FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

June 12, 1995

MADISON BRANCH MANAGEMENT	:	Contest Proceedings
	:	
v.	:	Docket Nos. WEVA 93-218-R
	:	WEVA 93-219-R
SECRETARY OF LABOR,	:	WEVA 93-220-R
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket Nos. WEVA 93-373
	:	WEVA 93-412
v.	:	
	:	
MADISON BRANCH MANAGEMENT	:	
	:	
	:	
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. WEVA 93-415
	:	
v.	:	
	:	
PROTECTIVE SECURITY SERVICES AND	:	
INVESTIGATIONS, INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

DECISION

BY: Jordan, Chairman and Marks, Commissioner

These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1988) ("Mine Act" or "Act"). On September 16, 1994, Madison Branch Management ("Madison") petitioned the Commission for

interlocutory review of interlocutory orders issued by Administrative Law Judge Jerold Feldman. *See* Commission Procedural Rule 76(a)(1)(ii), 29 C.F.R. ' 2700.76(a)(1)(ii). Madison also requested suspension of the hearing scheduled before the judge. The Secretary of Labor ("Secretary") filed a statement in support of Madison's petition. By order dated September 20, 1994, the Commission granted the petition, suspended briefing, and stayed the hearing.

In his orders, Judge Feldman, in effect, denied motions by the Secretary to dispose of these cases pursuant to a settlement agreement reached by the parties. The judge based his determinations on his concern that additional abatement measures beyond those required by the Secretary might be necessary to remove the safety risk posed by the violations. We view the instant petition as one seeking review of these interlocutory orders taken as a whole. For the reasons that follow, the Commission vacates the orders and remands the issue of whether the settlement agreement should be approved.[1]

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[1] All Commissioners vote to overturn the judge's determination that the settlement motion should be denied because, in his view, there exists a genuine factual issue, i.e. the efficacy of the vehicle inspection program, concerning whether respondents abated the violations. Order dated August 29, 1994, at 2. The Commissioners agree that this issue is not relevant to whether the respondents demonstrated good faith in attempting to achieve rapid compliance, the sixth penalty criterion. Chairman Jordan and Commissioner Marks vote to vacate the interlocutory orders, remand the question of approving the settlement, and permit the judge to consider non-monetary factors in ruling on the motion to approve the settlement. Commissioners Doyle and Holen disagree that non-monetary factors are appropriate considerations and conclude that a remand is unnecessary. They would approve the proposed settlement. In *Wyoming Fuel Co.*, 16 FMSHRC 1618, 1619-20 n.3 (August 1994), the Commission determined that, in the event of a tie vote, the vote of Commissioners closest in effect to the judge's decision is the Commission's disposition. The vote of Chairman Jordan and Commissioner Marks to remand this matter to the judge is closest in effect to the judge's decision and is therefore the Commission's disposition.

I.

Factual Background

These consolidated proceedings arose from two citations and an imminent danger order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Madison and from a citation and an imminent danger order issued by MSHA to Protective Security Service and Investigations, Inc. ("PSSI"), an independent contractor that provided security services at Madison's Job No. 3 mine. MSHA issued the citations following the death on March 1, 1993, of Allen Garrett, a security guard employed by PSSI, who was asphyxiated in his vehicle on mine property. An MSHA investigation determined that the vehicle's damaged exhaust system, which permitted excessive amounts of carbon monoxide to enter the cab, was the proximate cause of the fatality.

Citation Nos. 3976644 and 3976646 issued to Madison and PSSI, respectively, pursuant to section 104(a) of the Mine Act, 30 U.S.C. ' 814(a), alleged that PSSI operated the vehicle in an unsafe condition on mine property in violation of 30 C.F.R. ' 77.404(a).[2] The inspector designated the violation significant and substantial.[3] The Secretary proposed civil penalties of $2,000 against Madison and $3,000 against PSSI. The inspector further determined that the vehicle posed an imminent danger to employees working at Job No. 3 and, accordingly, pursuant to section 107(a) of the Act, 30 U.S.C. ' 817(a), issued Order Nos. 3976643 and 3976645 requiring its removal from mine property.

The citations are basically identical and state:

> The Ford Bronco II Serial # IFMBU14T7GUA67264 being operated on the surface mine property was not being maintained in a safe operating condition in that the exhaust system was damaged and leaking carbon monoxide at (3) locations.

