

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

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June 21, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2016-0123
Petitioner,	:	A.C. No. 46-01436-396817
v.	:	
	:	
CONSOLIDATION COAL CO. now	:	
THE OHIO COUNTY COAL CO.,	:	Mine: Shoemaker Mine
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. The docket involves 5 (five) citations for which the Secretary has filed a motion to approve settlement (“Motion”). The originally assessed amount for the five citations was \$72,500.00, and the proposed settlement is for \$39,875.00. The Secretary also requests that two of the citations be modified, as described below. For the reasons which follow, the motion must be denied.

Citation No. 9083154: The Court begins with the one citation which, per the settlement, is to be paid in full and without any modifications. This involved 104(a) Citation No. 9083154, citing 30 C.F.R. §75.223(a)(1),¹ for which the negligence was marked as “high,” and which was marked as “Significant and Substantial,” with the gravity listed as “reasonably likely,” “permanently disabling,” with one person affected. The issuing inspector described the following condition or practice:

The mine operator failed to propose revisions of the roof control plan. Mine conditions indicate the currently approved roof control plan is not suitable to control the mine ribs. The consistency of the rock binder has changed since the roof control plan was approved. The binder ranges between 5 and 18 inches in thickness. *The binder begins to deteriorate in 2-3 shifts after an area has been mined* allowing large pieces of coal/rock to fall out above and below the binder. The binder has also fallen out in large pieces. *Numerous citations for failure to*

¹ 30 C.F.R. § 75.223, titled, “Evaluation and revision of roof control plan,” provides at subsection (a)(1), “Revisions of the roof control plan shall be proposed by the operator - (1) When conditions indicate that the plan is not suitable for controlling the roof, face, ribs, or coal or rock bursts.” 30 C.F.R. § 75.223.

adequately support the ribs have been issued to the mine operator. Additionally, the mine operator has been placed on notice that the existing roof control plan is not adequate to address current mining conditions on June 11, 2015 and July 6, 2015. Mine management recognizes the adverse conditions as evidenced by an internal written standard operating procedure (email) mandating the installation of rib support. However, based on the observation of mining conditions, the installation of rib supports has been sporadic and intermittent, and miners continue to be exposed to the hazard of inadequately supported ribs.

Citation No. 9083154 (emphasis added).²

It is against this backdrop that the Secretary presented the following bases for the proposed reductions and modifications of the four other citations in this case. The reader should be mindful that when presenting his rationale for these significant reductions, about half (i.e. 50%) of *each* rationale offered by the Secretary repeats essentially the same mantra, that “[i]n consideration of this evidence, which slightly mitigates the negligence, and the risks inherent in proceeding to a hearing, the Secretary agreed to reduce the penalty.” Motion at 3.

For Citation No. 9083151, involving a 104(a) citation, invoking § 75.202(a) (failure to adequately control rib), and which was marked as S&S, Reasonably Likely, Permanently Disabling, with 1 Affected, Moderate Negligence, and with a proposed penalty of \$11,500.00, the settlement amount is \$6,513.00, representing a 43% reduction in the penalty.

² Further evidencing the seriousness of this citation invoking 30 C.F.R. §75.223(a)(1), five “subsequent actions,” dated August 28, 2015 through September 4, 2015, informed: “Extended to allow time for a geologist from Murray Energy and MSHA to determine the appropriate method to support mine ribs and submit a revised roof control plan. As part of this extension the operator agreed to conduct a safety meeting with all employees before going underground on heightened rib awareness to support and scale ribs down where men are required to work or travel.” Subsequent Action August 27, 2015. Following that, the next continuation data for the citation informed that, “[t]he operator has submitted an action plan which will take effect until a revision can be made to the approved roof control plan. The action plan will place an additional certified foreman on each producing section to monitor rib conditions in all entries and scale down as needed. The results of all scaled ribs will be recorded in the section examination book.” Subsequent Action August 28, 2015. Another Subsequent Action/Continuation Data noted progress in the revision of the roof control plan, while remarking that the August 28, 2015 action plan remained in place until such plan was approved. Subsequent Action, August 31, 2015. This process continued, as reflected in Subsequent Action dated September 1, 2015, with the same proviso that the August 28, 2015 action plan remained in effect until a revised roof control plan was approved. Three days later, the revised plan was approved. Subsequent Action September 4, 2015.

