissioner

Commissioners Jordan and Cohen, in favor of denying the settlement motion:

After review of the October 30, 2017, Motion to Approve Settlement Agreement, we do not believe that the terms proposed by the parties are consistent with the Mine Act. For the following reasons we would, in our discretion, deny the motion.

The parties characterize the settlement terms as an exchange in which they are "essentially splitting the difference." Mot. at 6. That is, the Secretary agreed to drop the flagrant designation and to reduce the level of gravity and penalty on the second order in exchange for AmCoal's acceptance of the first order as determined by the Judge and affirmed by the Commission.

The history of this case undermines the parties' claim of an exchange. The Secretary has made significant concessions, removing the flagrant designation for the second order and reducing the penalty by around 90%. It is unclear what AmCoal has agreed to give in exchange for the Secretary's concession. Upon AmCoal's first appeal of the Judge's decision, the Commission unanimously affirmed the Judge's ruling on the first order. 38 FMSHRC 2062, 2076 (Aug. 2016). The first order was not before the Judge on remand and is not currently before the Commission on appeal. Thus, AmCoal has agreed to accept a ruling that is not currently being litigated and whose outcome is not uncertain. Stated another way, AmCoal merely agreed to "accept" what it was already bound to do. If the parties wished to "split[] the difference," they would start from the $112,380 assessed by the Judge for the second order, rather than also including in the calculation the $101,475 penalty assessed by Judge, and affirmed by the Commission, for the first order. As far as the Commission is concerned, the first order assessment is final.[1]

Similarly, we are troubled by the parties' decision to change the gravity of the second order from "serious injury or death" to "lost workdays/restricted duty" as part of the settlement agreement. As noted above, we remanded the second order to the Judge to determine whether the flagrant designation was appropriate and to reevaluate the negligence. However, we explicitly did not remand the Judge's decision regarding gravity. *Id.* at 2079 n.23. In short, the Judge, as trier of fact, has already made a determination on the level of gravity and the Commission has affirmed it. This change in gravity illustrates another concession by the Secretary unwedded to a concession by the operator.

The end result of the proposed bargain would be an elimination of the flagrant designation and a consequent massive reduction in the penalty amount for the second order. As noted above, the Commission's authority to review settlements is contained in section 110(k) of the Act. In discussing this provision, Congress noted that excessive "compromising of the amounts of penalties actually paid" served to "reduce[] the effectiveness of the civil penalty as an enforcement tool . . ." S. Rep. No. 95-181, at 44, *reprinted in* Senate Subcommittee on Labor,

[1] We recognize that the operator could seek judicial review of the Commission's decision regarding the first order and attempt to invalidate the assessment. However, we do not regard foregoing a possible future appeal of a fully-considered, unanimous, final Commission decision as adequate consideration for the drastic reduction of the penalty which the Secretary is proposing in the second order.

Committee on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 632 (1978). Congress granted the Commission authority to review settlement agreements in order to guarantee that settlement negotiations occurred transparently, to prevent the Secretary from considering litigation costs and expenses as a reason for settlements, and to ensure that civil penalties were sufficient to "convinc[e] operators to comply with the Act's requirement." *Id.* at 632-633. The Commission has previously considered its duty to encourage operators to comply with the Act's requirements to be a matter of ensuring that the penalties assessed under the Mine Act have a deterrent effect. *See Black Beauty Coal Co.*, 34 FMSHRC 1856, 1865-69 (Aug. 2012).

We are concerned that a one-sided settlement agreement in which the Secretary concedes a $101,073 reduction in penalty in exchange for no clear consideration does not further the purposes of the Act. We fear that such a large concession, tethered only to an action that American is already required to take, is insufficient to convince the operator to comply with the Act, and reduces the effectiveness of the civil penalty as an enforcement tool.

Our interest in encouraging compliance is heightened where, as here, the operator has a substantial record of prior violations. As the judge found, in the 15 months preceding the issuance of the order, AmCoal received about 160 citations/orders for alleged violations of the standard at issue in this case. 35 FMSHRC 2208, 2267 (July 2013). Further, at hearing, the Secretary submitted a history of previous violations for 361 final and non-final orders for this kind of violation during the two-year period before the issuance of the order. *Id.* at 2211. This included five allegations of unwarrantable failure within the two months prior to the issuance of the subject order. Gov't Ex. 1. The operator has repeatedly failed to comply with the cited standard in the past. A large penalty may be necessary to ensure the operator takes actions to prevent these recurring violations.

Finally, we note that the parties' first argument in support of the settlement is that the Secretary has "unreviewable discretion to delete the 'flagrant' designation." Mot. at 4. In support of this proposition, the parties cite several cases that address different matters that the Commission has found are within the Secretary's discretion. *See RBK Constr.*, 15 FMSHRC 2099, 2101 (1993) (Secretary's authority to vacate a citation); *Mechanicsville Concrete*, 18 FMSHRC 877, 879-80 (Jun. 1996) (Secretary's authority to designate, or not designate, a violation as S&S); and *Energy West Mining Co.*, 18 FMSHRC 565, 576 n.2 (Apr. 1996) (Commissioner Holen concurring in part and dissenting in part) (Secretary's authority to delete an S&S designation). The parties assert that a flagrant designation is analogous to the situations addressed in those cases. However, all of the cases cited by the parties involve situations in which the Secretary exercised his discretion before the ALJ reached a decision on the merits. Thus, their argument that the Secretary may unilaterally vacate a flagrant violation may not be as clear-cut as the parties would have us believe.

In sum, the support provided by the parties for this proposed settlement agreement is insufficient. As noted above, Congress created section 110(k) in part because it was concerned about the issue of transparency in settlement negotiations. We conclude that the proposed settlement is not justified by the facts asserted to support it, and is not in the public interest. As a result, we would deny the parties' motion and find, in our discretion, that the proposed settlement is insufficiently supported for the reasons outlined above.

Mary Lu Jordan, Commissioner

Robert F. Cohen, Jr., Commissioner

Distribution

Jason W. Hardin, Esq.
Artemis D. Vamianakis
Fabian Vancott
215 South State Street, Suite 1200
Salt Lake City, Utah 84111-2323
jhardin@fabianvancott.com
avamianakis@fabianvancott.com

Edward Waldman
U.S. Department of Labor
Office of the Solicitor
201 12th Street South, Suite 401
Arlington, VA 22202-5450
Waldman.edward@dol.gov

Ali A. Beydoun, 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 Thomas McCarthy
Federal Mine Safety Health Review Commission
1331 Pennsylvania Avenue, NW Suite 520N
Washington, DC 20004-1710