

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

1331 Pennsylvania Avenue, NW, Suite 520N  
Washington, DC 20004-1710  
Phone: (202) 434-9933 | Fax: (202) 434-9949

March 8, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2015-0036
Petitioner,	:	A.C. No. 46-01318-361663
v.	:	
	:	
CONSOLIDATION COAL CO.,	:	Mine: Robinson Run No. 95
Respondent.	:	

**DECISION APPROVING SETTLEMENT**

Before: Judge Moran

This case is 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 Secretary has filed a motion to approve settlement. The originally assessed amount was \$68,550.00, and the proposed settlement is for \$48,000.00. The Secretary has stated that Citation No. 8058726 is vacated. The Secretary's discretion to vacate a citation or order is not subject to review. *RBK Contr. Inc.*, 15 FMSHRC 2099 (Oct. 1993). The Secretary also requests that several citations be modified, as indicated in the table below.

The Court has considered the representations submitted in this case and concludes that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

The settlement amounts are as follows:

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement Amount</u>
8056133	\$2,282.00	\$687.00
8056135	\$1,304.00	\$1,031.00
8056136	\$1,944.00	\$1,689.00
8058691	\$5,080.00	\$3,105.00
8058695	\$5,080.00	\$3,105.00
8060023	\$2,282.00	\$2,282.00
8060024	\$2,282.00	\$1,823.00
8056421	\$1,530.00	\$687.00
8058726	\$1,944.00	vacated
8058698	\$2,106.00	\$1,100.00
8058699	\$2,106.00	\$1,100.00
8058700	\$2,106.00	\$1,100.00
8058701	\$1,203.00	\$1,203.00
8058729	\$1,412.00	\$1,412.00
8058703	\$1,412.00	\$1,412.00
8056597	\$2,678.00	\$2,012.00
8058706	\$5,080.00	\$4,105.00
8058707	\$1,795.00	\$1,795.00
8058708	\$1,026.00	\$1,026.00
8058709	\$2,106.00	\$1,100.00
8058743	\$3,405.00	\$1,563.00
8058710	\$2,106.00	\$1,100.00
8058749	\$2,106.00	\$2,106.00
8058750	\$1,026.00	\$1,026.00
8058711	\$1,795.00	\$1,795.00
8058599	\$1,026.00	\$1,026.00
8058600	\$1,412.00	\$1,412.00
8058865	\$3,405.00	\$687.00
8058766	\$2,106.00	\$2,106.00
8058768	\$3,405.00	\$3,405.00
<b>TOTAL:</b>	<b>\$68,550.00</b>	<b>\$48,000.00</b>

The Secretary presents the following bases for the proposed reductions and modifications in this case:

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
8056133 <sup>1</sup>	75.400  Accumulation of combustible materials.	S&S, Reasonably Likely, Lost Work Days/ Restricted Duty, 4 Affected; Moderate	\$2,282.00	\$687.00	Modify to low negligence, 1 affected  Respondent would present evidence that the cited conditions developed after the most recent pre-shift examination and existed for less than one shift. Additionally, any smoke generated from a fire would ventilate to the return thereby reducing the number of miners affected. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.

---

<sup>1</sup> The citation asserted that, “Coal accumulations in the form of loose coal, coal fines and coal dust exist at the 21- A Longwall Section (084-0 MMU) Tailpiece. 1). Measured coal accumulations on the ‘walk side’ of the Tailpiece range from 10 inches deep, with ‘wear marks’ from the belt making contact with the coal, up to 18 inches deep at the Tail Roller. 2) . [sic] Measured coal accumulations on the ‘offside’ of the Tailpiece range from 6 inches deep to 14 inches deep, with ‘wear marks’ from the belt making contact with the coal. At the Tail roller the measured coal is 36 inches deep, with the Tail Roller grinding up coal into a fine coal and coal dust. This section operated on Day Shift and Afternoon Shift mined 85 Shields. Standard 75.400 was cited 148 times in two years...” In the Secretary’s motion, supporting a 70% proposed penalty reduction, he states in part that the Respondent “would present evidence that the cited conditions developed after the most recent pre-shift examination and existed for less than one shift.”

