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August 19, 2013

SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING DOCKET NO. VA 2010-564 A.C. No. 44-04856-228677-02
v.	:	
CONSOLIDATION COAL COMPANY Respondent	:	Mine Name: Buchanan Mine #1

ORDER DENYING SETTLEMENT MOTION

Before: Judge Moran

The Secretary's representative has filed a Motion for Decision and Proposed Order Approving Settlement.[1] For the reasons which follow, the Motion is DENIED. The Motion proposes a 35% overall reduction from the originally proposed assessment.[2] That percentage decrease is not, per se, the problem.[3] Instead, it is the lack of adequate justification for the reductions.

As the Commission observed in *Secretary v. Black Beauty Coal*, 2012 WL 4026640, 34 FMSHRC 1856, (August 12, 2012) ("*Black Beauty* "), "[t]he plain language of section 110(k) of the Mine Act explicitly authorizes the Commission to review a proffered settlement of a contested penalty. Section 110(k) provides that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except

[1] The Secretary's Representative in this instance is a Conference and Litigation Representative ("CLR").

[2] The originally assessed total amount was $42,035.00 and the proposed settlement was for $27,243.00.

[3] As the Court has stated before, as a rule of thumb, the greater the decrease in the penalty from the proposed assessment, the greater the amount of information which needs to be supplied to support the reduction.

with the approval of the Commission."*1861, 30 U.S.C. § 820(k). Thus, section 110(k) unambiguously sets forth the Commission's exclusive authority to approve the compromise, mitigation or settlement of a penalty after it has been contested.

The legislative history of section 110(k) explains that Congress intended the settlement of a penalty to be a transparent process that is open to public scrutiny and that the Commission is authorized to approve contested penalties offered for settlement. The Senate Report recognized, in particular, the importance of an Administrative Law Judge's review of a proposed settlement of a penalty:

> In addition to the delay in assessing and collecting penalties, another factor which reduces the effectiveness of the civil penalty as an enforcement tool under the Coal Act is the compromising of the amounts of penalties actually paid. In its investigation of the penalty collection system under the Coal Act, the Committee learned that to a great extent the compromising of assessed penalties does not come under public scrutiny…. Even after a Petition for Civil Penalty Assessment has been filed by the Solicitor with the Office of Hearings and Appeals, settlement efforts between the operator and the Solicitor are not on the record, and a settlement need not be approved by the Administrative Law Judge.

Black Beauty at 1861, quoting from S. Rep. No. 95-181, at 44 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632 (1978) ("Legis. Hist.").

Congress intended that the settlement of a penalty be open to scrutiny in order to better serve the purpose of civil penalties, that is, to encourage operators' compliance with mandatory standards*.”* The Senate report provided:

> The Committee strongly feels that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.
> *Id.* at 633.

The Commission went on to explain that “ [i]n order to ensure penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest, Congress authorized the Commission to approve the settlement of civil penalties. The Senate report explains:
To remedy this situation, section 111(l) [later codified as section 110(k)] provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission…. By imposing these requirements, the Committee intends to assure that the abuses involved in the unwarranted lowering of penalties as a result of

off-the-record negotiations are avoided. *It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties. Id.* (emphasis added). To carry out this responsibility, the Judge must have information sufficient to establish that the penalty reduction does, in fact, protect the public interest." *Black Beauty* at *1861-1862.

Thus, at its core, the Commission and its judges, acting as a sentinel, must be able to discern the basis for a proposed reduction as opposed to being presented with a mere assertion such as that there are "legitimate questions of fact." Without being presented with at least rudimentary details about the nature of such facts, the Court cannot independently review the basis for the reduction. To accept mere unadorned assertions would turn the review exercise into a procedural formality and therefore, ultimately, an empty review.

In the present matter, the Motion itself provides no supporting information to justify the reduction; it is entirely summary in nature. Instead, it is draft order which accompanied the motion, that attempts to provide justification for the proposed reductions. Therefore, this Order will turn to the particulars in the draft order.

The draft order first refers to "Citation No. 8176813 [requesting that it] be modified from "50" to "5" Persons Affected in that all persons inby the cited condition would not be expected to receive injury because the sections use split ventilation system." A 30% reduction was proposed. The citation, which listed the matter as "S&S" and of "moderate negligence," stated that "[t]his mine uses belt air to ventilate the working sections therefore all miners inby this condition are exposed to the hazards associated with belt fires." The deficiency is that more detail is needed to explain the basis for concluding that only 5, not 50, persons would be affected.