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[2] **Section 77.404(a) provides:**

> **Mobile and stationary equipment and machinery shall be maintained in safe operating condition and machinery . . . in unsafe condition shall be removed from service immediately.**

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

This was a contributing factor which resulted in a fatal injury.

This citation is issued in conjunction with 107A Order No. 3976643 therefore no abatement time is set.

In Citation No. 3976647 issued to Madison, MSHA also alleged a violation of 30 C.F.R. ' 48.31(a)[4] for failure to provide hazard training to Garrett before he began working at the mine. The Secretary proposed a civil penalty of $88 for this violation.

II.

Procedural Background

On March 31, 1994, the Secretary filed motions with the judge to approve settlements in these cases. The settlements would have required payment of $550 of the $2,088 in proposed penalties against Madison, and $1,000 of the $3,000 in proposed penalties against PSSI. By order dated April 7, 1994, Judge Feldman denied the Secretary's motions on the grounds that the Secretary had not shown "adequate mitigating circumstances to justify the significant reductions in the proposed penalties."

On April 8, 1994, the Secretary filed "Amended Motions to Approve Settlement," which provided that Madison and PSSI would pay in full the penalties proposed by the Secretary.[5] The proposed settlement also required that PSSI inspect the exhaust systems of security employees' vehicles at least once every 90 days and that PSSI maintain and, upon request, produce to MSHA documentation of such inspections.

The judge thereafter issued an order requiring Madison and PSSI to provide additional information. He ordered the Secretary to explain, *inter alia*, why the proposed inspection program would be adequate to abate "the hazard associated with exposure to carbon monoxide poisoning." Order Requesting Clarification at 3. The judge reserved ruling on the motions pending review of the requested information. On May 16, 1994, the parties filed a Joint Response to Order Requesting Clarification.

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[4] Section 48.31(a) provides in part:

> Operators shall provide to . . . miners . . . a training program before such miners commence their work duties.

[5] On May 16, 1994, the Secretary filed a "Second Amended Motion to Approve Settlements" ("S. Mot. to Approve Set."), which consolidated the two earlier amended motions.

On June 8, 1994, the judge denied the motions to approve the settlement on the grounds that, in order to determine the appropriate civil penalties, disputed facts concerning the adequacy of the proposed vehicle inspection program had to be resolved. Order Denying Motions for Approval of Settlements, Prehearing Order and Notice of Hearing ("June 8th Order").

The judge scheduled the matter for hearing and ordered the Secretary to call as a witness the Chief Medical Examiner of the West Virginia Department of Health and Human Services to testify to:

> the circumstances surrounding the decedent's death and his expert opinions concerning the health hazards associated with the short-term and continued long-term exposure to exhaust fumes and/or carbon monoxide poisoning.

June 8th Order at 6. The Secretary was also directed to call:

> a minimum of two qualified safety and health experts employed by the Occupational Safety and Health Administration (OSHA) . . . to testify whether remaining in a stationary vehicle for prolonged periods with the engine and heater running is a "recognized hazard" that is prohibited by Section 5(a)(1) or Section 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. ' 654(a)(1) and (a)(2).

Id. The judge further ordered the Secretary to call "[a] licensed qualified automobile mechanic" to testify about "the procedures and requisite qualifications for performing an adequate inspection of a motor vehicle's exhaust system. . . ." *Id*.

On July 19, 1994, the Secretary submitted a witness list. He stated that he did not intend to call as witnesses the individuals identified in the June 8th Order and that the parties intended to submit a joint motion for summary decision. The judge construed the latter statement to be a joint motion for summary decision, which he denied on July 22, 1994. Order Denying Joint Motion for Summary Decision ("July 22nd Order"). In his order, the judge identified what he described as disputed material facts relating to the adequacy of the proposed inspection program to remove hazards to security guards posed by carbon monoxide poisoning. *Id.* at 4. The judge advised the parties of his intention to call the Chief Medical Examiner as a "court" witness. *Id*. at 4-5.