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
8056135 <sup>2</sup>	72.630(b)  Drill dust control at underground areas of underground mines.	S&S, Reasonably Likely, Permanently Disabling, 1 Affected; Moderate	\$1,304.00	\$1,031.00	Modify to low negligence  Respondent would present evidence that the cited condition was more difficult to detect than initially considered. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8056136 <sup>3</sup>	75.400  Accumulation of combustible materials.	S&S, Reasonably Likely, Lost Work Days/ Restricted Duty, 3 Affected; Moderate	\$1,944.00	\$1,689.00	Modify to 1 affected  Respondent would present evidence that any smoke generated from a fire caused by the cited conditions would ventilate to the return thereby reducing the number of miners affected. Based on this and the risks inherent in proceeding to

<sup>2</sup> The citation asserted that, “The Dust Collection System for the Fletcher Roof Bolter (Approval # 2G-2674A-5, Serial # 8804/2011315) operating on 21-A Longwall Section (084-0 MMU), is not maintained in a permissible and operating condition. When this Roof Bolter was checked by this Inspector, at #2 Entry to #1 Entry, #29 Block, the following conditions existed: 1). The front dust collection hose (connected to the front drill head) has a measured 1 1/8 inch by 3/4inch hole, covered up by electrical tape. 2). A measured 1 inch of white fine dust is found behind the filter media (dust filter), which has the clean side of the dust collection system contaminated. A sample of this white fine dust is being sent to the MSHA Laboratory in Pittsburgh, Pa. for Quartz Analysis...” The Secretary’s motion stated in part, “Respondent would present evidence that the cited condition was more difficult to detect than initially considered.”

<sup>3</sup> This citation asserted, “Combustible Material in the form of loose coal and fine coal has been allowed to accumulate at the 21-A Longwall (084-0 MMU) Tailpiece. 1). Coal grinded up into small fine coal exists at the Tail roller measuring 78 inches long by 24 inches deep by 18 inches wide, making contact with the Tail roller. 2). At the outby end of the Tail Piece, where the V-Plow is, the coal accumulations measured 7 feet long by 14 inches deep to 24 inches deep by 24 inches wide making contact with the belt. *This is the third time, that this Inspector has cited this condition at the 21-A Longwall Section Tailpiece during this inspection Quarter...*” (emphasis added). The Secretary’s motion stated in part, “Respondent would present evidence that any smoke generated from a fire caused by the cited conditions would ventilate to the return thereby reducing the number of miners affected.” The inspection amended his findings to unlikely and non-S&S, and the initially assessed penalty of \$1,944.00 was derived from those amended findings.

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
					hearing, the Secretary agreed to the above modifications and reduction in penalty.
8058691 <sup>4</sup>	75.517  Power wires and cables; insulation and protection.	S&S, Reasonably Likely, Fatal, 1 Affected; Moderate	\$5,080.00	\$3,105.00	Modify to low negligence  Respondent would present evidence that, due to the location of the cited condition, it was more difficult to observe than initially considered. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8058695	75.517  Power wires and cables; insulation and protection.	S&S, Reasonably Likely, Fatal, 1 Affected; Moderate	\$5,080.00	\$3,105.00	Modify to low negligence  Respondent would present evidence that, due to the size and location of the cited condition, it was more difficult to observe than initially considered. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.

<sup>4</sup> The citation asserted, “The trailing cable supplying power to the Co. #6170 Joy 14ED25 (S/N JM6170) continuous miner being operated on the 1E, 040-0 MMU, working section, is not insulated adequately and fully protected. There is a gap between a *taped splice* and the outer jacket measuring 3" by 3/4, exposing the inner energized leads” (emphasis added). In support of the proposed 39% penalty reduction, the Secretary stated in part, “Respondent would present evidence that, due to the location of the cited condition, it was more difficult to observe than initially considered.”

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
8060024	75.517  Power wires and cables; insulation and protection.	S&S, Reasonably Likely, Permanently Disabling, 1 Affected; Moderate	\$2,282.00	\$1,823.00	Modify to low negligence  Respondent would present evidence that the cited condition developed after the most recent electrical examination and was not readily observable. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty. <sup>5</sup>
8056421 <sup>6</sup>	75.202(a)  Protection from falls of roof, face and ribs.	S&S, Reasonably Likely, Lost Work Days/ Restricted Duty, 1 Affected; Moderate	\$1,530.00	\$687.00	Modify to low negligence  Respondent would present evidence that the cited conditions developed after the most recent weekly examination of the area, and that miners rarely travel in this

<sup>5</sup> In considering this rationale, the Court assumes that the Secretary considered the inspector's notes.

