FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 13, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2011-13 A.C. No. 11-02752-232235
v.	
THE AMERICAN COAL COMPANY, Respondent	Mine: New Era Mine

ORDER DENYING MOTION FOR APPROVAL OF SETTLEMENT UPON SECRETARY'S MOTION FOR RECONSIDERATION

Before: Judge William B. Moran

Introduction

Quis custodiet ipsos custodes? Who will guard the guardians?

The Secretary has again filed its motion for settlement of this matter. The motion does not alter the terms of the original settlement motion, nor does it provide further explanation to justify its terms. Instead, the Secretary contends that it need not amend its motion and that the Court and the Commission must accept it as originally presented. The Secretary believes that the Commission's role in reviewing proposed penalties, which have been contested before it, is a perfunctory and hollow process. The words of section 110(k) of the Mine Act, 30 U.S.C. § 820(k), the legislative history for that provision, and the decisions of the Federal Mine Safety and Health Review Commission each refute that claim.

Additionally, of grave concern, and by itself a compelling demonstration of the need for the Commission's continued substantive oversight of settlements, per section 110(k), the Secretary's Motion contains *not a single word about the safety and health of miners*. The absence of any mention in its motion as to the impact which removal of Commission oversight would have on the protection of miners, highlights that the Commission's substantive role in the review of settlements, as specifically directed by Congress, must remain intact. To protect miners, as Congress recognized, it is the Commission which must guard the guardians. Thus, for the reasons which follow, upon the Court's reconsideration of this seriously misguided motion, the settlement is once again DENIED.

The Secretary's Motion for Reconsideration and Supporting Brief[1]

The Secretary's Motion announces that *it* has "reviewed all of the citations, the inspector's notes, and the exchange of positions between the parties during the original negotiations . . . [and that it] fully endorses the settlement as originally proposed . . . [and that it further] moves for the Court to reconsider its legal conclusions that Section 110(k) compels the Court to reject the proposed settlement *for lack of factual support*, and [the Court's conclusion] that Section 110(k) does not permit the Secretary to negotiate settlement agreements structured as a uniform percentage reduction of civil penalties." Motion at 1 (emphasis added).

At least at the start of its motion, the Secretary does acknowledge the words of the Mine Act which pertain to this issue, noting that section 110(k) of the Mine Act provides, as applicable here:[2]

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

30 U.S.C. § 820(k).

The Secretary goes on to relate that the mine operator and the Secretary, acting through a conference and litigation representative ("CLR") reached an agreement which called for an across-the-board cut in each of the 32 citations involved with this docket and for which they admit each of the 32 citations were cut by 30 percent. Once the Court rejected the settlement motion, the Secretary transferred the docket to an attorney within the Solicitor's Office. That attorney, in turn, filed the subject motion for reconsideration.

In maintaining that the original settlement motion should be upheld, the attorney stated that she "exercised her professional judgment, . . . considered the value of the proposed compromise; the prospects of coming out better, or worse, after a full trial; and the resources that the Secretary would need to expend in going through a trial." Motion at 4. In the larger context, however, the Secretary is contending that section 110(k) does not impede its authority to "negotiate settlement agreements structured as a uniform percentage reduction of civil penalties." *Id.* at 4.

To deal with the language of section 110(k), which literally provides that there can be no compromise, mitigation or settlement *except with the approval of the Commission*, the Secretary simply dismisses those words, contending that they don't count because the section "does not provide any meaningful standards for judicial review." The Secretary then obfuscates the separate roles that it and the Commission have in settlements, by asserting that "Section 110(k)

[1] It should not come as a surprise that the Respondent does not oppose the Secretary's Motion. After all, the original motion was a joint enterprise.

[2] The balance of the provision, which is not pertinent here, goes on to state that "[n]o penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the Court."

[ ] cannot be read to prevent the Secretary from negotiating, or the Commission from approving, settlements [structured as a uniform percentage reduction of civil penalties]."[3] Motion at 4.

In its naked attempt to make the command of section 110(k) meaningless, the Secretary asserts that any attempt by the Commission to go beyond its "role," either through its precedent or procedural rules, is an *ultra vires* act. Under the Secretary's reading of the section, the Commission's "approval" role is "simply a procedural mechanism to ensure that [ ] settlement agreements negotiated by the Secretary are clear, transparent to the public, and in accordance with any otherwise applicable law."[4]

Elaborating upon its contentions, the Secretary speaks first to its argument that section 110(k) provides no meaningful standards to limit the Secretary's prosecutorial discretion to settle Mine Act enforcement actions. In support of this, the Secretary begins in an odd manner, by noting that for *other* statutory schemes, an agency's enforcement authority is within its absolute discretion and that *generally* that discretion is unreviewable. Motion at 6. Of course, this issue is about the Mine Act's statutory scheme, not some *other* schemes. Carrying this rather unusual argument further, the Secretary adds that, why *were it not for section 110(k)*, it would not even have to be making this argument, as the general rule that the enforcement agency's discretion is unreviewable would apply. This is pure gobbledygook but it does not deter the Secretary from proceeding down that path with its irrelevant observations that *other* agencies, such as EPA and OSHA, can settle their enforcement actions without review.

Returning to the Mine Act, which is the subject of this litigation, the Secretary nods that its foregoing arguments don't apply "if Congress has otherwise provided." This brings the Secretary back to the nettlesome language of section 110(k). Effectively conceding that the general rule is not applicable because of that section, the Secretary then maintains that the provision is without effect unless the statute indicates an intent[5] to circumscribe the general rule of unfettered agency discretion *and* the statute also provides "meaningful standards for defining the limits of that discretion." Motion at 8.

Accordingly, it is the Secretary's position that if that statutory provision provides no "*meaningful* standards" for judicial review, then the provision becomes a nullity and the Commission's role is reduced to a *meaningless* standard of review, requiring it to approve any negotiated agreement as long as its terms are stated (i.e. "transparent") and providing that the agreement is "in accordance with any otherwise applicable law," whatever that means.[6] Only where the provision "provides 'clearly defined factors' to guide an enforcement agency's

[3] The bracketed language replaces the "settlements like the one proposed here" wording employed by the Secretary in its motion because it more precisely describes the type of settlement the Secretary believes is unreviewable, notwithstanding Congress' words in section 110(k).
[4] Ironically, the Secretary's statement that settlements must be "in accordance with any otherwise applicable law" apparently excludes section 110(k) as an applicable provision.
[5] Thereafter, the Secretary avoids further discussion of the "intent" argument, focusing instead on its "meaningful standards" contention.
[6] The Secretary displays the emptiness of the hollow "in accordance with any otherwise applicable law" phrase, as it offers no examples of its effect.

decision [may] the presumption of unreviewability [ ] be overcome," says the Secretary. Motion at 9.

Noting that the second sentence of section 110(k) employs the same language when an Article III court is reviewing a final order of the Commission—that no such Commission penalty assessment shall be compromised, mitigated, or settled except with the approval of the Court—the Secretary submits that the Commission should act "as a generalist court," and not examine the Secretary's prosecutorial discretion. *Id.* at 10. Beyond that section, the Secretary asserts that the Act's overall structure supports its contention that "the decision to settle" is within its prosecutorial discretion.[7]

The Secretary, continuing with its theme that, if there is an absence of meaningful standards, then the Commission's section 110(k) review authority is titular and its review under that provision ministerial, then asserts that section 110(i) of the Mine Act, the provision setting forth *the Commission's authority to assess all civil penalties* under the Act, cannot be a source of such meaningful standards. That section, it must be noted, states that, in assessing civil monetary penalties, the *Commission* is to consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

In what amounts to a representation that, in the Court's view, crosses an ethical line for the limits of proper advocacy, the Secretary, distinguishing the Commission's statutory role in assessing civil penalties from its statutory role in approval of proposed penalties, asserts that section 110(k) "governs the Commission's '*approval*' of 'proposed penalties . . . *compromised, mitigated, or settled'* by the Secretary." Motion at 11. (ellipsis and italics in the Secretary's Motion). This gross rewording and reordering of section 110(k) so distorts Congress' command that it must be repeated here that the section actually provides: "No proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission."[8]

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[7] The Court would note that the Secretary's *decision* to settle is not mutually exclusive from *the Commission's authority to review* settlements to determine if their approval is consonant with the Mine Act's overarching goals.