The Citation identified 8 (eight) areas where

[t]he mine ribs where persons work or travel are not being adequately controlled to protect persons from falling coal and rock on the 4 West TG Section in the following locations: 1) 4 WEST TG Track switch on left rib measuring 53" wide by 70" high and 8" thick [;] 2) 8S2-29 wall, #4-5 crosscut right rib measuring 24" wide by 32" high by 7" [;] 3) 8S2-28 wall, #5-6 crosscut right rib measuring 18' long by 3-5' high and 6" thick [;] 4) 8S2-28 wall, #7-8 crosscut, left inby corner measuring 45" wide by 58" high by 8" thick and 2' wide by 4' high and 8" thick. [;] 5) 4 WEST TG #5 entry inby #8 entry of the Mains measuring 24" wide by 5' high and 5" thick [;] 6) 4 West TG #4 entry just inby 0 + 08 on left rib measuring 8' long 5' high by 8" thick [;] 7) 4 West TG # 2 entry just inby 0 +08 right rib measuring 3' long by 4' high and 7" thick [;] 8) 4 West TG # 1 entry just outby 0 + 08 right rib measuring 5' long by 4' high and 6 inches thick and left rib measuring 5' long by 2' wide and 6" thick.

Citation No. 9083151.

Notably, the Citation then added, "Standard 75.202(a) [the standard violated] was cited 90 [ninety] times in two years at mine 4601436 (90 to the operator, 0 to a contractor.)" *Id.*

Employing an economy of words, a trait this Court has noted before in the Secretary's settlement motions, the rationale states, in full,

[t]hough there was visible deterioration to the ribs, Respondent presented evidence that this condition did not exist for an extended period of time. In consideration of this evidence, which slightly mitigates negligence, and the risks inherent in proceeding to a hearing, the Secretary agreed to reduce the penalty.

Motion at 3.

Thus, though providing no details, and informing only that the "Respondent presented evidence that this condition did not exist for an extended period of time," (though the eight areas are described singularly as a "condition," not conditions,) the Secretary's rationale must necessarily suggest that *all* eight areas did not exist for an "extended" period of time, a decidedly unusual situation.

Further, what the Secretary means by an "extended period" is not amplified. Beyond that is the more fundamental issue of whether the Secretary's declaring that *the Respondent presented evidence* that this condition did not exist for an extended period of time is sufficient. This is because telling the Commission that *the Respondent presented evidence* is simply an uninformative declaration, as contrasted with the presentation of facts, disputed or agreed upon. If such a declaration suffices, and the Commission is presented with nothing more, then the Secretary will have, as a practical matter, succeeded with his original stance in settlement submissions, that he need not provide the Commission with any real information. Such an outcome would be essentially no different, substantively, than his repeated expression that "[i]n

consideration of this *evidence*,³ which slightly mitigates negligence, and the risks inherent in proceeding to a hearing, the Secretary agreed to reduce the penalty.” Motion at 3 (emphasis added).

For Citation No. 9083289, involving a 104(a) citation, which also invoked § 75.202(a) (another failure to adequately control ribs), and which was also marked as S&S, and Reasonably Likely, but “Fatal,” instead of Permanently Disabling, and again with 1 Affected, Moderate Negligence, and with a proposed penalty of \$12,900.00, a 75% reduction was presented, the settlement amount being \$3,225.00. To justify this very large reduction, the Secretary advised that the “Respondent presented evidence that, based on their size, consistency, and location, the cited ribs would not have caused fatal injuries.” Motion at 3. For the expectation of a “*permanently disabling*” injury which, though not fatal, at least to the Court does not seem to be a trifling injury, and for no other basis, the Secretary seeks the 75% penalty reduction.