<sup>6</sup> This citation alleged violations spanning *several areas*: "The ribs where miners work or travel was not adequately supported or otherwise controlled in the following locations in the #3 entry of the 21-A section: 1) No. 42-44 crosscut, the rib was gapped 1-3 inches from the solid rib. The ribs (36 inches long, 24 inches wide, and 3 inches thick; 32 inches long, 25 inches wide and 3 inches thick and 18 feet long, 25 inches wide and 3-4 inches thick) were pryed down. 2) No. 44-46 crosscut, a piece of rib (43 inches long by 50 inches wide and 2 inches thick) was gapped 2-3 inches from the solid rib. 3) No. 46-48 crosscut, the rib was gapped 3-4 inches from the solid rib. A piece 6 feet long by 31 inches wide and 5 inches thick was pryed down. 4) No. 50 crosscut, a piece of rib 29 inches long by 18 inches wide and 6 inches thick was gapped from the solid rib 1-3 inches. 5) No. 56-58 crosscut, a piece of rib 47 inches long by 50 inches wide and 3 inches thick was gapped from the solid rib 2-3 inches. 6) No. 62-64 crosscut, a piece 72 inches long by 54 inches wide and 3 inches thick was gapped from the solid rib 2-3 inches. 7) No. 74-76 crosscut, a piece of rib 40 inches long by 31 inches wide and up to 4 inches thick was gapped 2-3 inches from the solid rib. 8) No. 76-78 crosscut, a piece of rib 48 inches long by 31 inches wide and 4 inches thick was gapped from the solid rib 1-3 inches. 9) No. 76-78 crosscut, a piece a rib 70 inches long by 28 inches wide and 6 inches thick was gapped 2- 3 inches from the solid rib." The Secretary's motion stated in part, "Respondent would present evidence that the cited conditions developed after the most recent weekly examination of the area, and that miners rarely travel in this location." The Court notes that neither document indicates how much time passed between the most recent examination and the inspection.

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
					location. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8058698	75.403  Maintenance of incombustible content of rock dust.	Non-S&S, Unlikely, Fatal, 8 Affected; Moderate	\$2,106.00	\$1,100.00	Modify to low negligence, lost work/restricted duty, 2 affected  Respondent would present evidence that the cited conditions were not visible to the unaided eye as the incombustible content of the two samples was no more than 0.3% less than the required 80%. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8058699	75.403  Maintenance of incombustible content of rock dust.	Non-S&S, Unlikely, Fatal, 8 Affected; Moderate	\$2,106.00	\$1,100.00	Modify to low negligence, lost work/restricted duty, 2 affected  Respondent would present evidence that the cited conditions were not visible to the unaided eye as the incombustible content of the sample was no more than 0.9% less than the required 80%. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
8058700	75.403  Maintenance of incombustible content of rock dust.	Non-S&S, Unlikely, Fatal, 8 Affected; Moderate	\$2,106.00	\$1,100.00	Modify to low negligence, lost work/restricted duty, 2 affected Respondent would present evidence that the cited conditions were not visible to the unaided eye as the incombustible content of the sample was no more than 1.2% less than the required 80%. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8056597	75.380(d)(7)(vi)  Escapeways; bituminous and lignite mines.	Non-S&S, Unlikely, Fatal, 10 Affected; Moderate	\$2,678.00	\$2,012.00	Modify to lost work/restricted duty  Respondent would present evidence that the injuries expected would be of the lost work/restricted duty variety from short delays in escaping in an emergency. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.



Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
8058706 <sup>7</sup>	75.517  Power wires and cables; insulation and protection.	S&S, Reasonably Likely, Fatal, 1 Affected; Moderate	\$5,080.00	\$4,105.00	Modify to low negligence  Respondent would present evidence that, due to the size and location of the cited condition, it was more difficult to observe than initially considered. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.
8058709	75.403  Maintenance of incombustible content of rock dust.	Non-S&S, Unlikely, Fatal, 8 Affected; Moderate	\$2,106.00	\$1,100.00	Modify to low negligence, lost work/restricted duty, 2 affected  Respondent would present evidence that the cited conditions were difficult to detect as the incombustible content of the samples were between 0.2% and 7.8% less than the required 80%. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.

<sup>7</sup> The citation alleged, “The trailing cable supplying power to the Co. #84 Joy shuttle car being operated on the Tail Gate E, 088-0 MMU, working section, is not insulated adequately and fully protected, in that [the] tape on the end of a 13” splice is rolled back exposing the energized inner leads. The opening measures 1” by 1/8”. Outer jackets shall be replaced in such manner as to prevent moisture from entering the cable. [Assuming] normal mining were to continue and the condition [were] left unabated, it is reasonably likely a miner would receive fatal injuries due to electrocution.” The Secretary’s motion stated in part, “Respondent would present evidence that, due to the size and location of the cited condition, it was more difficult to observe than initially considered.”

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
8058743	75.1505(a)  Escapeway maps.	S&S, Reasonably Likely, Fatal, 1 Affected; Moderate	\$3,405.00	\$1,563.00	Modify to lost work/restricted duty  Respondent would present evidence that the injuries expected would be of the lost work/restricted duty variety from short delays in escaping in an emergency. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty. <sup>8</sup>
8058710	75.403  Maintenance of incombustible content of rock dust.	Non-S&S, Unlikely, Fatal, 8 Affected; Moderate	\$2,106.00	\$1,100.00	Modify to low negligence, lost work/restricted duty, 2 affected  Respondent would present evidence that the cited conditions were difficult to detect as the incombustible content of the samples was only 2.2% less than the required 80%. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.

---

<sup>8</sup> The Court assumes that the Secretary considered the distance between the #6 block and the #4 block when proposing the 54% reduction in penalty amount. No filings submitted contain information on this point.

Citation No.	30 C.F.R. §	Gravity & Negligence	Penalty Assessed	Settlement	Rationale
8058865 <sup>9</sup>	75.360(a)(1)  Preshift examination at fixed intervals.	S&S, Reasonably Likely, Lost Work Days/ Restricted Duty, 1 Affected; High	\$3,405.00	\$687.00	Modify to unlikely, non-S&S  Respondent would present evidence that the most of the underlying conditions leading to the examination violation were unlikely to cause injury. Based on this and the risks inherent in proceeding to hearing, the Secretary agreed to the above modifications and reduction in penalty.

**WHEREFORE**, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation No. 8056133 be **MODIFIED** to low negligence and to 1 person affected.

It is **ORDERED** that Citation Nos. 8056135, 8058691, 8058695, 8060024, 8056421, and 8058706 be **MODIFIED** to low negligence.

It is **ORDERED** that Citation No. 8056136 be **MODIFIED** to 1 person affected.

It is **ORDERED** that Citation Nos. 8058698, 8058599, 8058700, 8058709, and 8058710 be **MODIFIED** to 2 persons affected, low negligence, and to lost work/restricted duty.

It is **ORDERED** that Citation Nos. 8056597 and 8058743 be **MODIFIED** to lost work/restricted duty.

---

<sup>9</sup> The citation alleged, “An inadequate examination has been conducted for the oncoming afternoon shift on the Tailgate E continuous miner section (088-0 mmu). The following conditions existed at the start of the oncoming shift as cited in violation numbers 8058599, 8058600, 8058861. A scoop has been parked under the lifeline at the end of the track limiting the width of the escapeway to 22”. Combustible material in the form of coal fines and lump coal has accumulated under and along side the conveyor belt from 62 block to 66 block. Combustible material is present in the #1 entry in by the feeder, in the #1 to #2 cross-cut at 67 block and in the #1 to #2 cross-cut at 68 block. The accumulations are obvious and extensive. A hole is present in the ventilation control between the belt entry and haulage intake escapeway at 62 block. None of the cited conditions have been listed in the pre-shift record book. There has been no production on the section since afternoon shift on 8/7/2014.” In support of the proposed 80% reduction in the proposed penalty amount, the Secretary’s motion stated in part, “Respondent would present evidence that the *most* of the underlying conditions leading to the examination violation were unlikely to cause injury” (emphasis added). The citation was issued at 6:30 p.m. on August 8, 2014.

It is **ORDERED** that Citation No. 8058865 be **MODIFIED** to unlikely and non-S&S.

It is further **ORDERED** that Respondent pay a penalty of \$48,000.00 within 30 days of this order.<sup>10</sup> Upon receipt of payment, this case is **DISMISSED**.

*William B. Moran*

William B. Moran  
Administrative Law Judge

Distribution:

Ryan M. Kooi, Esq., Office of the Regional Solicitor, The Curtis Center, 170 S. Independence Mall West, Suite 630 E, Philadelphia, PA 19106

Eric T. Frye, Esq., FLAHERTY SENSABAUGH BONASSO PLLC, 200 Capitol Street, Charleston, WV 25338-3843

/KP

---

<sup>10</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390