

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9933 / Fax 202-434-9949

March 16, 2023

SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),  
Petitioner

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2022-0489  
AC No. 46-08878-557759

v.

POCAHONTAS COAL COMPANY LLC,  
Respondent

Mine: Affinity Mine

**DECISION APPROVING SETTLEMENT**

Before: Judge William 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 the Motion to Approve Settlement of the citations involved in this matter. The parties move to modify and reduce the assessed penalty of one citation, as stated below. The overall penalty will be reduced from original assessed amount of **\$1,042.00** to **\$272.00**.

<b>Citation</b>	<b>MSHA's Proposed Penalty</b>	<b>Settlement Amount</b>	<b>Other modifications to citation</b>
9556249	\$133.00	\$133.00	Violation of 30 C.F.R. § 75.512, forklift not maintained according to wiring schematic in service manual. Sustained as Issued. <b>Minimum Penalty Assessed</b>
9556250	\$909.00	\$139.00	Violation of 30 C.F.R. § 72.630(b), roof bolting machine's dust collection system not maintained. Modify to "low" negligence, "unlikely" likelihood of injury or illness, and non-S&S. <b>Penalty Reduction of 85%</b>
<b>TOTAL</b>	<b>\$1,042.00</b>	<b>\$272.00</b>	<b>Total penalty reduction of seventy-four percent (74%)</b>

Both citations in this docket were issued as 104(a) citations, regularly assessed, and received a 10% penalty reduction for good faith.

**Citation No. 9556250**

Citation No. 9556250 was issued on May 25, 2022, for a violation of 30 C.F.R. § 72.630(b). Titled “Drill dust control at underground areas of underground mines,” the standard specifies that:

(b) Dust collectors. Dust collectors shall be maintained in permissible and operating condition. Dust collectors approved under Part 33 - Dust Collectors for Use in Connection with Rock Drilling in Coal Mines of this title or under Bureau of Mines Schedule 25B are permissible dust collectors for the purpose of this section.

30 C.F.R. § 72.630(b).

The citation read:

Standard 72.630(b) was cited 9 times in two years at mine 4608878 (9 to the operator, 0 to a contractor). Upon inspection of the #2 Section C/N# 71 roof bolting machine it was observed that the dust collection system was not being maintained in permissible and operating condition. When checked there was rock drill dust 1/16" inch deep on the off-side of the machine that had been allowed to accumulate behind the primary dust filters inside the duct work. Upon further examination rock drill dust in excess of 1/4" inch in depth was also present inside the secondary collection compartment and around the secondary filters on the off-side of the machine. This condition allowed rock drill dust to be visually suspended in the air space around the bolter both during the initial start and during operation. This violation if allowed to exist would result in miners exposure to the harmful elements present in rock drill dust and would result in permanently disabling injuries such as silicosis or coal miners pneumoconiosis.

Pet. for a Civil Penalty at 18.

For gravity, likelihood of injury was found to be “reasonably likely,” and injury could reasonably be expected to be “permanently disabling,” affecting 2 people. *Id.* The violation was found to be significant and substantial. *Id.* Negligence was found to be “moderate.” *Id.* The citation was terminated on May 26, 2022. As justification for the termination, the inspector wrote: “The dust collection system has been cleaned and is now functioning correctly.” *Id.* at 19.

The Secretary moves to modify the citation, changing the likelihood of injury or illness to “unlikely,” removing the S&S designation, reducing the negligence to “low,” and reducing the penalty to \$139.00, offering the following in support:

Order No. 9556250 shall be modified from Reasonably Likely to Unlikely, S&S to Non S&S and from Moderate Negligence to Low. The Respondent would have argued at the hearing that this citation was issued on the midnight shift when the

bolting machine was not in operation and that the curtain side roof bolter operator wore a Personal Dust Monitor on the previous shift and that the whole shift exposure was just 0.152 mg/cubic meter, an incredibly low and compliant result. Therefore, the condition did not cause exposure to hazardous respirable dust. Respondent would further argue that the condition was not obvious and had come into existence following the weekly examination 6 days prior.

Taking into account the Respondent's arguments, the facts and circumstances surrounding the violation, the available evidence, the Secretary has decided to modify the citation from Reasonably Likely to Unlikely, S&S to Non S&S and from Moderate Negligence to Low and to reduce the Penalty to \$139.00 for settlement purposes. Respondent has agreed to accept the citation as modified and pay the agreed-upon penalty. No other modifications are made.