The Secretary filed a "Motion for Summary Judgment" on August 25, 1994. He contended that the undisputed facts established the violations alleged in the citations as well as the statutory criteria to determine an appropriate penalty. S. Mot. for Summ. J. at 7-11. He noted respondents' good faith attempts to achieve rapid compliance. *Id.* at 12. The Secretary argued that the five issues identified by the judge in the July 22nd Order were not properly before him.

Id. at 15-18. The Secretary requested by letter that, in the event his motion was denied, the judge certify the denial to the Commission pursuant to Commission Rule 76(a)(1)(i). Madison supported by letter the Secretary's motion.

The judge denied the Secretary's motion on August 29, 1994. Order Denying the Secretary's Motion for Summary Judgment ("August 29th Order"). The judge ruled that, in order to determine the appropriateness of the proposed civil penalties, it was necessary to determine whether the hazard training and the vehicle inspection program were adequate to eliminate the danger of carbon monoxide poisoning to security guards who remain in their vehicles for long periods seeking heat and shelter. August 29th Order at 2. The judge also refused to certify to the Commission for interlocutory ruling either his July 22nd or August 29th order as requested by Madison and the Secretary, respectively. The instant petition for interlocutory review followed.

III.

Disposition

The issue before us is whether the judge properly denied the parties' motions to approve settlement.[6] In the judge's view, unresolved factual issues concerning the adequacy of abatement precluded his approval of the settlement.

Settlements are committed to the "sound discretion" of the Commission and its judges. *See, e.g., Medusa Cement Co.*, 12 FMSHRC 1913, 1914 (October 1990). Although Commission judges are not "bound to endorse all proposed settlements," their rejections of settlements, as well as approvals, must "be based on principled reasons." *Knox County Stone Co.*, 3 FMSHRC 2478, 2480 (November 1981). On review, the Commission will not disturb a judge's approval or rejection of a settlement if it is supported by the record, is consistent with the six statutory criteria specified in section 110(i) of the Act for the assessment of civil penalties, and is not otherwise improper. *Id.* In reviewing such cases, "abuses of discretion or plain errors are not immune from reversal." *Id.*

In rejecting the parties' settlement, the judge focused on Section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), which sets forth six criteria for determining the appropriateness of a civil

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[6] In his Motion for Summary Judgment, the Secretary requested the judge to "memorialize" in an order the provisions of the settlement proposal, in particular the vehicle inspection program. S. Mot. for Summ. J. at 14. Accordingly, we construe the Secretary's Motion for Summary Judgment as a motion to approve the settlement agreement.

penalty. The judge stated that "demonstrated good faith . . . in attempting to achieve rapid compliance," the sixth criterion, involved "a factual question that must be resolved through the testimony of expert witnesses in the hearing process." August 29th Order at 2. He identified as the central issue:

> [W]hether the respondents have adequately removed the risk of carbon monoxide poisoning through hazard training and vehicle maintenance, to security personnel who continue to use stationary vehicles for prolonged periods of time with no alternative means of warmth and shelter.[7]

Id.

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[7] The August 29th Order incorporates by reference the July 22nd Order, which listed the following five factual inquiries that the judge stated were "unresolved issues of material fact":

> 1. The nature of carbon monoxide intoxication and the correlation between the level of toxicity and the period of exposure;
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> 2. Given the characteristics of carbon monoxide, whether the risk of carbon monoxide intoxication to individuals who seek warmth and shelter in stationary vehicles for extended periods of time can be effectively alleviated by the methods proposed by the respondents;
>
> 3. Whether remaining in a stationary vehicle for prolonged periods with the engine and heater running is a "recognized hazard" that is prohibited by . . . the Occupational Safety and Health Act of 1970 . . .;
>
> 4. The qualifications of the individual assigned by [PSSI] to inspect employee vehicle exhaust systems and the methods of such inspection; and
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> 5. The requisite qualifications, equipment and procedures necessary for performing an adequate vehicle exhaust system inspection.

July 22nd Order at 4.

The scope of abatement is determined by the underlying citation and by the requirements of the statutory provision, standard or regulation alleged to have been violated. *See Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 509-11 (April 1989). In determining whether the factual issues set forth by the judge were material to his consideration of whether the operator had demonstrated good faith in attempting to achieve rapid compliance, we examine the scope of the citations and the actions required for abatement.