[8] In trying to divorce the applicability of the statutory criteria for assessing a civil penalty from proposed penalties contested before the Commission, as those criteria provide obvious and explicit factors for assessing civil penalties, the Secretary asserts that those criteria cannot provide a meaningful standard in the context of section 110(k) approvals by the Commission. Motion at 12. In the latter situation, the Secretary contends that the Commission's role is limited to "simply approv[ing] or reject[ing] the compromise before it. . . ." *Id.* Despite this assertion, the Secretary acknowledges that the parties "may agree to disagree about the factual or legal disputes giving rise to the proceeding in the first place." *Id.* But that is exactly the point—the parties' settlement motion needs to relate the factual or legal disputes that underpin their decision to settle. Here, the Secretary acknowledges implicitly that such disputes don't exist, or at least they don't see fit to inform the Commission about them. Instead, on the basis of the Secretary's unenlightening review, it contends only that "the value of the proposed compromise; the prospects of coming out better, or worse, after a full trial; and the resources that the Secretary would need to expend in going to trial" need to be asserted in order for its 30% across-the-board reduction to be

The Secretary's Brief continues to knock down straw men, asserting that the "role of an adjudicator is typically narrower when reviewing a proposed compromise because the adjudicator cannot assume from the existence of the compromise that the enforcement agency's underlying allegations are correct, or that the regulated entity did in fact fail to meet its statutory obligations." Motion at 12. This contention, as with many of the Secretary's arguments, sidesteps the language of section 110(k). Further, the Commission makes no assumption from the proposed settlement. Rather, it requires that the basis to support it be supplied, not merely that it be asserted to be meritorious. Continuing to miss the point, the Secretary notes that "parties are free to admit or to deny the fact of a violation in settlement agreements." *Id.* at 13 (citing *Amax Lead Co*., 4 FMSHRC 975, 977 (1982) ("*Amax Lead*")).

From this, the Secretary deduces that "a Commission administrative law judge cannot apply Section 110(i) to contested citations to determine whether the compromise penalty is 'appropriate' in light of the statutory penalty factors because the allegations . . . cannot be treated as if they were findings of fact and conclusions of law after trial." But, no one is contending that the allegations are being so treated. Instead, the Commission, per section 110(k), must be advised as to the basis for the compromise so that it can fulfill its statutory obligation and Congress' expressly stated concern that settlements not be based on the need to save litigation and collection expenses and that those factors should play no role in determining settlement amounts. *See* legislative history references, *infra*. Further, the Commission, in the cited 1982 *Amax Lead* decision, there noted "it is clear that section 110(k) confers upon the Commission the statutory authority either to approve or reject settlements in contested penalty proceedings. As we observed in *Co-op Mining Company*, 2 FMSHRC 3475, 3475-3476 (1980), '[S]ection 110(k) of the Mine Act places an affirmative duty upon us to oversee settlements.'" *Amax Lead*, 4 FMSHRC at 977. The focus in *Amax Lead* was over the inclusion of exculpatory language, but consistent with this Court's earlier remarks about the Commission's role in approving settlements, in affirming the judge's rejection of the settlement the parties submitted to him, its review of the proposed settlement included whether it would weaken the agency's enforcement capabilities and thereby "*jeopardize the health and safety of miners*." *Id.* at 978 (emphasis added).

Thus, unlike the Secretary's present motion, bereft as it is of any stated concern for the health and safety of miners, the Commission, now for more than 34 years, has kept its eye on the overriding focus of the Mine Act, our Nation's miners, just as Congress intended.

Apart from the discussion of the Commission's decision in *Black Beauty Coal Company*, 34 FMSHRC1856 (Aug. 2012), little more needs to be discussed about the Secretary's Motion. It does contend that its analysis of section 110(k) trumps the Commission's procedural rule regarding settlements, 29 C.F.R. §2700.31, again on its theory that no procedural rule can rescue

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justified. Of course, Congress has specifically stated that such considerations are *not* to be part of the equation where settlements are concerned. It is also noted that the requirement to provide the factual and/or legal basis for a settlement motion is not burdensome and that settlement motions *routinely* provide this kind of information. *See* Appendix to this Order, *infra*. It is through the submission of that information, factual, and/or legal, that the Commission is able to appreciate the basis for the presented compromise or mitigation and thereby carry out Congress' direction of its role in such matters.

the lack of meaningful standards for limiting its prosecutorial discretion to settle. As this is simply a rehash of its earlier argument, it need not be addressed a second time. Similarly, section "II" of its Motion is nothing more than a wind up of its earlier stated contentions.[9] Motion at 18-19.

Applying *its* construction of section 110(k), the Secretary concludes its Motion by asserting that it meets its test for approval, per *its* definition of that test. In this last section, the Secretary continues to mischaracterize the 110(k) review process, asserting that "evaluating the wisdom or sufficiency of the compromise is not the adjudicator's role." Motion at 20. The Commission does not evaluate the *wisdom* of the compromise, but it does require that the basis for it be provided. This is routinely done and this Court has reviewed many, many, such submissions where the information is easily supplied. Examples of this follow in the Appendix to this Order.

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[9] As part of the process of reviewing the Secretary's Motion, the Court of course reviewed cases cited by the Secretary in support of its claims. A few of those are discussed, briefly, but the bottom line is that the Court considers those cases as inapposite or distinguishable. *Heckler v. Chaney*, 470 U.S. 831(1985), for example, involved a decision *not* to take *enforcement* action. The Commission acknowledges that the decision to vacate a citation is not reviewable. Thus, the "presumption of unreviewability," which presumption the Court does not apply in any event where the Mine Act is concerned, was raised in *Heckler v. Chaney* only in that limited context. Besides, the Court emphasized that its decision was "only presumptively unreviewable; the presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers. Thus, in establishing this presumption in the APA, Congress did not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. Congress may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue. How to determine when Congress has done so is the question left open by *Overton Park*." *Id*.at 832-833.

As another example, in *Secretary of Labor v. Twentymile Coal Co.*, 456 F 3d 151 (D.C. Cir. 2006), the Court was addressing a very different context, namely the Secretary's authority to cite either the owner-operator, the independent contractor, or both for a contractor's violation. That decision also focused on the charging decision and the court there noted that "the *decision to prosecute* is particularly ill-suited to judicial review." *Id.* at 157. (emphasis added). Remembering that that the decision to prosecute is a special category, the D.C. Cir. also noted that "there is a strong presumption that agency action is reviewable . . . [and that] [i]n *Overton Park*, the Supreme Court declared that this exception to the presumption of reviewability applies 'in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply. 401 U.S. at 410' " and further that "[i]n determining "whether a matter has been committed solely to agency discretion, [the court] consider[s] both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action." *Id.* at 156 (citing *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir 2002)).