Next, the draft Order "requests that Citation No. 8176578 be modified from "Moderate" to "Low" in that the electrical cable is examined on a weekly basis and the damage could have occurred between exams." A 30% reduction was proposed here too. The citation notes that the cables for the bonder were "damaged and the copper wires are visible 1 inch from the battery plug on the bonder." The Inspector marked the violation as "S&S" and of moderate negligence. The Court would note that, typically, a cable will have an outer and inner jacket before bare wires are exposed. If that is true here that would tend to diminish the claim that the condition could have occurred in between the weekly examination. This is especially true where there is no information as to when the last weekly exam occurred here. More information is needed for the Court to appreciate the basis for the requested reduction.

For the next citation, "the CLR requests that Citation No. 8176581 be vacated because the mere presence of methane does not constitute a violation," citing *Secretary of Labor (MSHA) v. RBK Construction, Inc*., 15 FMSHRC 2099 (October 1993). While the Secretary can elect to vacate a citation, without providing any reason for that decision, the problem here is that the Secretary proceeded to state that the basis for that action is that "the mere presence of methane does not constitute a violation." The justification appears to conflict with the citation, in that it

informs that excessive methane was detected in the No. 1 heading on an active section and that the ventilation methods employed did not keep the methane below 1%. Instead the methane ranged from 1.2% to 1.95 % across the face. The Citation also stated that the 1.95% methane was detected 5 feet from the right rib and 1 foot from the face and 1 foot from the roof and that the methane has been detected above 1% on several occasions involving the ventilation tubing. The problem with the motion is that the cited standard, 30 C.F.R. 75.323(b)(1)(ii), addresses "Actions for excessive methane." It provides that when 1 percent or more of methane is present in a working place or an intake air course, "changes or adjustments shall be made at once to the ventilation system to reduce the concentrations of methane to less than 1.0 percent." Thus, the standard does not talk in terms of the "mere presence of methane." Instead it directs action occur where, as here, methane is at or above 1 percent.

Accordingly, as the Secretary has provided the basis for its action to vacate and that basis is a nullity for this standard, the Secretary's action to vacate must be rejected.

Next, the "CLR also request[ed] that Citation No. 8176727 be reduced in penalty due to legitimate questions of fact regarding the level of negligence attributable to the operator, [and for that reason] the parties agreed to a reduction in the proposed civil penalty. A 25% reduction was sought. This is simply an unadorned assertion. There is nothing offered for the Court to appreciate exactly what are the "legitimate questions of fact regarding the level of negligence attributable to the operator." On the other hand, the citation itself informs that the incombustible content of the rockdust was not being maintained to the "not less 65%" requirement, that this mine is on a 5 day spot inspection due to its very large methane liberation levels, and that the mine has experienced "a number of face ignitions." Such an empty submission cannot be approved.

For Citation No. 8176728 and the request that it "be vacated because the mere presence of methane does not constitute a violation,"[4] the same problem exists as in Citation No. 8176581, *supra,* namely that in attempting to vacate it, the Secretary has said too much by revealing an illegitimate basis for such an action. The cited standard, the same standard and section cited in Citation No. 8176581, is not about the "mere presence of methane." Rather, it is about having methane content below 1% and there is no claim disputing the Citation's assertion about that. On its face, the identified basis in the submission for vacating the Citation is inappropriate. Given the expressly stated basis in the submission, which basis is now part of the history of this alleged violation, doubts about the legitimacy of vacating this Citation would be created if the Secretary now were simply to announce that it has elected to vacate the matter.

Moving to Citation No. 8176818, the Secretary's representative seeks to have the negligence modified from "Moderate" to "Low," on the basis that the section foreman was unaware that the gas tests were not made in accordance with the ventilation plan. Instead of the

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[4] The same case is cited for the authority to vacate: *Secretary of Labor (MSHA) v. RBK Construction, Inc*., 15 FMSHRC 2099 (October 1993).

checks occurring, per the plan, every 10 minutes, at least double that time was elapsing between the checks in this high methane liberation mine. A 30% reduction from the proposed penalty amount is sought. The offered basis is difficult to understand. There is no mention in the citation, or in its action to terminate, about the foreman's knowledge, nor how that should impact the penalty. There is nothing offered in terms of whether the foreman, reasonably, should have had knowledge of the insufficient checks.[5] In abating the citation, it was the miner operator who received a safety talk; there was no allusion to the foreman's state of knowledge. The issuing Inspector also modified his citation, noting that when it was considered along with two other citations for methane, as noted above, and another citation for a methane monitor not "operating properly," the confluence of those matters caused him to list the gravity as "reasonably likely" that a methane ignition would occur. Accordingly, absent a reevaluation of the settlement amount proposed, more supporting information is needed for the Court to appreciate the basis for the lowered penalty.

