

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

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September 28, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2017-0264
Petitioner,	:	A.C. No. 11-03189-436532
v.	:	
	:	
COAL FIELD CONSTRUCTION	:	
COMPANY LLC,	:	MC#1 Mine
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 (“Mine Act”). The Conference and Litigation Representative (“CLR”) has filed a motion to approve settlement.¹ The originally assessed amount was \$15,700.00, and the proposed settlement is for \$5,009.00. The Secretary’s Motion is an example that, when inclined to put aside his recalcitrant behavior, the Secretary can easily and fully provide the type of information the Commission needs in order to carry out its Congressional mandate per section 110(k) of the Mine Act.

The single citation at issue, Citation No. 9039259, was issued on January 4, 2017 due to an alleged a violation of 30 C.F.R. § 77.1710(g). In December 2016, a miner was injured when he lost his balance on a six-inch water pipe and fell backwards onto the concrete floor of the coal preparation plant. Citation No. 9039259. The citation alleges that the miner was eight feet above the floor and was not wearing a safety belt or harness as fall protection. *Id.* This injury led to lost workdays or restricted duty, and the violation was specially assessed. *Id.*

The parties have proposed a penalty reduction based on the Respondent’s arguments that the operator was not highly negligent, and that the violation should not have been specially assessed.²

¹ It is **DETERMINED** that the CLR is accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

² The proposed penalty is the amount that would have been assessed under Part 100.

Regarding the operator's allegedly high negligence:

The Respondent would argue that there are mitigating circumstances that justify an evaluation of "Low" negligence. The Respondent states that mine management provided a ladder and safety harness for the subject miner and both were at the location where the miner fell. The inspection notes on page 8 support the Respondent's statement which affirms the fact that a ladder and safety harness were provided by mine management. Also, the inspector's written statement to the CLR does not refute the fact that the subject miner had a ladder and safety harness at the time of the fall. The Respondent further states that on page 15 of the inspection notes the inspector states "extreme aggravated conduct not observed but High Negligence due to management person directly supervising." However, the Respondent contends that a foreman did not observe or instruct the miner to work on a pipe suspended eight feet above the Preparation Plant floor and management had provided the necessary safety equipment (a ladder and safety harness) for the miner to perform his work duties safely. The inspection notes state on page 14 that "lead person/supervisor witnessed accident as relayed (via radio) to Potter Processing Management." Potter Processing Management is a separate contractor at the same mine site. The fall accident occurred on 12/12/2016 at 3:00 PM based on the company's "Report of Injury Investigation" form. The MSHA inspection and issuance of Citation 9039259 occurred on 01/04/2017, which was nine days after the accident event.

Motion at 4-5.

Regarding the special assessment:

The Respondent contends that the citation should be assessed using the penalty points assigned based on the gravity and negligence evaluations commensurate with the penalty points found in Part 100. The Respondent submits the following justifications for withdrawing/removing the "Special Assessment" penalty assessment; 1) There was not a high degree of negligence on the part of mine management and the negligence evaluation should have been "Low" based on the justification provided in Part 1. 2) The miner did not receive a serious injury and returned to work on 12/26/2016, the day after the fall occurred. 3) The citation was not evaluated as an "Unwarrantable Failure." 4) An "Order of Withdrawal" was not issued to the mine operator. 5) There was not an "Extraordinarily High Degree of Negligence" or "Extraordinarily High Gravity or Other Unique Aggravating Circumstances" on the part of the mine operator. The Respondent would reference 35 FMSHRC 1774 and contend that he has met the burden of proof to justify the withdrawal of the Special Assessment identified on page 31 of Judge Zielinski's *1774 decision and ask the penalty amount be regularly assessed per Part 100.³

³ Here the motion refers to a 2013 decision in which Judge Zielinski concluded that a rib support violation was incorrectly assessed as S&S. *American Coal Co.*, 35 FMSHRC 1774, 1804 (June

Motion at 5-6.

And finally:

The Respondent contends that the “Special Assessment Narrative Form” (SANF) provided by the MSHA Civil Penalty Compliance Office is not in agreement with the gravity evaluations made by the inspector and identified on the citation, MSHA Form 7000-3, line 10 A and 10 B. Line 10 A, Injury or Illness, of the citation is evaluated at “Reasonably Likely” which is assigned 30 penalty points per Part 100 while on the SANF the “Likelihood of Occurrence Points” is evaluated at “Occurred” with a 50 penalty point assessment per Part 100. On Line 10 B, Severity of Injury or Illness, the citation is evaluated at “Fatal” which is assigned 20 penalty points per Part 100 however the SANF shows the evaluation at “Lost Workdays” with a 5 penalty point assessment per Part 100. The Respondent argues that the regular assessment penalty points assigned per Part 100 should be five points less than is stated on the SANF or 102 Penalty Points total for a total regular assessment of \$3,357.... The Secretary acknowledges that any or all of the Respondent’s arguments may be persuasive at hearing on the merits. Based on the facts in evidence, the Special Assessment should be withdrawn, the violation assessed commensurate with the penalty points found in Part 100, and the citation remain unchanged and evaluated as written.

Motion at 6.

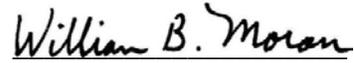
The Court has considered the representations submitted in this case and concludes that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

The settlement amounts are as follows:

<u>Citation No.</u>	<u>Assessment</u>	<u>Settlement Amount</u>
9039259	\$15,700.00	\$5,009.00
TOTAL:	\$15,700.00	\$5,009.00

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

It is **ORDERED** that Respondent pay a penalty of \$5,009.00 within 30 days of this order.⁴ Upon receipt of payment, this case is **DISMISSED**.


William B. Moran
Administrative Law Judge

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/JM

⁴ 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