Other cases cited by the Secretary are simply inapplicable to the matter at hand. For example, *Swift v. United States*, 318 F. 3d 250 (D.C. Cir 2003) involved a qui tam action alleging False Claim Act violations. Though holding that there was no implication of judicial review of the government's decision to dismiss the action, it is hardly instructive to the Mine Act or the provision in issue. Other cases, such as *Drake v. Federal Aviation Administration*, 291 F. 3d 59 (D.C. Cir), finding that the FAA's action "was equivalent to a decision not to commence an enforcement action" are of that unhelpful ilk. *Id*. at 70.

Further Discussion

I. The Commission's Decision in *Black Beauty Coal Company*, 34 FMSHRC 1856 (Aug. 2012).

Although the Secretary has attempted to overcome the Commission's Decision in *Black Beauty Coal*, its arguments are not worthy of prolonged discussion, as that decision cogently sets forth the basis for the Commission's role where proposed penalties have been contested before it. Reduced to its essence, the Secretary contends that the legislative history is now old, as if it had a shelf life expiration date on it. The motion also tells half the story about that history, focusing on Congress' remarks about the process being "carried out in public" and "on the record." Motion at 16. Apparently, the Secretary has the authority to pick and choose which parts of the legislative history are too old for it, while simultaneously pointing to old sections it likes. Or it may view the Congressional expressions as reflecting some sentient moments, followed by lapses into a fog. *See* Motion at 17 (asserting that Congress contradicted itself from one sentence to the next).

In its decision in *Secretary of Labor v. Black Beauty Coal Co.*,34 FMSHRC 1856, 2012 WL 4026640 (Aug. 2012) ("*Black Beauty*"), the Commission concluded that it "is clearly authorized by the Mine Act to review a proposed settlement of a contested penalty and to require parties to submit the factual support necessary for that review. Although the Commission's review authority may not extend to certain areas of the Secretary's enforcement authority, Congress emphatically authorized the Commission to review proposed settlements of contested penalties and to assess all penalties provided under the Act." *Id*. at 1860.

In reaching that conclusion, the Commission first took note that "the plain language of section 110(k) of the Mine Act explicitly authorizes the Commission to review a proffered settlement of a contested penalty . . . [and that section] unambiguously sets forth the Commission's exclusive authority to approve the compromise, mitigation or settlement of penalty after it has been contested." *Id.* at 1860-1861. That plain language is enough to eviscerate the Secretary's entire argument in its Motion.[10]

[10] In *UMWA v. Maple Creek* Mining, 29 FMSHRC 583, 2007 WL 2161858 (July 2007), the Commission spoke to the plain meaning issue, noting: "Although the parties do not refer to the terms of the Mine Act to support their competing positions, we must start there to determine whether Congress spoke directly to the question presented. The first inquiry in statutory construction is 'whether Congress has directly spoken to the precise question at issue.' *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Local Union No. 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Moreover, 'in ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.' *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a statute's text and legislative history, may be employed to determine whether 'Congress had an intention on the precise question at issue,' which must be given effect. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (citations omitted). If, however, the statute is ambiguous or silent on a point in question, a second inquiry is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2. Deference is accorded to

While the plain language ends the Secretary's contentions, the Commission went on to observe that the "legislative history of section 110(k) explains that Congress intended the settlement of a penalty to be a transparent process that is open to public scrutiny and that the Commission is authorized to approve contested penalties offered for settlement [and that] [t]he Senate Report recognized, in particular, the importance of an Administrative Law Judge's review of a proposed settlement of a penalty:

> In addition to the delay in assessing and collecting penalties, another factor which reduces the effectiveness of the civil penalty as an enforcement tool under the Coal Act is the compromising of the amounts of penalties actually paid. In its investigation of the penalty collection system under the Coal Act, the Committee learned that to a great extent the compromising of assessed penalties does not come under public scrutiny…. Even after a Petition for Civil Penalty Assessment has been filed by the Solicitor with the Office of Hearings and Appeals, settlement efforts between the operator and the Solicitor are not on the record, and a settlement need not be approved by the Administrative Law Judge.

Black Beauty, 34 FMSHRC at 1861 (citing S. Rep. No. 95-181, at 44 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632 (1978) ("Legis. Hist.")).

The Commission then explained that "Congress intended that the settlement of a penalty be open to scrutiny in order to better serve the purpose of civil penalties, that is, to encourage operators' compliance with mandatory standards, noting that [t]he Senate report provided: 'The Committee strongly feels that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and

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'an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable.' *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844). The Commission is clearly charged with administering the provisions of sections 105(a) and 105(d) of the Mine Act, which address the challenge of enforcement actions of the Secretary, the initiation of cases before the Commission, and the Commission's administration of hearings concerning the validity of those enforcement actions. *See Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 53, 56-59 (D.C. Cir. 1988) (where language of Mine Act was indecisive, court deferred to Commission's interpretation of section 104(d) regarding the issuance of withdrawal orders). As the Supreme Court stated in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994), the Commission was established as an independent review body to 'develop a uniform and comprehensive interpretation' of the Mine Act (citing Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n before the Senate Comm. on Human Res., 95th Cong. 1 (1978)). Moreover, the question of how the procedures set forth in sections 105(a) and 105(d) are to mesh and how the Commission will conduct hearings involves a major policy component, which the Commission is uniquely qualified to establish. Section 111 is also one of the provisions of the Mine Act the Commission is 'charged with administering.' 30 U.S.C. § 821 ('The Commission shall have the authority to order compensation due under this section ….'); *Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773, 775-80 (D.C. Cir. 1990). Consequently, we need not defer to another agency's interpretation of the statutory language at issue here." *Id.* at *5-*6. Here, the Secretary concedes that the language is plain about the Commission's role but that Congress' words were meaningless and empty.

collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.' *Id*. at 1862 (citing Senate Report at 632).

The Commission then observed that Congress specifically addressed that section 110(k) was part of the Mine Act "[i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest, [and for that reason] Congress authorized the Commission to approve the settlement of civil penalties." In this regard, the Senate Report explains: To remedy this situation, section 111(l) [later codified as section 110(k)] provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission…. By imposing these requirements, the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided. *It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties*. *Id*. (emphasis in Commission Decision).

Given the plain statutory language, not to mention the affirmatory legislative history, the Commission observed that "[t]o carry out this responsibility, the Judge must have information sufficient to establish that the penalty reduction does, in fact, protect the public interest." *Id.*

The Commission took pains to explain the Congressional design for this provision, noting that it "has long recognized, after 'an operator contests the Secretary's proposed assessment of penalty, . . . *Commission* jurisdiction over the matter attaches.' *Sellersburg Stone Co*., 5 FMSHRC 287, 291 (Mar. 1983), aff'd, 736 F.2d 1147 (7th Cir. 1984) (emphasis in original). It is clear that the Commission's jurisdiction attaches to a proposed penalty after it has been contested due to the language of section 110(k), which specifies that '[n]o proposed penalty which has been contested before the Commission under section 105(a)' shall be settled without the approval of the Commission. 30 U.S.C. § 820(k) [ ]. In addition, section 110(i) designates the Commission as the agency authorized to 'assess all civil penalties provided in this Act.' 30 U.S.C. § 820(i) [ ]. The assessment of such penalties clearly includes contested penalties that are the subject of a settlement agreement." *Id.*

The Commission then noted that with "this statutory mandate to approve or disapprove proposed penalty reductions, [it] has promulgated procedural rules which require parties to submit *factual support* for a proffered settlement agreement." *Black Beauty*, 34 FMSHRC at 1862-1863 (emphasis added). Driving home the point that has apparently eluded the Secretary in this motion, the Commission explained that its "Procedural Rule 31 provides that a 'proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion,' and expressly requires a party seeking the approval of a settlement to submit '[f]acts in support of the penalty agreed to by the parties.' 29 C.F.R. § 2700.31(b)(3). Rule 31 further provides that any 'order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record.' 29 C.F.R. § 2700.31(c). Rule 65 provides in part that a 'Judge may require the submission of proposed findings of fact.' 29 C.F.R. § 2700.65. Thus, a Judge's authority to reasonably request additional information to justify a proposed settlement is fully supported by both the Act and the Commission's procedural rules." *Id.* at 1863.

