

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

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December 27, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2017-0118
Petitioner,	:	A.C. No. 15-18198-426021
v.	:	
	:	
REVELATION ENERGY, LLC,	:	Mine: D-11 Panther
Respondent.	:	

DECISION DENYING SETTLEMENT MOTION

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”) The parties have filed a joint motion to approve settlement. The originally assessed amount was \$2,665.00, and the proposed settlement is for \$2,265.00, a 15% reduction.

The provision cited in the section 104(a) citation is from the Mine Act, 30 U.S.C. § 876(b)(2)(F)(ii). Section 876 speaks generally to the requirement that there be “Telephone service or equivalent two-way communication facilities, approved by the Secretary or his authorized representative, shall be provided between the surface and each landing of main shafts and slopes and between the surface and each working section of any coal mine that is more than one hundred feet from a portal.” The particular cited subsection, addressing “Accident preparedness and response, provides at (b)(2)(A) that “Not later than 60 days after June 15, 2006, each underground coal mine operator shall develop and adopt a written accident response plan that complies with this subsection with respect to each mine of the operator, and periodically update such plans to reflect changes in operations in the mine, advances in technology, or other relevant considerations. Each such operator shall make the accident response plan available to the miners and the miners’ representatives.” As for subsection (F)(ii), while (F) deals with “Plan content-specific requirements,” (ii) speaks to Post accident communications and requires

Not later than 3 years after June 15, 2006, a plan shall, to be approved, provide for post accident communication between underground and surface personnel via a wireless two-way medium, and provide for an electronic tracking system permitting surface personnel to determine the location of any persons trapped underground or set forth within the plan the reasons such provisions can not be adopted. Where such plan sets forth the reasons such provisions can not be adopted, the plan shall also set forth the operator’s alternative means of compliance. Such alternative shall approximate, as closely as possible, the degree

of functional utility and safety protection provided by the wireless two-way medium and tracking system referred to in this subpart.

30 U.S.C. § 876 (b)(2)(F)(ii).

Keeping this statutory provision in mind, it is noted that the issuing inspector was quite precise in listing 8 (eight) separate deficiencies:

The operator has failed to follow his approved Emergency response plan approved 10/15/2015. When checked the operator has failed to maintain the AMR MN -6000 mine wide tracking and communication system for this mine fully functional at all times when miners are underground. The following deficiencies are observed. (1) 3 miners one third shift and two day shift are not being tracked at all by the system or manually (2) 5 tracking pads located on the 004 MMU are showing dead no communication (3) The pad for the 004 MMU refuge alternative is showing dead no communication (4) The data repeater located in the intake at #10 belt drive is showing dead no communication this means only the roadway branch alternate escapeway is functioning inby this point so there is no redundancy for the system. (5) only 3 text pagers can be found in use that had enough charge left in the batteries to send and receive a text message. These pagers should last 12 hours.(6) The operator do[esn't] have any spare tracking tags or text pagers for visitors at this mine.(7) The operator do[esn't] have a current record of the weekly examinations of the system (8) The operator has no record of system or component failures or immediate corrective actions taken for these failures. This condition exposes miners required to work in this mine to delayed rescue and escape in the event of a mine disaster. The operator immediately began manually tracking miners in the affected areas and started making repairs to the system.

Citation No. 8383648.

The *entirety* of the Secretary's Motion provides:

Basis of compromise: This citation was issued for a failure to follow the approved emergency response plan with regard tracking and communication. Respondent contends that it would present evidence that only some equipment was nonfunctional and therefore not all 19 persons on the section would be affected. The Secretary does not necessarily agree with the Respondent's position, but the Secretary recognizes a legitimate factual and legal dispute and believes that settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act. Therefore, the Secretary agrees to accept a reduced monetary penalty for this violation.

Motion at 3.

While the Secretary simultaneously asserts that he “does not necessarily agree with the Respondent’s position,” he states that he “recognizes a legitimate factual and legal dispute and believes that settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act.” The problem with the Secretary’s response is twofold. First, while the mine operator contends that “only some equipment was nonfunctional,” the citation does not assert otherwise. Beyond that, the motion does not identify the equipment which was functional and how that would impact, if at all, the equipment identified by the inspector as not being maintained. Second, the Secretary does not inform the factual dispute as to the number of people who would be affected; “not all 19 persons” could mean 18 or some other number. In this regard it is noted that the Part 100 “number of persons potentially affected” Table provides for 18 penalty points if the number of persons is 10 or more. Even if the number were, for example, 9, the penalty points allotted would be 16 and the motion, beyond not claiming what the contended reduced number is, does not inform how that number would translate to a penalty reduction.

The Court recognizes that the penalty reduction is modest, but as it has explained before, Commission approval under section 110(k) is not simply about dollars. In this instance, the Secretary has merely regurgitated the Respondent’s contention that it “would present evidence that only some equipment was nonfunctional and therefore not all 19 persons on the section would be affected.” Motion at 3. However, the Secretary, upon informing that he “does not necessarily agree with the Respondent’s position,” puts forth two reasons in support of the reduction. First, he advises that he “recognizes a legitimate factual and legal dispute,” but without identifying what the factual dispute is, nor explaining how it would impact the penalty. *Id.* The second offering to justify the settlement, that the Secretary “believes that settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act,” is a nullity because it is meaningless in the context of a section 110(k) settlement approval and merely another way of echoing his initial stance that the Secretary knows best in settlements, and need not provide the Commission with a substantive factual basis for the motion.¹

¹ “In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to and even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all alleged violations are resolved and violations that are accepted can be used as a basis for future enforcement actions. A resolution of this matter in which all violations are resolved is of significant value to the Secretary and advances the purposes of the Act.” Motion at 2.

Accordingly, the parties are directed to either submit an amended motion providing the needed information, as explained above, or to prepare for a hearing. The parties are directed to advise the Court within 10 (ten) days of their intentions.

William B. Moran
William B. Moran
Administrative Law Judge

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