FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20001

December 16, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
	:	Docket Nos. WEVA 2006-654, et al.
v.	:	
	:	
ARACOMA COAL COMPANY, INC.	:	

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen Commissioners[1]

AMENDED DECISION

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On December 23, 2008, Chief Administrative Law Judge Robert Lesnick approved a settlement agreement between the Secretary of Labor and Aracoma Coal Company ("Aracoma"), which disposed of 102 penalty dockets that encompassed 1,281 citations and orders. 30 FMSHRC 1160 (Dec. 2008) (ALJ).[2] Some of the citations and orders resulted from an investigation by the Department of Labor's Mine Safety and Health Administration ("MSHA") into conditions at Aracoma's Alma No. 1 Mine and the Hernshaw Mine, following a fire at the Alma mine that resulted in two fatalities on January 19, 2006. *Id.* at 1167. Others were alleged violations occurring at the two mines after the fire.

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[1] A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218 (June 1994). In the interest of efficient decision making, Commissioner Patrick K. Nakamura has elected not to participate in this matter.

[2] The decision is amended pursuant to the parties' joint motion for reconsideration, filed November 24, 2010. In that motion, the parties asked the Commission to reconsider its original decision in this matter dated November 17, 2010, in order to address a joint motion to correct the settlement order that had initially been filed with the Chief Judge after the Commission granted review of this case on its own motion.

On January 22, 2009, pursuant to section 113(d)(2)(B) of the Mine Act, 30 U.S.C. § 823(d)(2)(B), Chairman Jordan and Commissioner Cohen voted to order sua sponte review of the judge's decision on the grounds that the decision may be contrary to law and presented a novel question of policy. The Commission direction for review was limited to "the question of whether the provisions of the settlement agreement . . . relating to the pattern of violations procedures are consistent with the provisions and objectives of section 104(e) of the Mine Act, 30 U.S.C. § 814(e)." After receiving permission from the Commission, the Secretary and Aracoma filed a joint brief on the question.

Having considered the judge's decision and the settlement agreement in light of the joint brief, Chairman Jordan and Commissioners Duffy and Young affirm the judge's decision. Commissioner Cohen would vacate and remand the judge's decision approving the settlement. Separate opinions of Commissioners follow.

Commissioners Duffy and Young, affirming the judge's decision:

We did not join in ordering sua sponte review because nothing at that time led us to believe that the judge had abused his discretion in approving the settlement. Nothing we have seen since disturbs that conclusion, so we affirm his decision.

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

Chairman Jordan, affirming the judge's decision:

I. Introduction

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"), the Commission granted review on its own motion of a decision approving a settlement agreement between the Secretary of Labor and Aracoma Coal Company, Inc. ("Aracoma"). In his decision, Chief Judge Robert Lesnick approved the settlement of proceedings consisting of 102 penalty dockets and 1,281 citations and orders. 30 FMSHRC 1160 (Dec. 2008) (ALJ). Twenty-five of these violations were designated as contributing to the January 19, 2006 fire at Aracoma's Alma Mine No. 1 that resulted in the deaths of two miners. *Id*. at 1167. The proposed penalties totaled $2,803,293. In the settlement agreement, Aracoma agreed to accept all the violations as written and to pay a penalty of $1,700,000. *Id*.

In addition to the civil penalties, Aracoma agreed with the United States Attorney for the Southern District of West Virginia to enter a guilty plea to a ten-count information related to the accident, and to pay a criminal fine of $2,500,000. *Id*. at 1169. The court subsequently accepted this plea agreement. Letter of April 21, 2009, from Jerald S. Feingold, Attorney, United States Department of Labor.

As part of the settlement, the parties also reached an agreement, discussed in detail below, providing Aracoma with an opportunity to voluntarily provide the Department of Labor's Mine Safety and Health Administration ("MSHA") with plans to reduce the rate of significant and substantial ("S&S") violations at both its Alma No.1 Mine and its Hernshaw Mine. Pursuant to the agreement, each mine could remain on the plan as long as it continued to maintain the goals in its plan. MSHA would forego issuing a warning letter that would normally begin the process of designating a mine as exhibiting a "pattern of violations" (or "POV"), pursuant to 30 C.F.R. § 104.4, 30 FMSHRC at 1168, which as explained below, has potentially severe consequences for an operator.

It is this latter portion of the settlement that is the focus of my review. In the Direction for Review, the Commission limited its consideration to "the question of whether the provisions in the judge's settlement order relating to the pattern of violations procedures are consistent with the provisions and objectives of section 104(e) of the Mine Act, 30 U.S.C. § 814(e)." Direction for Review at 8.[1]

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[1] 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). In considering settlements, Commission judges must review each proposed settlement in light of the six statutory factors set forth in section 110(i) of the Mine Act. 30 U.S.C. § 820(i).