Following that explication, the Commission then spoke to "[w]hether a Judge may consider the deterrent purposes of the statutory penalty scheme in reviewing a settlement proposal." *Id.* at 1864. It observed in that regard that "that section 110(k) "contains no explicit restrictions on what a Commission Judge may consider when reviewing a settlement proposal. Thus, Congress provided a broad mandate to the Commission (and its Judges), charging it with reviewing and approving all settlements of penalty cases pending before it and imposing no explicit limits on what should be considered in this review." *Id.* at 1865.

Unlike the Secretary, who contends that the Commission cannot look to the obvious relevance of the statutory penalty criteria in section 110(i),[11] the Commission noted the importance of penalties as deterrence to future violations. Speaking particularly to a key contention of the Secretary in this motion for reconsideration, the Commission pointed out that the legislative history anticipated the claim, noting that "[w]hile the reduction of litigation and collection expenses may be a reason for the compromise of assessed penalties, the Committee strongly feels that since the penalty system is not for the purpose of raising revenues for the Government, and is indeed for the purpose of encouraging operator compliance with the Act's requirements, *the need to save litigation and collection expenses should play no role in determining settlement amounts*." *Id*. at 1866 (quoting Senate Report at 629-33) (re-ordered emphasis added by this Court).

Given all those considerations, the Commission concluded that the assessment of a civil "penalty is 'is bounded by proper consideration of the statutory criteria *and* the deterrent purpose underlying the Act's penalty assessment scheme.'" *Id.* at 1866-1867 (quoting *Sellersburg Stone*, 5 FMSHRC at 294). Clearly Congress viewed civil penalties as a mechanism to promote operator compliance with health and safety mandates, to discourage operators from violating health and safety regulations and laws in the future.

II. The Settlement Denial in this matter

The Secretary concedes that in some instances there are modifications to civil penalty contests but, repeating its arguments, contends that it also has the "prosecutorial discretion to negotiate percentage-reduction settlements" and that it is under no obligation to do more than to announce that the Commission. Motion at 22.

Apart from the fact that the Secretary's own civil penalty assessment regulations provide, per section 30 C.F.R. § 100.7(b)(2), that "[w]hen MSHA receives the notice of contest, it advises the Federal Mine Safety and Health Review Commission (Commission) of such notice [and that] [N]o proposed penalty which has been contested before the Commission shall be compromised,

[11] That section expressly provide that "the Commission *shall consider* the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. §820(i). (emphasis added).

mitigated or settled except with the approval of the Commission." The Secretary's Motion, as noted, asserts that the Commission's approval authority is a ministerial task. That a uniform across-the-board reduction is within the Secretary's authority to present to the Commission and with the Commission, according to the Secretary, unauthorized to do anything except approve such a settlement, as long as it is clear and transparent to the public, the Secretary, without more, may always enter a uniform percentage reduction, apparently of any amount.[12]

Remembering that the Secretary has merely asserted that its across-the-board, unelaborated, 30% reduction is justifiable, it is worth examining the context in which this claim is made by returning from the theoretical realm to the real world of the citations involved here. A few examples from the citations will be noted, but one should bear in mind that *none* of the 32 citations have been modified; there is no contention, for example, that the citations' descriptions of the conditions or practices are challenged or just plain wrong. Nor is there a contention that the gravity or negligence should really be something other than what the issuing inspector marked for any of those citations. Instead, the Secretary contends that the private exercise of its professional judgment, the private valuation of the proposed compromise associated with that judgment, the prospects of coming out better, or worse, after a full trial, and the Secretary's resources that would need to be expended in going through a trial, combine to justify this 30% uniform reduction.

The following examples of some of the citations within this docket serve to demonstrate the need for additional information in order for the Commission to carry out Congress' directive under section 110(k). In the Court's original decision denying the settlement motion, it noted the absence of any legitimate basis to reduce any of the citations and the motion admitted this, announcing that there were *no changes* in gravity or negligence for *any* of the *32* citations. The court's original decision, denying the settlement motion, noted that included within these were:

* A haul truck seriously leaking oil, a condition which was made worse because its engine could not be shut down (Citation 8424013); the inspector listed the violation as significant and substantial;

* Up to 5 feet of water, rib to rib, in a longwall bleeder (Citation 8424511) was cited as a violation of the mine's approved ventilation plan. That plan required water pumps when water depth exceeded 12 inches and the effectiveness of the system was gauged by the depth *not* exceeding 24 inches of water. More than a week later, with more pumps having been installed, the water level still exceeded the standard and it took nearly *a month* (from July 29 to August 24) to remove the water;

* Inadequate roof and rib support, a problem which had been cited some 107 times at this mine in the past 2 years, (Citation 7579878). The inspector listed the condition as a significant and substantial violation, noting that the ribs were rashing out, and also that the distance from the last row of roof bolts was six to seven feet. With these findings, the inspector concluded that the roof and ribs were inadequately supported to protect miners from falls;

[12] Here, it happens to be a 30% reduction but there is no indication that Secretary would be hindered from a higher percentage across-the-board reduction, and those too would not require more information from the Secretary than it offers here.

*Another roof control violation was found, as set forth in Citation 8159274. This condition, the result of a rib roll, involved an excessive entry width continuing for 20 feet. The Inspector listed the violation as significant and substantial. Abatement required the installations of 6 x 6 posts;

*Still another roof control violation, identified as significant and substantial, was found. (Citation 8427401). This one, also the result of rib rashing, found ineffective rib bolts, bolts more than six feet away from the ribs and one that was seven feet from a rib corner. As with Citation 7579878, this standard had been cited at this mine more than one hundred times in the past two years.

*An outdated escapeway map and an incompletely installed life line in the primary escapeway (Citations 8424508 and 8424509). The importance of escapeway life lines cannot be gainsaid;

*Coal accumulations up to 20 inches in depth, and 18 feet wide for a distance of 165 feet, and another, similar, such situation was found as set forth in Citations 8424967 and 8424502. Regarding Citation 842967, the inspector listed the violation as significant and substantial, noting that the accumulations existed over the full width of conveyor belt and were packed under the drive and snub rollers for a distance over 10 feet with a 12 inch depth. The belt had to be removed from service;

*Two diesel powered scoops were being used to transport a loading machine without the use of proper couplings, as set forth in Citation 8418394. The practice was in violation of a safeguard which had been issued eight years earlier and which safeguard had been cited 72 times in the past two years at this mine. As in 2002, a belt chain, which is not a proper coupling, was being used. Both the Inspector and his supervisor recommended a special assessment, but the recommendation was turned down by the District Manager. Therefore, it was this regularly assessed violation for which the Secretary seeks an unexplained 30% reduction;

*An oxygen tank pressure gauge was not maintained in safe condition, as it lacked a protective cover and when that gauge was tested, its needle did not move. (Citation 8424002) Listing the violation as significant and substantial, a new set of gauges had to be installed on the tank;

*An energized power cable for a shuttle car was found to have two holes so that it was no longer adequately insulated. (Citation 7579858) For one of those holes, exposed, energized inner bare wires were present. The Inspector listed the violation as significant and substantial with a permanently disabling injury reasonably to be expected;

The point of describing these violations is not to establish that the proposed penalties could not be reduced. Rather, it is to demonstrate that *information* is needed to justify any reductions. This Court has explained that, under a "principle of proportionality," the greater the reduction sought for a proposed penalty, the greater the amount of information that should be provided to explain the basis for the reduction. In the Court's estimation, contrary to the

Secretary's assertion, *not* altering any of the citations is a factor cutting *against* the across-the-board reduction, as opposed to supporting it. The practical effect of the Secretary's position, that it may blithely present across-the-board percentage reductions, without justifying such reductions beyond its "because we can" mantra, effectively creates a new provision within Part 100. Besides contravening section 110(k)'s language, any mining company litigator would understandably insist that it too should have such reductions applied to proposed penalties under the vagaries of litigation and expenses of trial theory of penalty reduction.

