

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 15, 2014

THOMAS E. PEREZ, Secretary of Labor,)	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH)	
ADMINISTRATION (MSHA),)	
)	
Petitioner,)	DOCKET NO. VA 2014-95
)	
v.)	A.C. NO. 44-07159-338294
)	
BRISTOL COAL CORP.,)	MINE: MINE #9
)	

DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the court upon a petition for the assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a Joint Motion to Approve Settlement. The Secretary’s Motion advises that “[i]n reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt [sic]. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above. . . . Consistent with the position the Secretary has taken before the Commission in *The American Coal Company*, LAKE 2011-13, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the parties’ settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k).” Joint Motion at 2.

The Court notes that in its brief before the Commission upon interlocutory review, challenging the rejection of its proposed settlement in *Sec. of Labor v. The American Coal Company*, LAKE 2011-13 (“*American Coal*”) and in its underlying submission to this Court in that case, the Secretary repeatedly invoked the claim that its approach for settlement submissions promotes transparency and satisfies the need for public scrutiny, objectives to which it professedly subscribes. *See, for e.g.* Sec’s Brief in *American Coal* at 43.

The Secretary, in this Court’s view, has not caught on to the trend that began in the late twentieth century that more, not less, public information from government is the preferred practice. As the dictionary explains, to be “transparent” means to be “easily detected . . . characterized by visibility or accessibility of information especially concerning business practices.” Merriam-Webster.com. Instead, in its Motion before this Court in *American Coal*,

the Secretary merely proclaimed, in a decidedly non-transparent manner that “[a]fter further review of the evidence, the Secretary has determined that a reduced penalty is appropriate in light of the parties’ interest in settling this matter amicably without further litigation. In recognition of the nature of the citations at issue, and the uncertainties of litigation, the parties wish to settle the matter with a 30% reduction in the assessed penalty with no changes to gravity or negligence for any of the citations at issue.” *See, American Coal* Motion at 2-3. In the Court’s view, such an approach is at odds with the normal sense of the meaning of transparency and, importantly, makes public scrutiny impossible. Further, the Secretary exaggerates, and some might fairly state outright misrepresents, what is required for a settlement to pass muster, by asserting that the Commission’s approach requires “the Secretary to supply *extensive* information to justify proposed settlements.”¹ *See, Sec’s Br.* at 5, presently before the Commission under interlocutory review in *American Coal*.

The Present Motion in Bristol Coal Corporation

In its Bristol Coal Corp. Motion, the Secretary relates that the Respondent agrees to pay the penalty proposed by the Secretary for the violations alleged in the following citations:

<u>Citation Number</u>	<u>Penalty</u>
8208907	\$100
8208908	\$100
8208910	\$100
8208911	\$100
8208912	\$100
8208913	\$100
8208914	\$263
8208918	\$224
8208920	\$392
8208921	\$392
8208922	\$392
8208923	\$100
8208924	\$100
8208925	\$285
8208926	\$100
8208928	\$224
8208930	\$100
8208932	\$100
8208933	\$224

¹ The Secretary continues this theme of exaggeration by remarking that “settlement is an indispensable part of a well-functioning enforcement and adjudicatory regime,” as if anyone takes issue with that view. *See, Sec’s Br.* at 7, presently before the Commission under interlocutory review in *American Coal*.

Recalling its protest, as noted above, that “[i]n reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt [and that] [t]he Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above [and that] [c]onsistent with the position the Secretary has taken before the Commission in *The American Coal Company*, LAKE 2011-13, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the parties’ settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k),” it is fair to inquire in the representative example provided by the motion in this matter, involving Bristol Coal Corporation, just exactly what is the *extensive information* the Secretary must supply to justify its proposed settlement here?

The answer need not be speculative because the Secretary has grudgingly provided the required information but only *in the alternative* to its completely unenlightening first line position:

“The bases for the settlement of the remaining citations at issue in this docket, including the individual settlement amounts, are set forth below:

Citation Number 8208909

75.380(d)(7)(viii)

Basis of Compromise: Negligence and Number Affected.

At hearing, Respondent would present evidence that the condition had not existed at the time of the preshift exam. Further, the condition was not noted in the books therefore had likely just occurred. Hence, the negligence is overstated. Further, the Respondent alleges that nine miners would not be affected. Respondent asserts that the number affected should be modified to no more than four or five. Therefore, Respondent would argue that the citation should be modified to “low negligence” with four affected and the penalty should be reduced.

The Secretary, in reply to Respondent’s statements and contentions, states that he recognizes that they raise factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary agrees to accept a reduced penalty.

Amount of the penalty proposed by the Secretary: \$1,304.

Amount of the penalty agreed on by the parties: \$472.

Basis of Compromise: Negligence and Number Affected.

At hearing, Respondent would present evidence that the stopping had been knocked out accidentally by a piece of equipment but the condition had not existed very long. Further, the inspector does not know how long the condition existed and cannot say for certain that it had been busted for a week. Finally, if a fire did occur, it would not affect nine miners.. Therefore, Respondent would argue that the citation should be modified to “low negligence,” two affected and the penalty should be reduced.

The Secretary, in reply to Respondent’s statements and contentions, states that he recognizes that they raise factual and legal issues which can only be resolved by a hearing before the Commission or by the parties reaching a compromise of the penalty proposed by the Secretary or by a modification of the characterization of the citation to reflect a lower level of gravity or negligence or both. The Secretary agrees to accept a reduced penalty.

Amount of the penalty proposed by the Secretary: \$1,304.

Amount of the penalty agreed on by the parties: \$472.”

The Court finds this information adequate to explain the basis for the proposed reduction and consequently that it meets the statutorily mandated requirement for the Commission to approve the motion under Section 110(k) of the Mine Act. Accordingly, *by its own* Motion, the Secretary has demonstrated the ease with which sufficient, and certainly not extensive, information can be provided in its motions, belying its claims to the contrary. It is important to note that, simple as it is to provide the information necessary for a settlement approval, by putting that information in the motion, the Secretary is then on record as to the explicit basis for the reduction and in the unlikely event that the representations were untrue, the record of the basis would be there for accountability. In contrast, the Secretary’s initial posture, absent of transparency as to the basis, would not provide a basis for a post hoc review of the legitimacy of the settlement, because it gives no useable information for such a review.

Accordingly, based on the above discussion and the representations in the Motion, the Court, having considered the representations and documentation submitted in these cases, concludes that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. The settlement amount is as follows:

<u>Citation Number</u>	<u>Assessment</u>	<u>Settlement Amount</u>
8208097	\$100	\$100
8208908	\$100	\$100
8208909	\$1,304	\$472
8208910	\$100	\$100
8208911	\$100	\$100
8208912	\$100	\$100
8208913	\$100	\$100
8208914	\$263	\$263
8208918	\$224	\$224
8208920	\$392	\$392
8208921	\$392	\$392
8208922	\$392	\$392
8208923	\$100	\$100
8208924	\$100	\$100
8208925	\$285	\$285
8208926	\$100	\$100
8208928	\$224	\$224
8208930	\$100	\$100
8208932	\$100	\$100
8208933	\$224	\$224
8208934	\$1,304	\$472
TOTAL	\$5,919	\$4,440

It is further **ORDERED** that the operator pay a penalty amount of \$4,440 in thirty days. Upon receipt of the payment, this case will be **DISMISSED**.

William B. Moran

William Moran
Administrative Law Judge

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