

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

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June 5, 2018

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2017-0220
Petitioner,	:	A.C. No. 46-06618-427999
	:	
v.	:	
	:	
ROCKWELL MINING, LLC,	:	Mine: Gateway Eagle Mine
Respondent.	:	

ORDER REGARDING MOTION TO CERTIFY FOR INTERLOCUTORY REVIEW

Before: Judge Moran

The Secretary of Labor has filed a motion to certify for interlocutory review this Court’s Decision Denying Settlement in this docket. (“Motion”) The Motion incorrectly lists the docket number as “WEVA 2018-0220,” but the correct docket number is WEVA 2017-0220. The Court’s Decision Denying Settlement is included within this Order as an appendix.

The Commission procedural rule pertaining to interlocutory review provides that “[i]nterlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission.” 29 C.F.R. § 2700.76(a). The Secretary seeks the following question for certification for interlocutory review: “[w]hether the ALJ erred as a matter of law in rejecting as ‘facts in support’ of the proposed settlement: (1) the Secretary’s stated enforcement priorities, and (2) the Secretary’s *identification* of the facts disputed by the operator pertaining to the cited violations.”¹ Motion at 1 (emphasis added).

The Motion states that “[t]his case involves a question of law as to whether the ALJ interpreted Commission Rule 31(b)(1)’s phrase ‘facts in support’ too narrowly.” Motion at 2. However, the Motion is an oddity because, although the Secretary acknowledges that “Commission Rule 31(b)(1) (29 C.F.R. § 2700.31(b)(1)) requires a settlement motion to include ‘facts in support’ of the penalty agreed to by the parties,” the Motion never identifies the facts in support of the penalty reduction which the Secretary contends were interpreted too narrowly. *Id.* at 1.

¹ It is noted that the Secretary presented the same language in this motion as it did in in its motion seeking interlocutory review for WEVA 2018-0165, *Sec. v. Ohio County Coal*, filed the same day as this case.

The Court certifies that its ruling denying settlement “involves a controlling question of law and that in [its] opinion immediate review will materially advance the final disposition of the proceeding.” 29 C.F.R. § 2700.76(a)(1)(i). The Court grants the Secretary’s Motion, but on the basis that “[u]nless otherwise specified in the Commission’s order granting interlocutory review, review shall be confined to the issues raised in the Judge’s certification” 29 C.F.R. § 2700.76(d). Here, examining the twin bases relied upon by the Secretary as potential error by the Court, as noted above, the “facts in support” of that claim are “(1) the Secretary’s stated enforcement priorities, and (2) the Secretary’s identification of the facts disputed by the operator pertaining to the cited violations.” Motion at 1.

As to the first basis, the Court views that it is inherently presently before the Commission in its reconsideration of *Secretary of Labor v. The American Coal Company*, LAKE 2011-13. With regard to the second question posed by the Secretary in his motion for interlocutory review, namely whether the Court erred as a matter of law in rejecting the Secretary’s identification of the facts disputed by the operator pertaining to the cited violations, that basis was explained in the Court’s May 9, 2018 denial of the settlement.

For *each* of the three citations proposed for reduction, the Secretary makes the same incantation, to wit: “Taking into account the Respondent’s arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.” Secretary’s November 30, 2017 Motion to approve settlement, regarding Citation Nos. 9068232, 9070540, and 9070542.

In rejecting the settlement, the deficiencies were explained by the Court:

For the latter two of the three citations discussed above, the Secretary provided no substantive or case-specific information following the Respondent’s contentions. The repeated allusion to uncertainties of litigation does nothing to help the Court discern whether there is a legitimate dispute of fact or law at issue here.

For the first citation, Citation No. 9068232, the Secretary noted that “no rock dust was observed in the cracks in the ribs indicating that the cracks were fairly recent.” Motion at 3. While this additional information is at least somewhat helpful for the Court, the Secretary goes on to repeat the formulaic statement, “Taking into account the Respondent’s arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.” *Id.* The Court has no representation from the parties that there is a legitimate dispute on any issue of fact or law. Indeed, while the Court could infer from the representations regarding Citation No. 9068232 that there would be evidence regarding the condition developing recently, which would therefore be relevant to the level of negligence on behalf of the operator, the Secretary acknowledges this only obliquely.