Conclusion

In the Court's estimation, the Secretary's Motion for Reconsideration with its supporting brief is effectively an exhibit. By the submission of that exhibit, it is an admission against interest, unwittingly demonstrating that it does not grasp Congress' plain expression of its will regarding proposed penalties which are contested before the Commission and its directive that no such matters may be compromised, mitigated, or settled except with the Commission's approval. With no mention of the best interests of miners, nor reference to its client, the Mine Safety and Health Administration, nor any mention of Congress' concern about the deterrent effects of penalties, the Secretary, in what is little more than a power play, has demonstrated a disregard for any of these voices and by so doing underscored the wisdom of Congress' command that the Commission must approve such matters.

In addition, the Court has researched the provision which the Secretary seeks to eviscerate and has found no like statutory provision employing such terms. Nor, it is noted, has the Secretary pointed to such a like statutory provision for any other agency. Therefore, it is concluded that the section 110(k) provision is unique among federal agency statutes. Perhaps that is why Congress took pains to explain, in the legislative history, what was already plain in the text of the statute. That it is unique should not come as a surprise because the Federal Coal Mine Health and Safety Act of 1969, the Federal Mine Safety and Health Act of 1977 (Mine Act), and its most recent iteration, in 2006, with the Mine Improvement and New Emergency Response Act (MINER Act), were all prompted by mining disasters. These disasters moved Congress in each instance to re-examine the federal safety and health mining laws, brought about ever more serious Congressional treatment of mining, and formed the basis for the statement that mine safety laws and standards have been written in blood. These Congressional changes to our Nation's mine safety laws included that the Commission, through section 110(k), be entrusted to guard the guardians, where proposed penalties contested before the Commission are sought to be compromised, mitigated, or settled.

Accordingly, upon reconsideration, the Secretary's Motion for Reconsideration is DENIED. Within 30 (thirty) days of this Order, the Secretary is directed to either submit a supported motion for approval of settlement or to prepare for trial on the matters in this docket.

SO ORDERED.

William B. Moran

William B. Moran
Administrative Law Judge

APPENDIX

Settlement Example 1

UNITED STATES OF AMERICA
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue NW, Suite 520N
Washington, DC 20004-1710

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	)	**CIVIL PENALTY PROCEEDINGS**
	)	DOCKET NO. KENT 2011-1521
	)	A.C. NO. 15-05484-000264844 VP2
Petitioner,	)	
	)	Mine: Prep Plant
	)	
	)	DOCKET NO. KENT 2011-1522
v.	)	A.C. NO. 15-18978-000264876 VP2
	)	
	)	Mine: Buckeye Highwall Miner
	)	
	)	DOCKET NO. KENT 2011-1523
RIDGEWOOD TRUCKING, INC.,	)	A.C. NO. 15-19542-000264895 VP2
	)	
Respondent.	)	Mine: Bear Branch Mine
	)	

MOTION TO APPROVE SETTLEMENT AND ORDER PAYMENT

The Acting Secretary certifies that prior to filing this Motion, a copy was provided to Respondent, Ridgewood Trucking, Inc., through its representative for review, and Respondent consents to the granting of the Motion and the entry of the proposed Decision Approving Settlement and Order to Pay filed herewith. The Acting Secretary hereby moves as follows:

1. These matters arise from inspections of the Prep Plant, Buckeye Highwall Miner, and Bear Branch Mine ("the Mines") conducted in June and July 2011. At the time of the inspections, Respondent was a contractor at the Mines. These dockets are comprised of Respondent's contest of seventeen (17) citations issued during those inspections pursuant to the

Federal Mine Safety and Health Act of 1977 ("the Act"), as more specifically set forth in the paragraphs below. The civil money penalties for the citations were assessed at $25,651.00.

2. With respect to Citation Nos. 8395302, 8370015, 8370018, 8395504, 8344550, 8344551, 8344554, and 8344555, Respondent has agreed to accept these citations as written and pay the penalties as assessed. The specific penalties identified in paragraph 5, below.

3. Discovery and preparation for the hearing in this matter has revealed the following as to the parties' positions regarding the remaining citations at issue in these dockets:

(a) Citation Nos. 8370014, 8370016, and 8370017: Respondent was cited for violations of 30 CFR § 77.404(a). Specifically, the International coal haulers, Unit Nos. 36 (VIN 46194), 44 (VIN 552866), and 35 (VIN 469192) were not maintained in safe operating condition. The Unit No. 36 International coal hauler had an exhaust leak in the second coupling after the turbo charger and the left side tie rod end, attached to the driver's side wheel unit, was worn and loose (Citation No. 8370014). On the Unit No. 44 International coal hauler the right side tie rod end had excessive vertical movement (Citation No. 8370016). On the Unit No. 35 International coal hauler the rear right side drag link was excessively worn and loose and the rear inner tire showed signs of the inner side wall separating from the tire (Citation No. 8370017). Regarding Citation No. 8370014, Respondent argues that the tie rod was not worn and only one person drives the truck. Regarding Citation No. 8370016, Respondent argues that the tie rod was not excessive, some slack is normal, and only one person drives the truck. Regarding Citation No. 8370017, Respondent argues that one worn tire out of eighteen does not create an unsafe condition and only one person drives the truck. Respondent therefore argues that the gravity and persons affected were lower than that asserted by the Secretary. Petitioner reviewed the citations, the surrounding evidence, and each party's arguments. Without conceding Respondent's

arguments, but given the conflicting evidence and the associated litigation risk, the Acting Secretary has agreed to reductions of the proposed civil money penalties. The specific penalty reductions are identified in paragraph 5, below.

(b) Citation No. 8395503, 8395506, and 8395508: Respondent was cited for violations of 30 CFR § 77.1605(b). Specifically, the right front tandem-axle brake shoe assembly and brake drum on the blue International coal hauler (Company No. 38, Vin # 463195) (Citation No. 8395503), the left front tandem-axle brake shoe assembly and brake drum on the red Western Star coal hauler (Company No. 1) (Citation No. 8395506), and the right rear tandem-axle brake shoe assembly and brake drum on the red Western Star coal hauler (Company No. 28, Vin # 356615) (Citation No. 8395508) were saturated with oil, apparently from defective axle seals. Respondent argues that all other braking systems were operating and therefore it was not reasonably likely that a reasonably serious injury would occur. Respondent therefore argues that the gravity was lower than that asserted by the Secretary. Petitioner reviewed the citations, the surrounding evidence, and each party's arguments. Without conceding Respondent's arguments, but given the conflicting evidence and the associated litigation risk, the Acting Secretary has agreed to reductions of the proposed civil money penalties. The specific penalty reductions are identified in paragraph 5, below.

(c) Citation No. 8395507: Respondent was cited for a violation of 30 CFR § 77.404(a). Specifically, on the red Western Star coal hauler, Company No. 1, the trailing end of the left side steering system drag link contained excessive movement at its connection point with the left front wheel spindle and the rear yoke of the front drive shaft of the drive line assembly was cracked in the area where the universal joint is held in place. Respondent argues that this citation was duplicative of Citation No. 8395506. Respondent therefore argues that the citation

should be vacated. Petitioner reviewed the citation, the surrounding evidence, and each party's arguments. Without conceding Respondent's arguments, but given the conflicting evidence and the associated litigation risk, the Acting Secretary has agreed to a reduction of the proposed civil money penalty. The specific penalty reduction is identified in paragraph 5, below.

(d) Citation No. 8344552: Respondent was cited for a violation of 30 CFR § 77.404(a). Specifically, there was a crack in the frame on both sides of the red International Pay Star tandem coal truck, Unit No. 29, where the hoist jack is located. Respondent argues that it was unlikely that a reasonably serious injury would occur and that the inspector notes that only the driver should have known. Respondent therefore argues that the gravity and negligence were lower than that asserted by the Secretary. Petitioner reviewed the citation, the surrounding evidence, and each party's arguments. Without conceding Respondent's arguments, but given the conflicting evidence and the associated litigation risk, the Acting Secretary has agreed to a reduction of the proposed civil money penalty. The specific penalty reduction is identified in paragraph 5, below.

(e) Citation No. 8344553: Respondent was cited for a violation of 30 CFR § 77.1104. Specifically, there was an accumulation of oil on both sides of the engine of the red International Pay Star tandem coal truck, Unit No. 46. Respondent argues that it was unlikely a fire would occur and that the inspector notes that only the driver should have known. Respondent therefore argues that the gravity and negligence were lower than that asserted by the Secretary. Petitioner reviewed the citation, the surrounding evidence, and each party's arguments. Without conceding Respondent's arguments, but given the conflicting evidence and the associated litigation risk, the Acting Secretary has agreed to a reduction of the proposed civil money penalty. The specific penalty reduction is identified in paragraph 5, below.

4. The Acting Secretary has considered the criteria set forth at Section 110(i) of the Act and has determined that the proposed penalties are appropriate in light of these criteria and promote the purpose of the Act. Information pertaining to the operator's history of previous violations and size is contained in Exhibit A, which was filed by the Secretary along with the petition in the above-captioned proceeding.

5. The following chart summarizes the citations and associated penalties and the reductions to the penalties, as applicable. The penalty reductions are to be effective upon the approval of this settlement agreement by the Federal Mine Safety and Health Review Commission.

Citation No.	Modification to Citation	Proposed Penalty	Amended Penalty
DOCKET NO. KENT 2011-1521			
8395302	N/A	$207.00	$207.00
8370014	N/A	$2,901.00	$1,422.00
8370015	N/A	$585.00	$585.00
8370016	N/A	$2,901.00	$1,422.00
8370017	N/A	$2,901.00	$1,422.00
8370018	N/A	$285.00	$285.00
	Subtotal:	**$9,780.00**	**$5,343.00**
DOCKET NO. KENT 2011-1522			
8395503	N/A	$1,795.00	$990.00
8395504	N/A	$121.00	$121.00
8395506	N/A	$1,795.00	$990.00
8395507	N/A	$3,996.00	$2,001.00
8395508	N/A	$1,795.00	$990.00
	Subtotal:	**$9,502.00**	**$5,092.00**
DOCKET NO. KENT 2011-1523			
8344550	N/A	$540.00	$540.00
8344551	N/A	$540.00	$540.00
8344552	N/A	$2,678.00	$1,107.00
8344553	N/A	$1,944.00	$896.00
8344554	N/A	$127.00	$127.00
8344555	N/A	$540.00	$540.00
	Subtotal:	**$6,369.00**	**$3,750.00**
			Total Amended Penalty: $14,185.00

6. The parties have agreed that no modifications to the citations are to be made.

7. Respondent agrees to withdraw its contest to the penalties as modified herein. Respondent's withdrawal of its contest is to be effective upon the approval of this settlement by the Commission.

8. Respondent is/was a contractor at a surface coal mine.

9. Respondent exhibited good faith in abating the cited violations.

10. Payment of the proposed penalties will not impair Respondent's ability to continue in business.

11. The parties agree to bear their own attorney's fees, costs, and other expenses incurred by the parties in connection with any stage of the above referenced proceedings, including attorney's fees which may be available under the Equal Access to Justice Act, as amended.

12. Upon the Commission's approval of this settlement, the Acting Secretary further agrees that the total penalty amount shall be payable in twenty-four (24) installments. The first payment in the amount of $615.00 will be due on October 1, 2013. Subsequent payments, in the amount of $590.00 each, will be due on the 1st day of each month thereafter. Failure to make any payment within 30 days after its due date may result in the entire, unpaid balance becoming immediately due and payable, together with such court costs as may be incurred by the U.S. Department of Labor in collecting such amounts, pursuant to the practices and procedures of the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office. Payments shall be made by Respondent to the MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390. The Assessment Control Numbers and Docket Numbers, as set forth in the heading

of this document, shall be included on each payment. Payments shall be considered to be "made," as that term is used in this paragraph, on the date payment is placed in the U.S. mail, first class postage prepaid.

WHEREFORE, the parties move the Commission to approve the above settlement agreement pursuant to 29 C.F.R. § 2700.31, Rules of Procedure, FMSHRC, and to order payment of the amended proposed penalties of $14,185.00 as set forth in the payment plan described above.

Respectfully submitted this 18th day of July, 2013.

M. Patricia Smith
Solicitor of Labor

James E. Culp
Regional Solicitor

John Rainwater
Associate Regional Solicitor

Gregory W. Tronson
Manager, Denver Backlog Project

Natalie E. Lien
Trial Attorney
U. S. Department of Labor
Attorneys for Petitioner

Settlement Example 2

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

HILDA SOLIS, Secretary of Labor,	)	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	)	**(JUDGE WILLIAM MORAN)**
ADMINISTRATION (MSHA),	)	
	)	DOCKET NO. WEVA 2011-1449
Petitioner,	)	A.C. NO. 46-05121-249736
	)	
v.	)	DOCKET NO. WEVA 2011-1451
	)	A.C. NO. 46-05121-249736
	)	
ROCKSPRING DEVELOPMENT INC.,	)	MINE: CAMP CREEK MINE
	)	
Respondent.	)	

JOINT MOTION TO APPROVE SETTLEMENT

The parties propose the following settlement of the civil money penalties in the subject cases, as set forth below.

I

The Secretary proposed penalties totaling $13,992 against Rockspring Development Inc. (hereinafter referred to as the Respondent) for the violations alleged in Docket Number WEVA 2011-1449. The parties have agreed to settle that docket for penalties totaling $8,500. The Secretary proposed penalties totaling $56,621 for the violations alleged in Docket Number WEVA 2011-1451. The parties have agreed to settle that docket for penalties totaling $40,000. These dockets do not contain any citations that are the subject of a notice of contest.

II

The Respondent is very large in size, producing 2,986,909 tons of coal in 2010.

III

The proposed penalty is appropriate to the size of the Respondent's business and will not affect the operator's ability to continue in business.

IV

The Respondent demonstrated good faith in attempting to achieve rapid compliance after notification of the violations.

V

The parties have agreed that the Respondent's history of previous violations has not affected the terms of this Joint Motion to Approve Settlement.