For Citation No. 7342623, the motion offers the entirely unilluminating statement that a 30% reduction in the penalty is supported by "legitimate questions of fact regarding the level of negligence attributable to the operator ..." The motion offers no additional information, beyond that assertion, to illuminate the particular "legitimate questions of fact." Accordingly, the motion fails to provide the minimum level of information for the Court to assess the legitimacy of the assertion that there are such legitimate questions.

Regarding Citation No. 8176734, the motion seeks a modification of the Citation, from "'Permanently Disabling' to 'Lost Workdays or Restricted Duty' in that a Permanently Disabling injury is not likely to develop from a missing latch on the dust collector door," with a 25% reduction in the proposed penalty resulting from that change. Although the issuing Inspector listed the alleged violation as non-S&S and the injury or illness unlikely, he did mark it as "permanently disabling." This focus of the cited provision, 30 C.F.R. 72.630(b), appears to be health related and therefore the concern may have been about the insidious effects of exposure to airborne contaminants. A different review process is applied when evaluating risks where impacts on health are being evaluated. For these reasons, more information is needed to properly assess the settlement motion beyond the sterile assertion that "a missing latch on [a] dust collector door" is not likely to result in a Permanently Disabling injury."

For Citation No. 8176582, the CLR seeks to have the citation modified from "11" persons affected to "5" in that the section uses split ventilation which would only affect one side of the section. As with the motion's justification for Citation No. 8176813, *supra*, more detail is needed to explain the basis for concluding that only 5, not 11, persons would be affected. An additional, significant, problem is that the citation is not even listed among the settled citations listing the original, proposed assessment, and the "Settlement Amount." It is listed at $873.00 on Exhibit A for Docket VA 2010-564, but it disappears from the list of settlement amounts. It then appears in the proposed "Ordered" section of the draft order, seeking a 30%

[5] *See,* for example*, Sec. v. Highland Mining,* 2013 WL 1856603, *3 March 13, 2013.

reduction from the proposal to $611.00. This raises an additional issue as to whether the total proposed settlement amount is correct.

Addressing Citation No. 8176583, the motion seeks to vacate this citation with the same basis advanced for Citation No. 8176728. As with the latter, this effort to vacate says too much, revealing a legally inadequate basis to take that step. The citation, citing the same standard listed for Citation No. 8176728, is unrelated to the motion's assertion that the "mere presence of methane does not constitute a violation." The problems identified in the discussion, *supra*, for Citation No. 8176728, are incorporated for this matter. Having presented an irrelevant and deficient basis to vacate this citation, it would seem that here too the Secretary cannot now simply announce, without elaboration, that it is vacating this matter, without creating a cloud as to the legitimacy of such a decision.

In the case of Citation No. 8176735 for which the motion seeks a modification "from '10' persons affected to '5' in that not all persons on the section would be expected receive injury from the cited condition because the sections utilize split ventilation," more information is needed, as explained *supra* for Citation Nos. 8176582 and 8176813. It is noted that the issuing Inspector denominated this citation as "S&S," and with moderate negligence, a facially understandable assertion, given that the Inspector stated that he found a barrel of a roller broken, spinning on its shaft, and "very hot to the touch," presenting a fire hazard with continued normal mining operations.

For Citation No. 8176736, in which the motion seeks a modification from moderate to low negligence on the basis that the cited stopping is only examined on a weekly basis, the motion should inform when the last such exam occurred. It is noted that the citation asserts that cinder blocks were missing and that there were problems with two stoppings.

With respect to Citation No 8176737, in which the Secretary seeks to vacate the citation, the motion runs into the same deficiency as the others, as described *supra. See,* Citation Nos. 8176581, 8176728, and 8176583. Although the Secretary could have simply announced that it was vacating the citation, having put forward an invalid basis to vacate, it is no longer in that posture, and must either provide for a settlement amount or advance a valid basis to vacate the citation or litigate the matter.

Here, the CLR requests that Citation No. 8176738 be modified from "Moderate" to "Low" in that the electrical cable is examined on a weekly basis and the damage could have occurred between exams. Given the rather stark information in the Citation, including that multiple damaged areas were found and that miners crawl over the top of the damaged cable to access the tailgate, that abating the condition involved applying 10 feet of jacket wrap and that the Inspector listed the matter as "S&S," more information is needed, including the date of the last weekly exam.

The proposed reduction for Citation No. 8176739 is similarly difficult to fathom. The

CLR has requested that it be modified from " '5' to '1' persons affected in that only one person would be using the fire extinguisher," but as the cited fire extinguisher had no pressure gauge and was completely empty, the point is not simply that a miner would be trying to put out a fire with a useless extinguisher, but that others at the 13 right longwall headgate could be affected.