Again, the Secretary declined to provide any substantive information with regard to the proposed changes for Citation Nos. 9070540 and 9070542.

Decision Denying Settlement at 3.

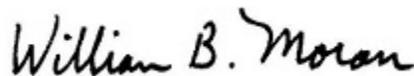
The Court expressed in its Decision Denying Settlement that “[i]f this settlement motion were held to be sufficiently supported, then the Secretary will effectively have no obligation to provide the Commission with any real information in the context of settlements.” *Id.* at 3-4.

Notwithstanding the Court’s view that the first issue is inherently before the Commission in *American Coal*, and that, for the second issue, the motion failed to identify the disputed facts and further that it is insufficient for the Secretary to merely *identify* the Respondent’s contentions, the Court still concludes that immediate review will materially advance the final disposition of the proceeding. Thus, as confined to the issues raised in this certification, the question is whether a settlement must be accepted without the Secretary forthrightly acknowledging that the Respondent has identified legitimate issues of fact, which matters are in dispute and which can only be resolved by the hearing process, or by simply acknowledging that the assertions made by the Respondent are acknowledged to be fact. Instead, the Secretary’s Motion to Approve Settlement only offers “[t]aking into account the Respondent’s arguments,” without any affirmative statement about their worth. Motion to approve settlement at 3-4. It is the view of this Court that it is too coy for the Secretary to merely *identify* facts disputed by the operator, as a motion for settlement must do more, if section 110(k)’s requirements are to have genuine meaning.

Pursuant to 29 C.F.R. § 2700.76(d), “Scope of review,” the Court’s granting of interlocutory is confined to the issue in its certification, as described above.

Accordingly, the Secretary’s Motion to certify for interlocutory review is **GRANTED**.

SO ORDERED.



William B. Moran
Administrative Law Judge

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APPENDIX

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

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May 9, 2018

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2017-0220
Petitioner,	:	A.C. No. 46-06618-427999
v.	:	
	:	
ROCKWELL MINING, LLC,	:	Mine: Gateway Eagle 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. On November 30, 2017 the Secretary filed a motion to approve settlement. For the following reasons, the factual support presented for the proposed penalty reductions is inadequate, and the motion must be denied.

Seven citations are involved in this docket. The settlement motion proposed penalty reductions for three citations, and the Respondent agreed to pay the proposed penalties for three more, with no modifications. The motion also informed the Court that the Secretary had decided to vacate Citation No. 9070543, which alleged a violation of 30 C.F.R. § 75.400-2. The total proposed penalty amount was \$6,977.00, and the proposed settlement is for \$5,232.00. This amounts to a 25% reduction from the total proposed penalty.

Citation No. 9068232, which alleged a violation of 30 C.F.R. § 75.202(a), was proposed for a penalty reduction from \$446.00 to \$244.00. This citation alleged that,

on the CO #2 section, 012/013 MMU, the rib area of the #3 entry, on the inby right rib corner across from the loading point, has not been supported or otherwise controlled to protect persons from hazards related to fall of the rib. When checked, the rib corner was found cracked and loose. When the rib was pulled, the corner fell in two pieces. When measured, one piece was approximately 18"x21"x10" and was rectangular in shape and the second piece was approximately 12"x21"x9" and was triangular in shape.

Citation No. 9068232 (formatting added).

The Secretary alleged that this violation was S&S, reasonably likely to result in lost workdays or restricted duties for one person, and the result of moderate negligence.

In support of the proposed penalty reduction for this citation, the motion stated,

the Respondent argues that the evidence would establish that it was not negligent. The Respondent was taking steps to control the ribs by installing rib bolts throughout the section as needed. Furthermore, the cited conditions likely occurred since the most recent examination in the area. The Secretary notes that no rock dust was observed in the cracks in the ribs indicating that the cracks were fairly recent. Taking into account the Respondent's arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.

Motion at 3.