II. The Fire at the Alma No. 1 Mine

On January 19, 2006, a fire occurred at the Alma Mine No. 1 which resulted in the deaths of two miners. Jt. Br. at 2. The fire resulted from frictional heating that occurred when the longwall belt became misaligned in the 9 Headgate longwall belt takeup storage unit. Order No. 7435539. This frictional heating ignited accumulations of combustible materials which "were present in the form of grease, oil, coal dust, float coal dust, coal fines and loose coal spillage at numerous locations along the approximate 2,000 feet (sic) length of the 9 Headgate longwall belt conveyor." Order No. 7435532. "[T]he need for additional cleaning and rock dusting" along the 9 Headgate longwall belt conveyor was noted in the mine record books but not corrected "for 38 of the 56 examinations" between January 2, 2006 and January 19, 2006. Order No. 7435527. Once ignited, the accumulations "quickly grew into the strong flaming fire needed to ignite the flame resistant belt." Order No. 7435532. The resulting belt fire generated "copious quantities of hot, dense, toxic smoke." *Id.*

Immediately upon discovery of the fire, the belt examiner notified the responsible person designated by the operator for that shift, but that individual failed to initiate an immediate mine evacuation. Order No. 7435538. The Atmospheric Monitoring System ("AMS") should have provided a visual and audible signal to all affected working sections when the carbon monoxide concentration reached alarm level. However, the miners at 2 Section did not receive an automatic notification because "[n]o carbon monoxide alarm unit was installed at a location where it could be seen or heard by miners on 2 Section." Order No. 7435523. Adequate visual examinations of the alarms and sensors, as required by 30 C.F.R. § 75.351(n)(1) would have revealed the lack of an alarm unit on 2 Section, as would have adequate training in the installation of the system components. Order Nos. 7435521 and 7435548. There was an AMS operator who was on duty when the mine fire occurred, but that person "did not promptly notify the appropriate personnel that an alarm signal had been generated." Order No. 7435529.

During the preceding month, "[t]wo other fires occurred at this mine." Order No. 7435524. Alarm signals were activated in the dispatcher's office on the surface but "[i]n both cases, the miners in the affected areas of the mine were not notified of the alarms and were not withdrawn to a safe location." Order No. 7435524.

When the fire occurred on January 19, 2006, a breach in the separation between the belt and escapeway "allowed smoke and carbon monoxide gas to inundate the primary escapeway used by the miners during the evacuation from 2 Section." Order No. 7435530. The breach existed because "prior to November 2005 . . . one or more of the permanent stoppings that provided separation between the No. 7 Belt conveyor entry and the primary escapeway in the North East Mains were (sic) removed." *Id*. This condition should have been detected during preshift exams. Order No. 7435108. An "inaccurate map" also "resulted in the operator not correcting the lack of separation between the primary escapeway and the belt entry." Order No. 7435537.

Efforts to fight the fire were hampered by several factors. The fire-fighting equipment was inadequate in that "[t]he threads of the female coupling of the fire hose were not compatible with the threads of the male pipe of the fire hose outlet valve." Order No. 7435534. The pertinent water supply line "was not capable of delivering 50 gallons of water per minute at a nozzle pressure of 50 pounds per square inch." Order No. 7435533. According to an eye witness, "while attempting to fight the fire, the fire hose outlet valve located near the belt conveyor takeup storage unit was opened and no water was produced." *Id*. In addition, "[t]he mine operator failed to install the water sprinkler system in accordance with 30 C.F.R. § 75.1101-8(a)." Order No. 7435535.

MSHA issued 25 citations and orders to Aracoma as a result of the fire and resulting deaths of miners Don Bragg and Ellery Hatfield. All were denoted as significant and substantial.[2] Of these, 21 were the result of "reckless disregard" which is defined in 30 C.F.R. § 100.3(d) as "conduct which exhibits the absence of the slightest degree of care." The remaining four orders were characterized by MSHA as resulting from "high negligence." MSHA assessed each of the 25 contributory violations the then-maximum penalty of $60,000.

Aracoma contested the assessments for these 25 citations and orders. In addition to these proposed assessments, Aracoma contested 1,256 other proposed assessments. Indeed, it appears that Aracoma contested every penalty for a citation or order that MSHA issued between January 19, 2006, and May 6, 2008, the inclusive dates of the citations and orders in this case. The citations and orders appended to the In Camera Joint Motion to Approve Settlement ("Settlement") include 298 proposed assessments for $60 each and 162 proposed settlements for $100 each.

III. Overview of Commission Review of ALJ Decisions on Settlement Agreements

The Commission has recognized that oversight of proposed settlements of contested cases is an important aspect of its adjudicative responsibilities under the Mine Act. *Birchfield Mining Co.*, 11 FMSHRC 1428, 1430 (Aug. 1989). Section 110(k) of the Mine Act, 30 U.S.C. § 821(k), requires the Commission and its judges "to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act's objectives." *Knox County Stone Co*, 3 FMSHRC 2478, 2479 (Nov. 1981)*; see also Co-op Mining Co.*, 2 FMSHRC 3475, 3475-76 (Dec. 1980) (rejecting judge's approval of a settlement after directing case for review *sua sponte*). Our own procedural rules also require that all settlements be approved by the Commission. Commission Procedural Rule 31, 29 C.F.R. § 2700.31.

The Commission has acknowledged that, although judges have wide discretion in their oversight of the settlement process, "it is not unlimited and at least some of its outer boundaries are clear." *Knox,* 3 FMSHRC at 2479. As it has declared in *Knox*, 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, the Commission will not disturb it. *Id*. at 2480.

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[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."

However, the Commission has at the same time cautioned that in reviewing such cases, "abuses of discretion or plain errors are not immune from reversal." *Id.* We have held that abuse of discretion may be found when "there is no evidence to support the decision or if the decision is based on an improper understanding of the law." *Akzo Nobel Salt, Inc.*, 19 FMSHRC 1254, 1258 n.3 (July 1997). Thus, "the abuse of discretion standard cannot be used as a rubber stamp to approve all settlements." *United States v. City of Miami*, 614 F.2d 1322, 1335 (5th Cir. 1980).

As stated above, the Commission's review of the judge's decision approving settlement in this case is limited to the portion of the agreement regarding how notification of potential pattern of violations would occur. In examining the non-financial aspect of the settlement, I take into account the principle set forth in the separate opinion issued by Commissioner Marks and me in *Madison Branch Management*, 17 FMSHRC 859, 867-68 (June 1995), that "[t]he 'affirmative duty' that section 110(k) places on the Commission and its judges to 'oversee settlements,' . . . necessarily requires the judge to accord due consideration to the entirety of the proposed settlement package, including both its monetary and non-monetary aspects." Thus, the judge properly took the POV section of the settlement into account in issuing his decision and consequently, the Commission has the authority to review the POV issue in the parties' settlement agreement.[3]

IV. MSHA Procedures for Enforcement of Section 104(e) of the Mine Act

Before proceeding with a discussion of the parties' agreement relating to the POV process, it is helpful to review the legal authority on which the implementation of this heretofore seldom-used provision of the Mine Act rests.[4] Section 104(e) of the Mine Act states in relevant part:

> (1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected

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[3] In *Madison Branch* the Commission split evenly on the issue of whether a judge must consider both the monetary and non-monetary aspects of settlement agreements. 17 FMSHRC at 860 n.1. For purposes of this case, the parties have assumed that the law requires the Commission and its judges to consider both monetary and non-monetary aspects of settlements. Jt. Br. at 6 n.5.

[4] One administrative law judge has concluded that the POV procedures and policy "are little understood by many in industry and the bar," and acknowledged the "difficulty comprehending the POV process." *Rockhouse Energy Mining Co.*, 30 FMSHRC 1125, 1129 (Dec. 2008) (ALJ).

> by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.
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> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.
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> (3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.

30 U.S.C. § 814(e).

In enacting this provision, Congress explicitly recognized why such a sanction was necessary:

> The need for such a provision was forcefully demonstrated during the investigation by the Subcommittee on Labor of the Scotia mine disaster which occurred in March 1976 in Eastern Kentucky. That investigation showed that the Scotia mine, as well as other mines, had an inspection history of recurrent violations, some of which were tragically related to the disasters, which the existing enforcement scheme was unable to address. The Committee's intention is to provide an effective enforcement tool to protect miners when the operator demonstrates his disregard for the health and safety of miners through an established pattern of violations.
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> . . . . The Committee believes that this additional sequence and closure sanction is necessary to deal with continuing violations of the Act's standards. The Committee views the [pattern of violations] notice as indicating to both the mine operator and the Secretary that there exists at that mine a serious safety and health management problem, one which permits continued violations of safety and health standards. The existence of such a pattern, should signal to both the operator and the Secretary that there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient.

S. Rep. No. 95-181, at 32-33 (1977), *reprinted in* Senate Subcomm. On Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 620-21 (1978).

Despite the insistence of Congress on the need for this enforcement mechanism, implementing regulations were not promulgated until 1990. *See* 55 Fed. Reg. 31,128 (July 31, 1990). The regulations describe MSHA's procedures for determining whether an operator has demonstrated a POV. 30 C.F.R. § 104.1 et seq. They establish a four-step process to designate a POV and to terminate POV status: (1) initial screening (section 104.2); (2) identification by MSHA of mines with a potential POV by applying the regulatory criteria (section 104.3); (3) designation of POV status and issuance of the designation to the operator (section 104.4); and (4) termination of POV status (section 104.5).

The first step includes an initial annual screening (which takes into account, among other factors, the mine's history of S&S violations). 30 C.F.R. § 104.2. If the initial screening indicates that the operator "may habitually allow the recurrence of" S&S violations, the second step, MSHA's identification of mines with a potential POV, is triggered. 30 C.F.R. § 104.3. The criteria used to make this determination include (1) a history of repeated S&S violations of a particular standard, (2) a history of repeated S&S violations of standards related to the same hazard, or (3) a history of

repeated S&S violations caused by unwarrantable failure to comply. 30 C.F.R. § 104.3. By use of the word "or," MSHA indicated that any one of these three circumstances would trigger the next step. Significantly, pursuant to section 104.3(b), only citations and orders which have become final shall be used to identify mines with a potential POV.

