

JUNE 28, 2018 | MSHA INSPECTIONS, CITATIONS & ENFORCEMENT

MSHA and FMSHRC ALJ Still At Odds Over Settlement Approval

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On May 9, commissioners at the Federal Mine Safety and Health Review Commission (FMSHRC) once again heard the case *Secretary of Labor (MSHA) vs. American Coal Co.*, in which the Secretary of Labor has fought an administrative law judge (ALJ) at the Commission for years over a planned settlement with the coal operator. This is a key issue for mining operators who want to reach settlements rather than trying to challenge alleged violations before the FMSHRC, and this is the second time the case made its way before the Commission. ([See our previous post regarding the litigation history of MSHA v. American Coal Co.](#))

At issue is interpreting [Section 110\(k\) of the Mine Act](#), which states that no penalty which has been issued under the Act "shall be compromised, mitigated, or settled except with the approval of the Commission." The section also provides 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." 

In the American Coal case, the Commission ALJ earlier insisted the Secretary of Labor furnish detailed information regarding the basis of a settlement with American Coal that would result in an across-the-board penalty reduction of 30 percent. However, the Secretary has argued in various briefs and motions before the Commission that disclosing such information could compromise its case if it ever went to court.

The judge consistently rejected such arguments, calling them speculation and questioning how concerns about litigation evolved into a 30 percent across-the-board cut in penalties. The settlement reduced penalties on 32 citations, but the Secretary argued because all violations are admitted, it is an effective settlement from an enforcement point of view.

According to the ALJ, allowing DOL/MSHA and the coal company to settle, without having to provide more evidence reinforcing the 30 percent reduction, would "neuter" the commission's authority under Section 110(k) to approve or deny settlements.

United Mine Workers, which upon review raised concerns about the total amount of penalty reduction, has filed briefs with the Commission backing the ALJ's position.

The DOL counsel argued that not only is some of the information regarding the penalty reductions privileged, but

that reviewing those details actually runs “*substantial risk*” that the court could further reduce the degree of negligence or gravity with respect to 14 of the 32 citations.

But, according to an [order by the ALJ last year](#) that denied the Secretary’s motion for interlocutory review (an interim appeal of the case), Section 110(k) in plain language gives the Commission full authority to approve or deny MSHA settlements.

The Judge said a “*one-size-fits-all*” 30 percent reduction is “*not likely to be satisfactory, because each violation is fact-specific*” and that is why the commission earlier said substantive facts must be provided. The judge said that “*even if plausible facts were presented and the Secretary admitted that those facts presented genuine disputes, it would be highly questionable if, through some magic, each citation ended up with an odds-defying 30% reduction.*”

Often in these cases the Commission’s authority to review makes little difference. In oral arguments at the Commission on May 9, one member noted that in recent years almost all settlements presented to the Commission ALJ’s received approval. The Commissioners also added that while across the board penalty reductions may require closer review to ensure safety and health (and the deterrent effect of the penalty) are not being disregarded, such settlements should not be expressly be denied.

Per a [June 15 order](#), the Commission approved the settlement following the submission of an Amended Joint Motion to Approve Settlement rather than remand the matter to the ALJ again. In the amended motion, the Secretary provided “*substantive explanations*” as to penalty modification and “*why it would not be in the public interest to litigate certain issues in the context of this case.*” This motion ends the long running push and pull between the two government agencies, while also granting the operator approval to conclude a case it agreed to settle years ago.

This is an eye-opening case for mining companies that thought agreeing to terms with MSHA marked the end of litigation. While that may be the instance most of the time, we likely have not seen the end of this power struggle between the Commission and Secretary of Labor.