The citations are narrowly drawn. They do not allege a pattern or practice of shoddy vehicle maintenance or a general failure by Madison to provide hazard training to its miners. Rather, they address a particular defective vehicle that contributed to the fatality and the failure to train security guard Garrett. The regulations at issue also impose specific requirements. The Commission has held that section 77.404(a):

> imposes two duties upon an operator: (1) to maintain machinery and equipment in safe operating condition, and (2) to remove unsafe equipment from service. Derogation of either duty violates the regulation.

Peabody Coal Co., 1 FMSHRC 1494, 1495 (October 1979). This standard does not require unsafe equipment to be repaired so long as it is immediately removed from service. *See Alabama By-Products Corp.*, 4 FMSHRC 2128, 2130 (December 1982) ("[O]nce unsafe equipment is removed from service abatement is completed.") (construing identical language in section 75.1725(a)). Section 48.31(a) is also specific, requiring operators to provide training to individuals before they begin working at a mine. Abatement is completed when the affected miners are trained. *See Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 319-20 (D.C. Cir. 1990) (operator abated violation of section 48.7 by task training affected employee).

In the instant case, the Secretary determined that respondents abated the unsafe equipment violation when they removed the defective vehicle from service. *See Alabama By-Products*, 4 FMSHRC at 2130. Likewise, by citing only the failure to train a particular employee, the Secretary did not trigger a broad duty of abatement with respect to that violation. Thus, the issue identified by the judge in the August 29th Order, "whether the respondents have adequately removed the risk of carbon monoxide poisoning through hazard training and vehicle maintenance," is immaterial to the issue of whether the respondents demonstrated good faith in attempting to abate the narrow violations charged in this particular instance.[8] Accordingly, we

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[8] We do not suggest that the duty to abate is necessarily always narrow in scope. The nature of a given violation or the regulatory or statutory provision violated may lead the Secretary to impose broad abatement duties. In the present case, for example, the Secretary issued imminent danger orders in connection with the unsafe equipment citations. In discussing the Mine Act's imminent danger provision, the Senate drafters stressed the importance of adequately abating such hazards:

> If miners are to receive the continuing protection that Congress

conclude that the judge erred to the extent that he denied the settlement motions because of a determination that the parties had failed to provide facts demonstrating the good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. We therefore vacate the judge's orders that effectively disapproved the proposed settlement.

IV.

Remand

We remand for the judge to reconsider the settlement motions without recourse to the erroneous abatement analysis discussed above. The general principles governing a judge's disposition of a proposed settlement are well established. Section 110(k) of the Act provides that no contested proposed penalty "shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. ' 820(k). *See also* Commission Procedural Rule 31, 29 C.F.R. ' 2700.31. Section 110(k) charges the Commission and its judges with the duty "to protect the public interest by ensuring that all settlements of contested penalties are consistent with the . . . Act's objectives." *Knox County*, 3 FMSHRC at 2479. The judge shall review the adequacy of the penalties proposed to settle this matter in light of the other five statutory penalty criteria, which he did not discuss in his prior orders. In that regard, of course, he is not bound by the parties' assertions concerning these criteria. *Knox County*, 3 FMSHRC at 2479-81. *Cf.*

> **intends inspectors and operators must look to the underlying conditions and practices causing an imminent danger. Section 10[7](a) thus requires the operator to correct the root causes as well as the symptoms of mine health and safety problems which gave rise to the order.**

S. Rep. No. 181, 95th Cong., 1st Sess. 37 (1977) ("S. Rep."), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 625 (1978) ("*Legis. Hist.*"). **Thus, in the circumstances presented here, the Secretary had the authority to include broader abatement duties than he actually required.**

Sellersburg Stone Co., 5 FMSHRC 287, 293-94 (March 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

Although the vehicle inspection program that the operator proposes to adopt as part of the settlement is not relevant to a determination of whether this operator "exercised good faith in achieving compliance after notification of a violation," we do not imply that the program's efficacy cannot be a factor in the judge's determination of whether to approve or reject the proposed settlement. In determining whether to approve a proposed settlement a judge must consider, *inter alia*, whether the amount proposed will accomplish the underlying purpose of a civil penalty -- to encourage and induce compliance with the Mine Act and its standards. *Co-op Mining Co.*, 2 FMSHRC 3475, 3475-76 (December 1980), *citing* S. Rep. 41, *reprinted in Legis. Hist.* 629. *See also Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (August 1982); S. Rep. 42-45, *reprinted in Legis. Hist.* 630-33. The "affirmative duty" that section 110(k) places on the Commission and its judges to "oversee settlements," *Co-op Mining*, 2 FMSHRC at 3475-76, necessarily requires the judge to accord due consideration to the entirety of the proposed settlement package, including both its monetary and non-monetary aspects.