Next, pursuant to section 104.4(a), if a potential pattern of violations is identified, MSHA is to notify the operator in writing. The operator then has a variety of ways to respond, including instituting a program to avoid repeated S&S violations at the mine. 30 C.F.R. § 104.4(a)(4). However, if the district manager continues to believe that a potential POV exists at the mine, he or she is to send a report to the appropriate MSHA Administrator, with a copy to the operator. 30 C.F.R. § 104.4(b). The operator has an opportunity to respond to the report. After all of these procedures, the MSHA Administrator decides whether to issue a notice of POV, constituting the third step in the process. 30 C.F.R. § 104.4(c). Finally, the regulations provide for the termination of POV status. 30 C.F.R. § 104.5.

Even after these regulations were in place, however, for many years no enforcement action was taken by MSHA under section 104(e). *U.S. Steel Mining Co.*, 18 FMSHRC 862, 872 (June 1996) (Comm'r Marks, concurring). In fact, the agency only recently has begun to exercise its authority under section 104(e) of the Act. *Rockhouse*, 30 FMSHRC at 1129.

MSHA issued a screening criteria and scoring model to determine if a potential POV exists, and revised it in 2009. MSHA, *Pattern of Violations Screening Criteria and Scoring Model – 2009,* previously available at http://www.msha.gov/POV/POVScreeningCriteria.pdf. This document focuses on the initial screening criteria under 30 C.F.R. § 104.2, and lists a number of initial screening factors. It lists a series of eight specific criteria,[5] five of which are triggered by the issuance of citations or orders, while the other three are triggered by citations or orders becoming final orders of the Commission. Significantly, the initial screening criteria provides that unless a mine meets all of the criteria, it will not be considered under the next step of the process, the pattern of violations criteria set forth in 30 C.F.R. § 104.3. One of the eight initial screening factors is that "[t]he mines' (sic) rate of S&S Citations/Orders issued per 100 inspection hours during the 24 month review period is equal to or greater than 125% of the National rate of S&S Citations/Orders issued per 100 inspection hours for that mine type and classification." As described *infra*, this screening factor of 125% of the national average is at the heart of the settlement agreement between MSHA and Aracoma in this case.

V. The Settlement Agreement Between MSHA and Aracoma

With regard to pattern of violations, the Aracoma settlement agreement focuses entirely on reducing the S&S violation issuance rate to 125% of the national average for underground bituminous coal mines. (According to the agreement, the issuance rate for all underground

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[5] Literally, there are 10 criteria listed. However, four of them are essentially pairs, one being applicable to surface mines and facilities and the other being applicable to underground mines. Thus, effectively, there are eight criteria applicable to any given mine.

bituminous mines of S&S violations per 100 inspection hours during the 24 months ending June 30, 2008, was 7.1. During the same period, the Aracoma Alma #1 Mine had an issuance rate of 15.6, while the Hernshaw Mine had an issuance rate of 8.9). It provides that Aracoma may submit a plan to reduce (for the Alma Mine, over two to three calendar quarters) and maintain (for Hernshaw Mine) the rate to 125% of the national average. No other action is required of Aracoma to avoid a POV Notice.

I granted review of the judge's decision approving the settlement because the agreement involved enforcement of section 104(e), the pattern of violations provision in the Mine Act that the Secretary had not enforced against an operator to date. Although this statutory provision has been in effect for over 30 years, the historic lack of enforcement means that both the practical and legal implications of the Secretary's recent decision to breathe life into this once moribund provision are still untested.

The settlement agreement states that "[a]s long as the mine's S&S issuance rate remains at or below 125% of the national average for that quarter, the mine will not be considered as exhibiting a potential pattern of violations. . . . As long as each mine continues to achieve and maintain the goals described above, that mine will be able to remain on its S&S reduction plan indefinitely and MSHA will forego issuing potential pattern warning letters." Settlement at 6-7. The "goals described above" refer to the reduction of overall S&S violations to 125% of the national average. The language in this section suggests that MSHA is agreeing to permanently forego issuing a POV warning letter to Aracoma as long as the mine's S&S violation rate does not exceed 125% of the national average.

However, the agreement also states that the reduction plan "will remain in effect only as long as the mine remains in immediate jeopardy of receiving a potential pattern warning letter after the plan's adoption." Settlement at 5 n.3. It goes on to state that upon the first POV review in which it is determined that an Aracoma mine "is no longer in jeopardy of receiving a potential POV warning letter because the mine does not meet the screening criteria set forth at http://www.msha.gov/Pov/POVScreeningCriteria.pdf, that mine will no longer qualify for participation in the voluntary S&S reduction plan described herein, and will thereafter be evaluated, along with all other mines, under MSHA's normal pattern of violations process." *Id*. This language suggests that the plan, with its reliance on the 125% S&S violation rate, is not permanent, and that Aracoma will be treated just like other companies after it achieves a violation rate of 125% of the national average. Thus, it appears that the language of the settlement agreement is inconsistent with regard to the duration of the reduction plan.