Citation No. 9070540, which alleged a violation of 30 C.F.R. § 75.380(d)(4), was proposed for a penalty reduction from \$2,598.00 to \$2,000.00. The citation alleged that,

The operator failed to maintain 6 foot of clearance on the branch line leading from secondary escapeway lifeline to the section refuge chamber, on 1 Section (010 and 011 MMU), in that upon arrival to the section a 6 man Diesel mantrip was observed parked under the branch line leading from the secondary escapeway lifeline to the section refuge chamber.

Citation No. 9070540.

The Secretary alleged that this violation was S&S, reasonably likely to result in permanently disabling injuries for 10 persons, and the result of moderate negligence.

In support of the proposed penalty reduction for this citation, the Motion stated,

the Respondent argues that the evidence would establish that it was not negligent because there is no evidence as to how long the referenced mantrip was parked beneath the branch line or that management was aware of its presence. Taking into account the Respondent's arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.

Motion at 3-4.

Citation No. 9070542, which alleged a violation of 30 C.F.R. § 75.604(b), was proposed for a penalty reduction from \$666.00 to \$443.00. The citation alleged that,

The operator failed to effectively insulate and seal a permanent splice in the energized 995 volt trailing cable supplying [sic] power to the Co.# 251 continuous mining machine located on the right side of the 1 Section (010 and 011 MMU), in that an opening was observed in the permanent splice exposing the energized insulated inner conductors.

Citation No. 9070542.

The Secretary alleged that this violation was S&S, reasonably likely to result in permanently disabling injuries for one person, and the result of moderate negligence.

In support of the proposed penalty reduction for this citation, the Motion stated,

the Respondent argues that the levels of gravity and negligence were overwritten. The Respondent would argue that the violation should not have been issued as S&S because there were no exposed inner leads in the splice. Respondent also argues that the cable is being moved on a continuous basis and the damage to the splice likely occurred sometime after the most recent weekly electrical examination. Taking into account the Respondent's arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.

Motion at 4.

Discussion

The Court has considered the representations submitted in this case and concludes that the proffered settlement is not appropriate under the criteria set forth in section 110(i) of the Act. The Court recognizes that the penalty reduction proposed here is relatively modest, but as it has explained before, Commission approval under section 110(k) is not simply about dollars. For the latter two of the three citations discussed above, the Secretary provided no substantive or case-specific information following the Respondent's contentions. The repeated allusion to uncertainties of litigation does nothing to help the Court discern whether there is a legitimate dispute of fact or law at issue here.²

For the first citation, Citation No. 9068232, the Secretary noted that "no rock dust was observed in the cracks in the ribs indicating that the cracks were fairly recent." Motion at 3. While this additional information is at least somewhat helpful for the Court, the Secretary goes on to repeat the formulaic statement, "Taking into account the Respondent's arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty." *Id.* The Court has no representation from the parties that there is a legitimate dispute on any issue of fact or law. Indeed, while the Court could infer from the representations regarding Citation No. 9068232 that there would be evidence regarding the condition developing recently, which would therefore be relevant to the level of negligence on behalf of the operator, the Secretary acknowledges this only obliquely.

² The Court notes that Attorney Robert Wilson began representing the Secretary in this matter on October 12, 2017 and filed the instant motion. As such, Mr. Wilson is well aware from previous denials of inadequately supported motions of the type of information the Court requires from the Secretary in order to meet the Commission's responsibilities under Section 110(k) of the Mine Act, assuming of course that such representations obtain in this case.

Again, the Secretary declined to provide any substantive information with regard to the proposed changes for Citation Nos. 9070540 and 9070542. If this settlement motion were held to be sufficiently supported, then the Secretary will effectively have no obligation to provide the Commission with any real information in the context of settlements.³

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

The parties are **ORDERED** to confer with the Court within ten (10) days of this order so that a conference call may be held to set this matter for a prompt hearing.

William B. Moran

William B. Moran
Administrative Law Judge

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/KP

³ This is consistent with the Secretary's extraneous statement that that *he* has weighed the matter, considered the cost of going to trial, formed the belief that *he* has maximized his prosecutorial impact, and settled the matter, which in *his sole judgment*, is on appropriate terms, and which ends with his unusual conclusion that *even if he won at trial*, and *even if the judgment were greater than the settlement*, such a result would not necessarily be a better outcome. Motion at 2.