VI

The Respondent, as demonstrated by the signature of its representative or attorney set forth below, certifies that it has reviewed the provisions of this Joint Motion to Approve Settlement and agrees to the statements and representations herein and to the amount of the penalty compromise. On this basis, the Respondent waives its right to the five-day notice requirement set forth in 29 C.F.R. § 2700.31(d)(3) and requests that the Administrative Law Judge enter an immediate order approving the parties' proposed settlement of the citations at issue in these cases.

VII

Docket Number WEVA 2011-1449

The Secretary originally proposed penalties totaling $13,992 for the violations alleged in Docket Number WEVA 2011-1449, and the parties have agreed to settle that docket for penalties totaling $8,500.

The Respondent has agreed to pay the penalty proposed by the Secretary for the violation alleged in the following citation:

Citation Number	Penalty
8116757	$6,996

The basis for the settlement of the remaining citation at issue in this docket, including the individual settlement amount, is set forth below:

Citation Number 8116755 **30 U.S.C. § 876(b)(2)(F)(ii)**

Basis of compromise of penalty: Negligence.

At hearing, the Respondent would present evidence that there is an exception in its emergency response plan which provides, "zones of discontinuous communications coverage may exist for limited distance and/or duration throughout the working section in areas such as, but not limited to, behind pillars around equipment, etc." It argues that this exception excuses its failure to provide communication in the outside entries of the #2 section. Therefore, it argues that the level of negligence is mischaracterized and should be modified to "moderate negligence," and the number of persons affected should be modified to "7 persons," with a corresponding penalty reduction.

The Secretary, in reply to the Respondent's statements and contentions, states that she recognizes that they raise factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. Therefore, she agrees to modify this citation to "moderate negligence," and "7 persons affected," and to accept a reduced penalty.

Amount of the penalty proposed by the Secretary: $6,996.

Amount of the penalty agreed on by the parties: $1,504.

Docket Number WEVA 2011-1451

The Secretary originally proposed penalties totaling $56,621 for the violations alleged in Docket Number WEVA 2011-1451, and the parties have agreed to settle that docket for penalties totaling $40,000.

The Respondent has agreed to pay the penalties proposed by the Secretary for the violations alleged in the following citations:

Citation Number	Penalty
8118642	$1,412
8118643	$1,203
8122264	$3,143
8118645	$807
8122273	$873
8122277	$1,111

8127165	$3,143
8122279	$1,530
8122280	$807
8122281	$1,530
8122283	$946
8127164	$3,143
8122284	$873
8122285	$873
8122287	$1,026
8122286	$873
8122289	$1,944
8127168	$2,901

The bases for the settlement of the remaining citations at issue in this docket, including the individual settlement amounts, are set forth below:

Citation Number 8118640 **75.503**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that the leads were insulated and only the outer jacket was torn on the rear light of the #4 maintenance ride, located on the #4 section. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $1,026.

Amount of the penalty proposed by the parties: $526.

Citation Number 8122266 **75.1713-7(c)**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that although the first aid supplies on the #5 working section were individually wrapped in airtight plastic bags and stored in the bin. Therefore, it argues that this citation should be modified to reflect a

characterization of this violation as "not significant and substantial," "1 person affected," and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely," "1 person affected," and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $4,689.

Amount of the penalty proposed by the parties: $3,611.

Citation Number 8122268 **75.400**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that the 995-volt motor and pump on the coal feeder, located on the #2 section, would not get warm enough to ignite combustible material. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $1,412.

Amount of the penalty proposed by the parties: $1,212.

Citation Number 8122270 **75.400**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that the operating temperature of the pump motor compartment of the #8358 Fletcher roof bolter, located on the 014 MMU of the #2 section, does not get hot enough to ignite coal or hydraulic oil. Therefore, it argues

that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $1,530.

Amount of the penalty proposed by the parties: $250.

Citation Number 8122271 **75.400**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that the operating temperature of the pump motor compartment of the #7320 Fletcher roof bolter, located on the 011 MMU of the #2 section, does not get hot enough to ignite coal or hydraulic oil. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $1,530.

Amount of the penalty proposed by the parties: $252.

Citation Number 8122274 **75.400**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that the operating temperature of the pump motor compartment of the #35 Powell scoop, located on the #2 section, does not get hot enough to ignite coal or hydraulic oil. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $1,530.

Amount of the penalty proposed by the parties: $251.

Citation Number 8122275 **75.1403**

Basis of compromise of penalty: Fact of violation.

The Respondent would present evidence at hearing that the underlying safeguard (Number 7154568) was improperly issued because it fails to identify the hazard at which it is directed. It further argues that the underlying safeguard does not identify any hazard, and thus makes the safeguard and subject citation invalid. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $1,026.

Amount of the penalty proposed by the parties: $526.

Citation Number 8122276 **75.400**

Basis of compromise of penalty: Fact of violation.

The Respondent would present evidence at hearing that the loose coal along the ribs and cross-cuts in the track entry near the #2 working section was material produced in the normal course of mining, and not an accumulation for the purpose of 30 C.F.R. § 75.400. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $1,657.

Amount of the penalty proposed by the parties: $379.

Citation Number 8123746 **75.1505(b)**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that, although the refuge alternative was shown in the wrong location on the escapeway map for the #005 section, everyone on the working section had been trained on the location of both escapeways. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $3,143.

Amount of the penalty proposed by the parties: $307.

Citation Number 8123747 **75.1505(a)(3)**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that although the refuge alternative was shown in the wrong location on the escapeway map for the #005 section, everyone on the working section had been trained on the location of both escapeways. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $3,143.

Amount of the penalty proposed by the parties: $308.

Citation Number 8116759 **75.512**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that the door to the starting box, used to supply 480 volts to the #4-B belt head, was closed, but simply did not have a lock. It further argues that there was no methane in any areas of the working section as supported by the examination reports. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $3,143.

Amount of the penalty proposed by the parties: $1,864.

Citation Number 8122282 **75.1731(b)**

Basis of compromise of penalty: Fact of violation.

The Respondent would present evidence at hearing that this citation is duplicative of Citation Number 8122280 because both enforcement actions addressed the same condition and required the same action to abate. It further argues that aligning the 5a belt cured the cited condition. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $807.

Amount of the penalty proposed by the parties: $307.

Citation Number 8122290 **75.517**

Basis of compromise of penalty: Negligence.

At hearing, the Respondent would present evidence that the bare red lead wire on the 480-volt power cable on the #58 scoop charger had likely occurred since the previous electrical examination. Therefore, it argues that the level of negligence is mischaracterized and should be modified to "low negligence," with a corresponding penalty reduction.

The Secretary, in reply to the Respondent's statements and contentions, states that she recognizes that they raise factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. Therefore, she agrees to modify this citation to "low negligence," and to accept a reduced penalty.

Amount of the penalty proposed by the Secretary: $946.

Amount of the penalty agreed on by the parties: $446.

Citation Number 8127167 **75.333(h)**

Basis of compromise of penalty: Gravity.

The Respondent would present evidence at hearing that the small holes in the stoppings on the left side return of the 9 south belt line had no effect on the mine ventilation. Therefore, it argues that this citation should be modified to reflect a characterization of this violation as "not significant and substantial" and that the proposed penalty should be reduced in light of this characterization.

The Secretary recognizes that Respondent has raised factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary has decided to remove the S&S designation from this citation, and believes that removal of the S&S designation here is consistent with her enforcement responsibility under the Mine Act. Further, the Secretary agrees to modify the citation to "unlikely" and to accept a reduced penalty.

Amount of the penalty proposed by the Office of Assessments: $2,901.

Amount of the penalty proposed by the parties: $1,623.