One might ask why the duration of the reduction plan matters, since no mine can be considered as having a potential pattern of violations if its overall S&S issuance rate is within 125% of the national average. My concern was that the Screening Criteria then published on the internet could change in the future. MSHA could reconsider its Screening Criteria in the future, and eliminate the 125% industry-wide norm as a *sine qua non* of POV consideration. In that case, based on the language contained on page 7 of the Settlement, Aracoma might contend that MSHA could never enforce section 104(e) of the Mine Act against it so long as its overall S&S issuance rate was within 125% of the national average. (Indeed, MSHA recently did revise its Screening Criteria

and withdrew the criterion regarding the 125% industry-wide norm, http://www.msha.gov/pov/povsinglesource.asp, but those revised criteria are not at issue in this case).

The Commission now has the benefit of a joint brief from the parties.[6] The joint brief does not directly address the ambiguity in the settlement agreement regarding its duration, but it states that the agreement would "temporarily remove the Alma #1 Mine and the Hernshaw Mine from the POV screening process and permit them to continue to operate under the voluntary S&S reduction plan as long as the mines continued to achieve the goals set forth in the agreement or until they were no longer in jeopardy of receiving a potential POV warning letter at the time of a subsequent POV review by the Secretary. Thereafter, Aracoma's mines would be treated precisely like all other mines during a POV review." (Jt. Br. at 4-5).

VI. Conclusion

Although I would have preferred more clarity on the question of the duration of the settlement agreement, it does not appear that the parties intended to permanently insulate Aracoma from any future changes in the screening criteria that may occur. Consequently, I find that the judge did not abuse his discretion in approving the settlement agreement between the parties. Therefore, I would affirm his decision.

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Mary Lu Jordan, Chairman

[6] The joint brief makes a general assertion that "in practical effect," Aracoma's voluntary reduction plan is identical to the one an operator may provide under section 104.4(a)(4), but provides no explanation to support this claim. Jt. Br. at 14; *see also id*. at 18 (Aracoma's voluntary plan "requires no less than what would be required in plans submitted pursuant to a formal notice issued under Section 104(e)").

Commissioner Cohen, dissenting:

It is a fundamental function of the Commission to ensure that the public interest is adequately protected before a settlement is approved. *Birchfield Mining Co.*, 11 FMSHRC 1428, 1430 (Aug. 1989). In this case, the Commission took review on its own motion to determine whether this settlement of 1,281 citations and orders, including 24 section 104(d)(2) orders and one section 104(a) citation resulting from the fatal fire at Aracoma's Alma No. 1 Mine on January 19, 2006, met that standard.

My dissent is based on the Secretary's implementation of Section 104(e) of the Mine Act. Section 104(e) is a provision under which Congress gave the Secretary strong powers to take decisive action when an operator displays a "pattern of violations of mandatory health or safety standards . . . which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards." 30 U.S.C. § 814(e)(1).

At the onset, it is important to recognize that the tragic deaths of Don Bragg and Ellery Hatfield should never have occurred. The Secretary issued 25 citations and orders for violations which contributed to the fire and the deaths of Bragg and Hatfield. 30 FMSHRC 1160, 1167 (Dec. 2008) (ALJ). The Secretary determined that all of these citations and orders showed either "reckless disregard" (defined in 30 C.F.R. § 100.3(d) as "conduct which exhibits the absence of the slightest degree of care") or "high negligence." Aracoma has withdrawn its contests of these citations and orders as part of the settlement agreement, In Camera Jt. Mot. to Approve Settlement ("Settlement") at 9-10,[1] and thus the Commission accepts these citations as being accurate and true.

I.

As Chairman Jordan has described, the fire resulted from frictional heating caused by a misaligned longwall belt. The inspector observed numerous conditions which were "indicative of prolonged operation of the longwall belt conveyor while the belt was misaligned." Order No. 7435539. The frictional heating ignited accumulations of combustible material in the form of grease, oil, coal dust, float dust, coal fines, and loose coal spillage at numerous locations along the longwall belt conveyor. Order No. 7435532. The hazardous conditions of a misaligned belt and

[1] The Secretary assessed each of the 25 contributory citations and orders the then-maximum penalty of $60,000. She assessed a total of $2,803,293 for the total 1,281 citations and orders included in the settlement. In reducing the total penalties to $1,700,000, the settlement agreement merely stated that "[t]he civil penalty is to be apportioned in payment of each covered citation and order in the same proportion as $1,700,000 is to the total assessment of $2,806,027." Settlement at 4 n.2. (The assessment as subsequently corrected is $2,803,293). Thus, in terms of the monetary settlement, the judge was informed only that each penalty was being settled for a little less than 61 cents on the dollar. I question how a judge can fulfill his statutory responsibility under section 110(k) of the Mine Act, so as to review a settlement of 1,281 citations and orders, when the judge has been informed only of the total amount of the settlement. However, this issue is not part of the Direction for Review, and so I will not address it.

accumulations of combustible material had not been identified in Aracoma's on-shift examinations, Order No. 7435526. Where hazardous conditions, such as the need for cleaning and rock dusting, were recorded in mine record books, they had not been corrected. Order No. 7435527.