By the Court’s reading of the Citation which, under the settlement, is not challenged, except as to the fatal versus permanently disabling injury issue, the areas cited seem extensive. The citation declared,

[t]he operator failed to adequately support or otherwise control the ribs in the # 2 entry (track) of 2- East. Hazardous rib conditions were observed in the following locations gapped/separated and were easily pried down: – Between 71 and 72 block on the belt side rib, the loose rib measured 10.5 feet long, up to 3 feet wide, and 8 inches thick. The binder in this area measured 2 feet thick[.] Between 76 and 77 block on the belt side rib, the loose rib measured 8 feet long, 6 feet wide, and 4 inches thick. The binder in this area measured 2 inches thick. This is a highly traveled area as miners walk past these conditions to get from the end of the track to the longwall face. Some areas on this section have been rib bolted and some areas have not been. The areas that are rib bolted do not slough and fall out in big pieces like the areas that have not been supported. The cited location[s] were along a rib line that was not supported. Standard 75.202(a) was cited 83 times in two years at mine 4601436 (83 to the operator, 0 to a contractor).

Citation No. 9083289.

The rationale provides no information as to the basis for the claim that the “size, consistency and location” of the cited ribs would not cause a fatal injury but the settlement concedes that a *permanently disabling* injury would occur and that it was reasonably likely to

³ To be clear, the Court does not consider an unadorned assertion that the “*Respondent presented evidence* that this condition did not exist for an extended period of time,” standing alone, as useful information. In numerous settlement motions before this Court the Secretary has provided more information, at least as asserted from the perspective of a Respondent, to support a proposed penalty reduction based on the contention that a condition had not existed for long. In such cases, typically the settlement motion would then acknowledge that, in light of the particular facts asserted by the Respondent, those asserted facts present legitimate questions of fact which could only be resolved by way of a hearing.

result. Motion at 3. Nor does the Secretary concede, in any manner, that the size, consistency and location claim creates legitimate factual disputes which could only be resolved through a hearing. The citation, it should be recalled, referred to “big pieces” and noted that it was “a highly traveled area.” Citation No. 9083289.

For Citation No. 9083153, involving a 104(a) citation, which again invoked § 75.202(a) (another failure to adequately control rib), and which was also marked as S&S, and Reasonably Likely, Permanently Disabling, and again with 1 Affected, Moderate Negligence, and with a proposed penalty of \$11,500.00, a 43% reduction reappears, with the settlement amount being \$6,513.00. To justify this very large reduction, the Secretary advised, in a reprise of its justification for Citation No. 9083151, that the “[t]hough the cited condition was in a traveled area, Respondent presented evidence that this condition did not exist for an extended period of time.” Motion at 3.

The Citation stated that “[t]he mine ribs where persons work or travel are not being adequately controlled to protect persons from falling coal and rock on the 8 South Mains track entry left rib from 8S2-49 to 8S3-01 a piece of rib was scaled down with little to no effort measuring 12' long by 5' high and 9" thick.” Citation No. 9083153.

The Secretary’s rationale for the 43% reduction provides in its entirety,

Though the cited condition was in a traveled area, Respondent presented evidence that this condition did not exist for an extended period of time. In consideration of this evidence, which slightly mitigates the negligence, and the risks inherent in proceeding to a hearing, the Secretary agreed to reduce the penalty.

Motion at 3.

It should be recognized that, reduced to its essence, the rationale offers 15 (fifteen) words: “Respondent presented evidence that this condition did not exist for an extended period of time.” *Id.*

Accordingly, the Court notes the same deficiencies for Citation No. 9083153 as it highlighted for Citation No. 9083151. If section 110(k) is to be meaningful, it is patently insufficient for the Secretary to merely state that the Respondent presented evidence that this condition did not exist for an extended period of time. Some basis for the Respondent’s claim must accompany such an assertion.