VIII

Each party agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding including, but not limited to, attorney fees and costs which may be available under the Equal Access to Justice Act, as amended.

IX

It is the parties' belief that approval of this settlement is in the public interest and will further the intent and purpose of the Federal Mine Safety and Health Act, as amended.

Therefore, the parties request that this Motion be granted and that an order approving settlement and directing payment, according to the parties' agreement, be issued.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

STANLEY E. KEEN
Regional Solicitor

CHRISTIAN P. BARBER
Supervisory Trial Attorney

/s/ Patrick W. Dennison
PATRICK W. DENNISON
Attorney

Rockspring Development Inc.
Attorney for Respondent

/s/ J. Malia Lawson
J. MALIA LAWSON
Attorney

U.S. Department of Labor
Attorneys for the Secretary

Settlement Example 3

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004-1710
Telephone: (202) 434-9971/ Fax: (202) 434-9949

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2010-468
Petitioner	:	A.C. No. 46-08885-202527
v.	:	
	:	Mine: Poplar Ridge No. 1 Deep Mine
	:	
BROOKS RUN MINING CO., LLC,	:	
Respondent	:	
	:	

ORDER APPROVING SETTLEMENT

Before: Judge Moran

These cases are before the Court upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"). The Secretary has filed a Motion for Decision and Order Approving Settlement to which Respondent has agreed. The Court has considered the six statutory civil penalty criteria contained at § 110(i) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 820(i), and finds that the proposed penalty amount is appropriate. It is hereby ORDERED that:

1. The citations and orders involved in these cases are affirmed, modified, or vacated as follows:

Citation No. 8089450 was issued to the Respondent on October 20, 2009 and alleged a violation of 30 C.F.R. § 75.517 and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that one person was affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $499.00. The Respondent contends that the likelihood of injury and level of negligence alleged are excessive, and states that at hearing it would present evidence that the individual leads of the allegedly damaged cable were insulated, that there was no damage to the inner power or ground conductors and that the condition had existed for only a short time and would have been discovered during the next examination. In light of the contested evidence, the Secretary has agreed to modify the likelihood from "reasonably likely" to unlikely," to modify the citation from "significant and substantial" to not significant and substantial," to modify the negligence from "moderate" to "low," and to reduce the penalty to $275.00.

Citation No. 8089451 was issued to the Respondent on October 22, 2009 and alleged a violation of 30 C.F.R. § 75.220(a)(1) and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that two persons were affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $540.00. The Respondent contends that the likelihood of injury alleged is excessive, and states that at hearing it would present evidence that the roof in the cited entry was too high for the automated temporary roof support system to effectively control the roof, the roof conditions were good and the top was solid, stable and secure and that any roof sloughage was addressed by the installation of "pizza pans" and 6-foot torque tension bolts. The parties agree that this citation will remain as issued with no modifications, but in light of the contested evidence, the Secretary has agreed to reduce the penalty to $475.00.

Citation No. 8089453 was issued to the Respondent on October 22, 2009 and alleged a violation of 30 C.F.R. § 75.1101-2 and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was unlikely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was not significant and substantial; that eight persons were affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $285.00. The Respondent contends that the level of negligence and the number of persons alleged to have been affected are excessive, and states that at hearing it would present evidence that the deluge-type fire suppression system only provided substantial protection, covering 42 of the 50 feet of conveyor belt that it was supposed to cover, and that air flowed outby across the belt and therefore only one supply man and one belt man would have been affected. In light of the contested evidence, the Secretary has agreed to modify the negligence from "moderate" to "low," to modify the number of persons affected from "eight" to "two," and to reduce the penalty to $100.00.

Citation No. 8071617 was issued to the Respondent on October 23, 2009 and alleged a violation of 30 C.F.R. § 75.1914(h)(1) and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was unlikely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was not significant and substantial; that eight persons were affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $285.00. The parties agree that this citation will remain as issued with no modifications. Accordingly, the Respondent has agreed to pay the proposed penalty of $285.00.

Citation No. 8089455 was issued to the Respondent on October 30, 2009 and alleged a violation of 30 C.F.R. § 77.400(a) and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that one person was affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $499.00. The Respondent contends that the likelihood of injury alleged is excessive, and states that at hearing it would present evidence that visibility and lighting were good and that there were no tripping hazards along the walkway where the cited roller was located, and that the mine

had chained off the area around the walkway to prevent miners from coming into contact with the roller. In light of the contested evidence, the Secretary has agreed to modify the likelihood from "reasonably likely" to unlikely," to modify the citation from "significant and substantial" to not significant and substantial," and to reduce the penalty to $300.00.

Citation No. 8089456 was issued to the Respondent on November 4, 2009 and alleged a violation of 30 C.F.R. § 75.370(a)(1) and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was unlikely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was not significant and substantial; that ten persons were affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $392.00. The Respondent contends that the level of negligence alleged is excessive, and states that at hearing it would present evidence that the alleged reverse in the direction of airflow had resulted, unbeknownst to mine management, from recent adjustments to the ventilation controls that accompanied a move to a new section and simply had not yet been corrected. In light of the contested evidence, the Secretary has agreed to modify the negligence from "moderate" to "low," and to reduce the penalty to $250.00.

Citation No. 8089458 was issued to the Respondent on November 4, 2009 and alleged a violation of 30 C.F.R. § 75.1502 and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was unlikely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was not significant and substantial; that ten persons were affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $392.00. The Respondent contends that the level of negligence alleged is excessive, and states that at hearing it would present evidence that the alleged condition -- inadequate volume of the automatic fire sensor and warning device system -- had not existed during the most recent weekly examination. The parties agree that this citation will remain as issued with no modifications, but in light of the contested evidence, the Secretary has agreed to reduce the penalty to $325.

Citation No. 8089459 was issued to the Respondent on November 6, 2009 and alleged a violation of 30 C.F.R. § 75.517 and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that one person was affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $499.00. The Respondent contends that the level of negligence alleged is excessive, and states that at hearing it would present evidence that the alleged condition -- damaged outer jackets of cables -- did not exist at the time of the last weekly examination and that the cable's ground fault wire was working properly. In light of the contested evidence, the Secretary has agreed to modify the negligence from "moderate" to "low," and to reduce the penalty to $300.00.

Citation/Order No.	Assessment Amount	Settlement Amount
8089450	$499.00	$275.00
8089451	$540.00	$475.00
8089453	$285.00	$100.00
8071617	$285.00	$285.00
8089455	$499.00	$300.00
8089456	$392.00	$250.00
8089458	$392.00	$325.00
8089459	$499.00	$300.00
Totals	**$3,391.00**	**$2,310.00**

2. The proposed penalty amounts are reasonable given the circumstances surrounding the violations.

3. The criteria set forth at Section 110(i) of the Act have been considered and the penalties are appropriate in light of these criteria and promote the purposes of the Act. The gravity of the violations and the operator's alleged negligence are set forth above. The violations were abated in good faith. Information pertaining to the operator's history of previous violations and size are contained in Exhibit A which was filed by the Secretary along with the petition in this matter. Payment of the proposed penalties will not adversely affect the operator's ability to continue in business.

4. Each party agrees to bear its own attorney's fees, costs and other expenses incurred by such party in connection with any stage of the above-referenced proceeding including but not limited to, attorney's fees and costs which may be available under the Equal Access to Justice Act, as amended.

5. Within 30 days of the date of this Order, Respondent shall send a check in the amount of $2,310.00, made payable to "U.S. Department of Labor/MSHA" to P.O. Box 790390, St. Louis, MO 63179-0390.

William B. Moran

William B. Moran
Administrative Law Judge

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/cts