The miners on the longwall section were unable to fight the fire effectively because of a number of violations. The water supply line was not capable of delivering the required volume of water. Indeed, when the fire hose outlet valve was opened, "no water was produced." Order No. 7435533. Moreover, the threads of the female coupling of the fire hose were not compatible with the threads of the male pipe of the fire hose outlet valve. Order No. 7435534. Additionally, the water sprinkler system was improperly installed, and failed to provide coverage over the belt takeup storage unit where the fire began. Order No. 7435535. The water sprinkler system, fire hydrants and fire hoses had not been properly examined and tested before the fire. Order Nos. 7435536 and 7435522.

Although the dispatcher was immediately notified of the fire by the mine examiner, mine management failed to initiate and conduct an immediate evacuation despite imminent danger to the miners. Order No. 7435538. Moreover, the Atmospheric Monitoring System ("AMS") operator who was on duty when the fire occurred did not promptly notify appropriate personnel that an alarm signal had been generated. Order No. 7435529. Miners were not promptly evacuated to a safe area in response to AMS alarm signals. Order No. 7435524.

The miners on 2 Section, where Bragg and Hatfield worked, were unaware that a fire existed outby their location. The AMS, which was supposed to provide visual and audible signals at all affected working sections when the carbon monoxide concentration at CO sensors reached alarm level, failed because no carbon monoxide alarm unit had been installed at a location where it could be seen or heard by miners on 2 Section. Order No. 7435523.

When the miners on 2 Section finally attempted to evacuate the mine, their ability to escape was compromised by additional violations. Aracoma had removed permanent stoppings which provided separation between the belt conveyor entry and the primary escapeway in the North East Mains. This lack of separation "allowed smoke and carbon monoxide gas to inundate the primary escapeway used by miners during the evacuation from 2 section." Order No. 7435530. Moreover, adequate escapeway drills had not been conducted as required, Order No. 7435531, the location of personnel doors in stoppings were not clearly marked so that doors could be easily identified to someone traveling in the escapeways, Order No. 7435109, and the mine map did not accurately depict the location of permanent ventilation controls or the designations of escapeways, Order No. 7435537. Preshift and weekly examinations of the entries were inadequate in failing to identify and correct the lack of separation between the belt conveyor entry and the primary escapeway, and the lack of a clearly marked primary escapeway and location of personnel doors. Order Nos. 7435525, 7435110, 7435108, 6643276, and 7435528. Because of reduced visibility caused by the thick smoke, Bragg and Hatfield were separated from the section crew, and were unable to escape. *Id.*

This was not the first time that Aracoma had reacted to a fire in an improper manner. Two fires had occurred at this mine within a month of this fire, on December 23, 2005, and December 29,

2005, and on both occasions CO sensors had activated alarm signals in the dispatcher's office, but miners in affected areas were not notified of the alarms and were not withdrawn to a safe location. On both previous occasions, MSHA had issued section 104(d)(2) orders. MSHA determined that Aracoma's "repeated lack of proper response to the carbon monoxide alarm signals is an indication of an attitude of indifference" to the requirements of response to AMS alarm signals. Order No. 7435524.

II.

Chairman Jordan's opinion sets forth the text and legislative history of section 104(e) of the Mine Act, the provision addressing a pattern of violations ("POV"). Slip op. at 6-8. Chairman Jordan also notes that although Congress enacted this provision in 1977, the Secretary did not promulgate implementing regulations until 1990. Her opinion describes the implementing regulations set forth at 30 C.F.R. Part 104, the non-enforcement of those regulations for many years, and the Secretary's issuance several years ago of a Screening Criteria and Scoring Model (hereinafter "Screening Criteria") to determine if a POV exists. *Id*. at 8-9.[2]

The purpose of the Screening Criteria appears to be to screen out all but the most egregious mine operators from even being considered for POV designation. Thus, one of the Screening Criteria provides:

> The mines' rate of S&S Citations/Orders issued per 100 inspection hours during the 24 month review period is equal to or greater than 125% of the National rate of S&S Citations/Orders issued per 100 inspection hours for that mine type and classification.

In other words, a mine, during the 24 month review period, can not only have an S&S issuance rate greater than the national average for such mines, but can be up to 25% worse than the national average, and be excluded from consideration for POV, no matter what else is in the mine's violation or accident history.[3]

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[2] On September 28, 2010, MSHA issued a set of revised Pattern of Violations Screening Criteria, which replace the Screening Criteria discussed herein.