The requirement that a judge consider all elements of a settlement presented to him for approval is consistent with the settled principle that, in considering whether to approve a proposed settlement, a judge must determine whether it is "fair, adequate and reasonable." *Young v. Katz*, 447 F.2d 431, 433 (5th Cir. 1971). *Accord, United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1337 (S.D. Ind. 1982); *see also, United States v. Akzo Coatings of America, Inc.*, 949 F.2d 1409, 1426 (6th Cir. 1991) (settlement should be reviewed for "fairness, reasonableness and consistency with the statute"); *United States v. City of Jackson, Mississippi*, 519 F.2d 1147, 1151 (5th Cir. 1975) (judge must assure himself that the settlement's terms "are not unlawful, unreasonable or inequitable"); *Neuwirth v. Allen*, 338 F.2d 2, 3 (2d Cir. 1964) (judge correctly determined that "the settlement was fair"). These inquiries are bottomed on a concern that the settlement "adequately protects the public interest." *United States v. Seymour Recycling*, 554 F. Supp. at 1337; *see also United States v. Ketchikan Pulp Co.*, 430 F. Supp. 83, 86 (D. Alaska 1977) (judge should determine that settlement "adequately protects the public interest and is in accord with the dictates of Congress"). In assessing the fairness of the settlement and whether it is consistent with the public interest, a judge must examine "*all* relief . . . , not just the [monetary] provisions of the settlement . . . ." *Luevano v. Campbell*, 93 F.R.D. 68, 86 (D.D.C. 1981) (emphasis supplied); *see also, United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 864 (5th Cir. 1975) (monetary relief must be viewed in light of other relief provided in settlement), *cert. denied sub nom. Harris v. Allegheny-Ludlum Industries, Inc.*, 425 U.S. 944 (1976).

Our dissenting colleagues err in concluding that the Mine Act "clearly" proscribes Commission judges from considering non-monetary settlement provisions presented to them by the parties for approval. Slip op. at 13. In construing the Mine Act, we are guided by the principle that "the primary dispositive source of statutory construction is the wording of the statute itself." *Association of Bituminous Contractors v. Andrus*, 581 F.2d 853, 861 (D.C. Cir.

1978). Section 110(k) of the Act, which governs settlements, does not contain language restricting in any way the scope of the Commission's inquiry in reviewing them. Had Congress desired to depart from the law governing the scope of review of settlements, it could easily have inserted in section 110(k) terms limiting the scope of the Commission's review of settlements. It did not do so, and the Commission is without authority to insert such terms itself.

The parties have made the vehicle inspection program part of the settlement package and they relied on its inclusion in arguing to the judge that the penalties proposed were consistent with the statutory criteria and should be approved. **S. Mot. to Approve Set. at 3-4.** It is appropriate for the judge to consider the weight to be given to each of the statutory penalty criteria in light of the planned inspection program's contribution to compliance. To the extent the parties are unsuccessful in persuading the judge of the efficacy of the inspection program as currently agreed to, the judge need not accord the program significance in his evaluation of the penalty proposed in the settlement. If the judge disagrees with the proposed penalties, he is free to reject the settlement and direct the matter for hearing. *Knox County*, 3 FMSHRC at 2481-82. Alternatively, since the parties couched their renewed settlement approval motion in terms of a motion for summary judgment (*see* n.5, *supra*), the judge may examine the record and, if there are no factual disputes relating to liability and penalty assessment, issue a decision based on the record. *See Knox County*, 3 FMSHRC at 2481-82 & n.5. Rejection of the current settlement proposal would be without prejudice to the parties' resubmission of a settlement package tailored to meet the judge's objections.

V.

Conclusion

For the foregoing reasons, we vacate the judge's orders denying the motions for summary decision and the amended motions for approval of settlement, and remand for further proceedings consistent with this decision.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner