

**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

June 2, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2016-0729
Petitioner,	:	A.C. No. 02-01049-416209
v.	:	
	:	
PINTO VALLEY MINING CORP.,	:	Mine: Pinto Valley Mine
Respondent.	:	

**DECISION DENYING 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 (“Mine Act” or “Act”). On April 25, 2017, the Secretary filed a motion to approve settlement (“Secretary’s motion” or “Motion”).

The Court has considered the representations submitted in this case and, applying section 110(k) of the Act, finds the proffered settlement wanting. Two citations are problematic.<sup>1</sup> The two citations for which insufficient information was provided are Citation Nos. 9302206 and 8934146.

Regarding Citation No. 9302206, a section 104(a) citation alleging a violation of 30 C.F.R. § 56.9300(a), the inspector related,

SX Non potable and potable water service tank road access. The berm on the south side of the circular roadway has sloughed from wet weather leaving a section of road without a berm. Two traffic cones demarcating the slough have fallen over the edge. Truck tire tracks are approx.. **2 ft. from the edge**. The operator states **the road is accessed daily** by pick up [sic] truck for tank measurement. Should normal operations continue, persons would be exposed to an approx. **40 - 50 ft. rollover hazard down the hillside**.

Citation No. 9302206 (emphasis added).

---

<sup>1</sup> There are four citations at issue in this matter. Two are not discussed here: Citation Nos. 8934539 and 8934544, which the Respondent agreed to pay as assessed with no modification to either as part of the proposed settlement.

The Secretary's motion sought a 50% reduction in the penalty amount for this citation. Although the Respondent asserted plausible mitigating contentions, that "the cited condition was not likely to result in an injury because the cited location was wide and infrequently traveled, there is one truck in the area at a time, and it travels at only 5 mph," the Secretary offered no useful comment to those contentions. Motion at 2. Instead, the Secretary stated only that he "would have presented evidence *supporting the citation as written.*" *Id.* (emphasis added). The Secretary then continues, "nevertheless, without admitting that Respondent's arguments are relevant or persuasive, [he] agrees to modify the citation's gravity designations from Reasonably Likely to Unlikely and from Significant and Substantial ("S&S") to Non-S&S, and agrees to reduce the penalty from \$2,398.00 to \$1,200.00." Motion at 2-3.

Accordingly, the Secretary has provided absolutely nothing to support the reduction. To the contrary, the Secretary did not even concede that the Respondent presented *legitimate* issues of fact that can be resolved only by going to hearing. One needs to put this insufficient statement in further context by appreciating that the Secretary's offering, if it can be described as such, is his *fallback* position. The Secretary's initial position on settlements remains that he "has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above." Motion at 2.

It is only after announcing his primary position, that *the Secretary has determined how the Mine Act is best served through his settlement*, that he acknowledges that the Commission has issued a "recent decision" finding that the Commission's procedural rules require support for settlements.<sup>2</sup> *Id.* (emphasis added). In that context, the Secretary then "presents... information in support of the penalties agreed to by the parties." *Id.* Though the language suggests that "information in support of the penalties" will then be provided in the motion, the only mitigating factual assertions come from the Respondent, as the Secretary, with no congruity between the parties at all, simply announces that he "agrees to modify the citation's gravity designations from Reasonably Likely to Unlikely and from Significant and Substantial ("S&S") to Non-S&S, and agrees to reduce the penalty from \$2,398.00 to \$1,200.00." Motion at 3. Why the Secretary so agrees to the proposed changes is never explained. In fact, discordantly, the Secretary asserts that he would have presented evidence supporting the citation as was written, and does not admit that the reasons advanced by the Respondent are persuasive, or even relevant.

Simply stated, a settlement motion such as this cannot be approved when only the mine operator advances claimed mitigating factors and the Secretary offers no comment in support of such claims and exacerbates that shortcoming by taking matters a step further, denying that the claimed mitigating factors are persuasive or relevant.

---

<sup>2</sup> This presumably refers to *The American Coal Company*, which reaffirmed that Congress authorized the Commission to review in detail settlements of contested civil penalties before approving them. *The American Coal Co.*, 38 FMSHRC 1972 (Aug. 2016) (citing *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1862 (Aug. 2012)).

If one were to try to present such a motion mathematically, it might appear in this manner:

Mine operator's representations about facts that may mitigate a violation  
– Secretary failure to concede presence of genuine factual dispute regarding operator's representations + no additional information from the Secretary about those representations = invalid settlement.

For the other matter, Citation No. 8934146, the Secretary takes the same approach as he did in the previous citation, this time seeking a 28% penalty reduction. Though the penalty reduction is different, the playbook is the same. The citation alleges,

[a] ¾ inch water hose was strung out on the ground level pad on the North side of the Fine Ore Crushing building in front of the stairway to the Crusher Motor Level. The hose was elevated off the floor on one end and coiled up in a pile on the other side about three feet from the bottom of the steps to the Crusher Motor Level. This condition exposed workers accessing the stairway to a slip, fall hazard that could cause a serious injury.

Citation No. 8934146.

After making the condition sound less serious, describing it only as “a hose in front of a stairway,” the Secretary's Motion states, the “Respondent would have argued at hearing for modification of the citation's gravity designations because, Respondent argues, the hose was easily visible and did not present a tripping hazard.” Motion at 3. The Court observes that these are plausible reasons to support a reduced penalty and changes to the gravity determinations listed by the issuing inspector. However, as just noted, hearing only from one side is insufficient in matters of proposed settlements. Indeed, the idea behind a settlement often is that the parties acknowledge some legitimate disputes about the facts. This means that the Court must hear from both sides. Yet, employing his formulaic response, the Secretary again only recites his routine statement that he “would have presented evidence supporting the citation *as written.*” *Id.* (emphasis added). Then, as before, the Secretary continues that, “nevertheless, without admitting that Respondent's arguments are relevant or persuasive, [he] agrees to modify the citation's gravity designations from Reasonably Likely to Unlikely and from S&S to Non-S&S, and agrees to reduce the penalty from \$722.00 to \$520.00.” *Id.* As there is no explanation provided by the Secretary for the gravity modifications, nor for the penalty reduction, this proposed settlement is also inadequately supported.

**WHEREFORE**, the motion for approval of settlement, being deficient, is **DENIED**. This matter must now be set for hearing.<sup>3</sup>

*William B. Moran*

William B. Moran  
Administrative Law Judge

Distribution:

Ryan L. Pardue, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 216, Denver, Colorado 80204

Donna V. Pryor, Esq., Husch Blackwell LLP, 1801 Wewatta Street, Suite 1000, Denver, Colorado 80202

---

<sup>3</sup> Setting a matter for hearing does not foreclose the parties' option to submit a new, adequately supported motion for approval of settlement. However, this possibility is an insufficient basis to postpone establishing a hearing date.