[3] The revised Screening Criteria published September 28, 2010, *supra*, do not contain a requirement that a mine's S&S issuance rate be at least 125% of the national average before the mine can be considered as having a pattern of violations. The revised Screening Criteria appear

The Screening Criteria provision that no mine can be considered for POV unless its S&S issuance rate is at least 125% of the national average is contrary to the regulation it purports to implement. Section 104.2 provides:

> **§ 104.2 Initial screening.**
> At least once each year, MSHA shall review the compliance records of mines. MSHA's review shall include an examination of the following:
> (a) The mine's history of–
> (1) Significant and substantial violations;
> (2) Section 104(b) of the Act closure orders resulting from significant and substantial violations; and
> (3) Section 107(a) of the Act imminent danger orders.
> (b) In addition to the compliance records listed in paragraph (a) of this section, the following shall also be considered as part of the initial screening:
> (1) Enforcement measures, other than section 104(e) of the Act, which have been applied at the mine.
> (2) Evidence of the mine operator's lack of good faith in correcting the problem that results in repeated S&S violations.
> (3) An accident, injury, or illness record that demonstrates a serious safety or health management problem at the mine.
> (4) Any mitigating circumstances.
> (c) Only citations and orders issued after October 1, 1990, shall be considered as part of the initial screening.

Screening criteria which prevent consideration for pattern of violations status if the operator has an S&S issuance rate no more than 125% of the national average preclude consideration of factors required to be considered under 30 C.F.R. § 104.2, such as a history of section 104(b) closure orders and a history of section 107(a) imminent danger orders. It would not matter if, for example, a mine had an egregious and dangerous history of imminent danger orders, as long as the operator kept its S&S issuance rate within 125% of the national average. Thus, the Screening Criteria are in conflict with 30 C.F.R. § 104.2.

In the preamble to the final rule on POV, MSHA stated that the regulations should focus on the safety and health record of each mine rather than "strictly quantitative comparisons of mines to industry-wide norms." 55 Fed. Reg. 31,128, 31,129 (July 31, 1990). Significantly, when 30 C.F.R. § 104.2 was initially published as a proposed rule, commenters – citing the need for operators to receive adequate notice of the specific factors which would cause them to be identified through initial screening as having a potential POV – suggested that MSHA utilize a statistical

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to be designed to apply all of the factors set forth in 30 C.F.R. § 104.2. Hence, the discussion of the Screening Criteria contained in this opinion does not apply to present MSHA policy.

comparison of a mine's rate of violations with an industry-wide average, and the agency rejected the suggestion:

> A number of commenters stated that the initial screening factors do not provide adequate notice to operators of the specific number or combination of citations and orders which would cause an operator to be identified through initial screening as having a potential pattern of violations. Commenters suggested a variety of specific statistical screening mechanisms, including comparison of a mine's rate of violations with an industry-wide average. Although the Agency has considered such a scheme, MSHA believes that the initial screening criteria will allow identification of those mines which are in a recurrent cycle of violation and abatement with no correction of the underlying circumstances giving rise to the violations. Additionally, the final rule is consistent with the legislative history of section 104(e), which stresses that a pattern of violations does not necessarily mean a specific number of violations of any particular standard.

Id. at 31,131.

Although the preamble made clear that the POV screening criteria were not to be based on "strictly quantitative comparisons of mines to industry-wide norms," it appears that MSHA did precisely that in providing that any mine within 125% of the industry average for S&S violations will be excluded from further consideration as a mine on POV status. Thus, despite its notice-and-comment rulemaking, MSHA has adopted a strictly quantitative *sine qua non*, contrary to the language of the regulations.

III.

With respect to Aracoma's POV status, the settlement agreement in this case focuses entirely on whether Aracoma's S&S issuance rate exceeds 125% of the national average. I question the validity of the settlement agreement for that reason, and thus would find that the judge erred in approving the settlement agreement.

The Commission has emphasized that a judge's approval or rejection of a settlement agreement must "be based on principled reasons." *Madison Branch Mgmt.*, 17 FMSHRC 859, 864 (June 1995) (quoting *Knox County Stone Co.*, 3 FMSHRC 2478, 2480 (Nov. 1981)). Here, the judge merely recited the terms of the section of the settlement agreement pertaining to the POV provisions. However, the Screening Criteria, with the 125% issuance rate threshold for POV consideration, are in contradiction of 30 C.F.R. § 104.2, which provides for consideration of a variety of factors, and, as explained in the preamble, are not to be based on "strictly quantitative comparisons of mines to industry-wide norms." Clearly, a threshold of a 125% S&S issuance rate is a quantitative comparison to an industry-wide norm. Mindful that a judge's abuse of discretion in approving a settlement is "not immune from reversal," *Madison Branch*, 17 FMSHRC at 864, I

conclude that the judge abused his discretion in approving the pattern of violations aspect of this settlement agreement.