Mot. to Approve Settlement at 3.

## Analysis

The Court considers the settlement for Citation No. 9556250 with antipathy. Pneumoconiosis, "Black Lung" is an insidious disease. Speaking in the past tense about the condition he found, the inspector noted:

[t]his condition *allowed* rock drill dust to be visually suspended in the air space around the bolter both during the initial start and during operation. This violation if allowed to exist would result in miners exposure to the harmful elements present in rock drill dust and would result in permanently disabling injuries such as silicosis or coal miners pneumoconiosis.

Petition at 18.

Each instance of potential exposure to the lung-crippling coal dust contributes to developing this respiration smothering disease. It is the cumulative effect that impairs, not a single instance. By endorsing the "unlikely" designation, MSHA does no favors to the miners it is charged with protecting. Here, the inspector found that the dust collection system on a roof bolting machine was not being maintained in permissible and operating condition and he identified two locations on the machine with this issue.

MSHA compounds this mistake of calling the injury as 'unlikely,' by accepting the idea that the curtain side roof bolter operator wore a Personal Dust Monitor on the previous shift<sup>1</sup> and that the whole shift exposure was just 0.152 mg/cubic meter, an incredibly low and compliant

---

<sup>1</sup> The operator's statement is also an implicit admission that the condition existed on the prior shift and it couples this with the misguided notion that wearing a dust monitor lessens the hazard.

result. Even if true, such putative claims are not to be considered in evaluating likelihood and the significant and substantial designation. The federal courts of appeals have rejected the ‘alternative safety measures’ argument raised by respondents when analyzing the significant and substantial designation. Redundant safety measures are not to be considered in evaluating a hazard. For example, in *Knox Creek Coal*, 811 F.3d 148 (4th Cir. 2016), that Court observed:

“[i]f mine operators could avoid S & S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply.”...Such a policy would make such standards “mandatory” in name only. It is therefore unsurprising that other appellate courts have concluded that ‘[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the [S & S] inquiry.’ *Cumberland Coal*, 717 F.3d at 1029; see also *Buck Creek*, 52 F.3d at 136.

*Knox Creek Coal*, 811 F.3d 148, 162 (4th Cir. 2016).

Further regarding this issue, in *Consolidation Coal*, 895 F.3d 113, (D.C. Cir. 2018), the D.C. Circuit, referring to its decision in *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Commission*, 717 F.3d 1020 (D.C. Cir. 2013), noted that it:

interpreted the statutory text to focus on the “nature” of “the violation” rather than any surrounding circumstances. More to the point, the court held that “consideration of redundant safety measures,”— that is, “preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely”—“is inconsistent with the language of [Section] 814(d)(1).” *Id.* at 1028–1029.

*Id.* at 118-119

Nor is the mine operator ignorant of the cited requirement, having been cited for violating it **nine (9) times** in the past two years.

In the Court’s opinion, reducing this now-admitted violation by **85%**, from a regularly assessed amount of \$909.00 down to \$139.00, virtually a minimum penalty, MSHA does a disservice to the miners it is charged with protecting. Such results raise the risk that operators may decide that a minimal fine is the better option than compliance.

In spite of the concerns expressed above, the Court finds that the motion meets the test for approval because under the Commission’s interpretation of section 110(k) of the Mine Act, Congress only intended that the three elements as laid out in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) (“*AmCoal*”) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) must be shown.

*In that light only*, the Court has considered the motion and finds that justification for the reduction in the penalty has been presented. Accordingly, the motion to approve settlement is **GRANTED**. Respondent Pocahontas Coal Company LLC is **ORDERED** to pay the Secretary of Labor the sum of **\$272.00** within 30 days of this decision.<sup>2</sup>

*William B. Moran*

---

William B. Moran  
Administrative Law Judge

Distribution:

Douglas W. Johnson, CLR, U.S. Department of Labor, MSHA, 1293 Airport Road, Beaver, WV 25813 ([johnson.douglas@dol.gov](mailto:johnson.douglas@dol.gov))

Justin Chandler, STEPTOE & JOHNSON PLLC, Chase Tower, Seventeenth Floor, P.O. Box 1588, Charleston, WV 25326 ([jonathan.ellis@steptoe-johnson.com](mailto:jonathan.ellis@steptoe-johnson.com))

---

<sup>2</sup> It is preferred that penalties be paid electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to:

U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390.

It is important to include Docket and A.C. Numbers with the payment.