For Citation No. 9083292, once again involving a 104(a) citation, and which also invoked § 75.202(a) (another failure to adequately control rib), and which was also marked as S&S, Reasonably Likely, and “Fatal,” with 1 Affected, Moderate Negligence, and with a proposed penalty of \$17,300.00, a 75% reduction was presented, the settlement amount being \$4,324.00. To justify this very large reduction, the Secretary advised that the

Respondent presented evidence that, based on its size and consistency, the cited rib would not have caused fatal injuries. Respondent also presented evidence that this condition did not exist for an extended period of time. In consideration of this evidence and the risk inherent in proceeding to a hearing, the Secretary agreed to modify the type of injury and reduce the penalty.

Motion at 4.

The citation asserted that,

[t]he operator failed to adequately support or otherwise control the ribs in the belt entry of the 2-East Longwall. Between 77 and 76 block, a piece of rib is gapped/separated and *was easily pried down* on the walk side of the belt. The void in the rib after the area was scaled down measured 4 feet long, up to 3 feet wide, and up to 8 inches thick. The loose rib was at the top portion of the rib line. *The bottom half of the rib had already had already sloughed and fallen out prior to the condition being found. A miner was working beside the belt with his back to the rib when the condition was found.* No rib bolts were installed in this area. Standard 75.202(a) was cited 93 times in two years at mine 4601436 (93 to the operator, 0 to a contractor).

Citation No. 9083292 (emphasis added).

Again, in what the Court considers a jaw-dropping justification for a 75% reduction, the settlement rests on the idea that a merely permanently disabling injury warrants such a reduction. Notably, the Secretary dropped the “size, consistency, and location” description utilized in Citation No. 9083289 (uninformative as it is), leaving “size and consistency,” without including “location,” in support of the reduction. Motion at 3-4. This was not surprising, given that the citation noted that “[a] miner was working beside the belt with his back to the rib when the condition was found [and that] [n]o rib bolts were installed in this area.” Citation No. 9083292. As he did for Citation Nos. 9083151 and 9083153, the Secretary again asserted the unilluminating claim that the “Respondent also *presented evidence* that this condition did not exist for an extended period of time,” but without any information about the nature of that evidence. Motion at 4 (emphasis added).

When the above-articulated deficiencies in these rationales are considered in the context of the one matter that was entirely conceded in the settlement, Citation No. 9083154, it strikes the Court that the enormous penalty reductions for the other citations are unexplained anomalies. Given the fully admitted conditions identified in Citation No. 9083154, and the concession that the proposed penalty for that citation should remain intact, the other citations require substantial

justification to support reductions of this order.⁴ After all, that fully-admitted violation, Citation No. 9083154, describes a rib stability issue of long and known duration, with numerous citations for failure to adequately support the ribs issued to the operator.

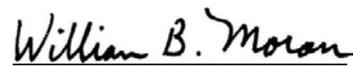
As noted at the outset of this decision, that citation informs,

the mine operator has been placed on notice that the existing roof control plan is not adequate to address current mining conditions on June 11, 2015 and July 6, 2015. Mine management recognizes the adverse conditions as evidenced by an internal written standard operating procedure (email) mandating the installation of rib support. However, based on the observation of mining conditions, the installation of rib supports has been sporadic and intermittent, and miners continue to be exposed to the hazard of inadequately supported ribs.

Citation No. 9083154.

Accordingly, based on the foregoing reasons, and because merely asserting that a respondent has “presented evidence,” is insufficient, the Secretary’s Motion for Decision and Order Approving Settlement, being inadequate under Section 110(k), is **DENIED**. This case is now to be set for a prompt hearing.

SO ORDERED.


William B. Moran
Administrative Law Judge

⁴ As noted, each of these involved 30 C.F.R. §75.202(a) violations. Three of these were found on August 26, 2015, (Citation Nos. 9083151, 9083289, and 9083153, at 5:05 p.m., 5:25 p.m., and 9:00 p.m., respectively.) Thus, the three citations found on August 26, 2015 precipitated the issuance of Citation No. 9083154, as reflected by that citation’s issuance at the end of that day. The fourth § 75.202(a) violation, Citation No. 9083292, was issued two days later, on August 28, 2015.

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