In voting to review the judge's decision, I also sought to determine whether, in the settlement agreement, the Secretary was enforcing the POV provision of the Mine Act more leniently against Aracoma, as compared with other operators.[4] According to the Settlement, the Alma Mine # 1 had a rate of 15.6 S&S citations and orders per 100 on-site inspection hours during the baseline 24 month period ending on the last day of June 2008. Settlement at 5. The Settlement further indicates that the National Average for All Underground Bituminous Mines was 7.1 S&S citations and orders per

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[4] If this were the case, it could be the result of Aracoma's litigation strategy, which involved contesting every single penalty MSHA assessed for each of the 1,281 citations and orders issued over a period of two years and three months, beginning with the date of the Alma No. 1 fire. In this group of 1,281 citations and orders were 298 assessments for the previous minimum of $60.00 and 162 assessments for the later minimum of $100.00. I question whether there is a basis to contest 1,281 consecutive penalties, including 460 minimum penalties, other than an intent to obstruct the enforcement system. Such has been the practice in other industries, such as tobacco. For example, R.J. Reynolds Tobacco Company was able to win dismissal of a case by burying its opponent in paper. In a confidential memo, an attorney for R.J. Reynolds boasted about the strategy: "The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive to plaintiffs' lawyers, particularly sole [practitioners] . . . . To paraphrase General Patton, the way we won these cases was not by spending all of Reynolds' money, but by making that other son of a bitch spend all his." *See* Kenneth Lasson, *Lawyering Askew: Excesses in the Pursuit of Fees and Justice*, 74 B.U.L. Rev. 723, 755 (1994). It would be outrageous if an operator was able to ignore mine safety, and then achieve a more favorable settlement of the resulting violations by clogging the appellate system with frivolous penalty contests. From a purely economic standpoint, this would give such an operator a competitive advantage over mine operators which were spending the necessary money to keep their mines safe. More law-abiding operators would have an incentive to change their practices for the worse, calculating that they could similarly stonewall penalties for better than two years, settle everything for 61 cents on the dollar, and walk away with no sanction other than a requirement to bring their S&S rates down to 125% of the national average.

This poses an especially difficult problem in an industry where there have historically been some operators willing to subordinate safety responsibilities to production imperatives. *See, e.g., Consolidation Coal Co.*, 23 FMSHRC 588, 597 (June 2001) (operator subordinated cleanup responsibilities to its desire to complete construction); *Consolidation Coal Co.*, 22 FMSHRC 328, 332 (Mar. 2000) (operator failed to rectify a violative condition so as not to interfere with production); *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1770 (Nov. 1997) (in order to continue production, operator made a conscious decision to evade a device designed to act as an important preventive safeguard). The January 19, 2006 fire at Aracoma's Alma No. 1 Mine is consistent with the Supreme Court's characterization of the mining industry as "industrial activity with a notorious history of serious accidents and unhealthful working conditions." *Donovan v. Dewey,* 452 U.S. 594, 603 (1981).

100 on-site inspection hours, so that 125% of the national rate was 8.9 S&S citations and orders per 100 on-site inspection hours. *Id*. at 6. Presumably, with an S&S issuance rate which was 220% of the national average, the Alma No.1 Mine was a prime candidate for POV status, at least after the requisite violations had become final.

If MSHA had issued a notice of potential pattern of violations for the Alma No. 1 Mine pursuant to 30 C.F.R. § 104.4(a), Aracoma would have had an opportunity to "[i]nstitute a program to avoid repeated significant and substantial violations at the mine" pursuant to 30 C.F.R. § 104.4(a)(4). The record does not indicate what requirements MSHA typically imposes on other operators in their section 104.4(a)(4) programs.

Specifically, assuming hypothetically that an operator has received a section 104.4(a) warning letter because its section 104.3 analysis revealed a history of repeated S&S violations of standards relating to respirable dust hazards, would MSHA require this operator to specifically address respirable dust in its section 104.4(a)(4) program, or would MSHA be satisfied if the operator simply reduced its overall rate of S&S violations to 125% of the national average or less? If it is the latter, then Aracoma is not being treated differently. However, if MSHA normally requires an operator to address specifically the problems which have been identified in the section 104.3 analysis (e.g., respirable dust), then Aracoma is being treated differently from other operators. One could pose similar hypothetical questions based on any of the pattern criteria contained in 30 C.F.R. § 104.3 (i.e., repeated S&S violations of a particular standard, repeated S&S violations relating to the same hazard, or repeated S&S violations caused by unwarrantable failure to comply). The question is whether a section 104.4(a)(4) remediation program requires an operator to focus on the particular issue which brought about the written warning of a potential pattern of violations under section 104.4(a), or whether MSHA is satisfied that an operator brings its S&S issuance rate down to 125% of the national average. There is no information in the record to clarify this point.

Based on the record before us, I would hold that the Chief Administrative Law Judge abused his discretion in approving a settlement agreement which, with respect to the pattern of violations provisions, is based on a principle – that an operator cannot be found to have committed a pattern of violations pursuant to section 104(e) of the Mine Act unless its S&S issuance rate is at least 125% of the national average for similar mines – which is contrary to the regulations, 30 C.F.R. § 104.2. Therefore, I respectfully dissent.

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Robert F. Cohen, Jr., Commissioner

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