Although the circumstances raise questions about whether a pre-operational check would have found and corrected the problem cited by the Inspector for Citation No 6631196, at least this proposed reduction does advance a factual basis for the 40 % reduction, by stating "that the machine had just been returned to service and not examined." The problem with that rationale is that the Inspector noted that the pre-operational check had not yet occurred and the proposed assessment was made with knowledge of that circumstance.[6] Further, with oil alleged to be leaking directly on the engine's exhaust, this does not appear to be a negligible matter. Given that the tram had just been returned from the repair shop and then had been lowered to the shaft bottom and was awaiting supplies, which it was then to deliver, it seems at least questionable that, upon receiving the supplies that it was about to transport, a pre-operational check would have stopped all that intended activity and the tram would have been returned to the shop for further repairs. Thus, with the misgivings identified, the proposed settlement for this Citation is accepted. Of course, as nearly all of the citations in this docket have inadequate explanations for the proposed reductions, perhaps this citation will be revisited during the review.

Regarding Citation No. 6631198, here too, because the Court is not in the business of second guessing the factual basis presented, but rather in determining if a demonstrable basis has been presented, and not merely an assertion or conclusion, this proposed settlement is accepted.

In this instance, pertaining to Citation No. 8176584, the CLR requested a 30% reduction from the proposed penalty through modification of the negligence from "Moderate" to "Low" negligence and by modifying the persons affected from "5" to "1." The motion asserts that the "condition was not obvious, and the sections utilize split ventilation," to justify the reduction. The Citation makes no mention that the matter was not obvious and it presented a serious problem in that a roof bolt which was hot to the touch was found "hung in the scraper" and there was a 12 inch pile of coal under the scraper with dry float coal dust on top of the pile. The Inspector marked the violation as "S&S", with moderate negligence. As with other proposed reductions in this motion, there is no explanation how the split ventilation reduces the number of persons affected down to "1." Presumably the Inspector was aware of the ventilation system

[6] The Court's review responsibility is to determine if there is a factual basis presented to justify a proposed reduction, as opposed to a mere conclusory assertion. Thus, the role is not to second guess the basis or the amount of the proposed reduction but rather to see if there is any factual basis presented. Typically, in motions which pass muster, a settlement will present something along the lines that the mine operator has presented evidence tending to show certain facts supporting its claimed basis for a reduction, with such facts articulated in the motion. The Secretary will then typically respond that, while it does not concede such claims, it recognizes that legitimate questions of fact exist and that such disputed facts justify the proposed reduction.

employed when he marked the number affected as "5." More information is needed.

Moving to Citation No. 8176585, the motion seeks to have the Citation modified from reasonably likely to unlikely and from "S&S" to "Non S&S," on the basis that the section equipment is equipped with protective cabs. It would seem that the issuing Inspector was aware that coal haulers and shuttle cars would have protective cabs, if that is true with regard to both of these types of equipment. Yet, the Inspector concluded that the operators of such equipment would be at risk. Further, the Citation alludes to foot travel at the location of this hazard: roof bolts extending out from the rib by 18, 21 and 32 inches from the rib. Protective cabs offer no protection for those traveling on foot. Accordingly, more information is needed to properly consider the 40% reduction proposed by the Secretary.

The lack of necessary information is plain with regard to Citation No. 8176587, for which the Secretary seeks a 30% reduction. This Citation is another that may be considered "missing in action," as it is not listed in the settlement amount table but surfaces in the Order portion of the proposed draft, where the settlement amount is listed at $144.00. Consultation with file reveals that the $207 was the amount originally proposed. The motion advises that the reduction is justified "due to legitimate questions of fact regarding the level of negligence attributable to the operator." The deficiency is that this is a mere averment which provides the Court with no objective basis to review the legitimacy of the proposed reduction. As such, it must be rejected.

For Citation No. 7318190, another matter for which a 30% reduction is sought, the basis advanced for the reduction, from $1,111.00 to $777.00, in its entirety, is that the citation "be modified from 'Moderate' to 'Low' negligence in that the section foreman was unaware of the condition." The Court is unaware that the lack of awareness on the part of the section foreman is a basis for reducing a proposed penalty by 30%. The Citation reveals that the amount of required air was 40% less than the required minimum amount and that no ventilation had been disturbed when the reading was taken. There is no indication in the file concerning the foreman's knowledge, or lack thereof, of the insufficient ventilation for this citation which was marked as "S&S" and presenting moderate negligence. Lack of knowledge on the part of a supervisor, in some circumstances, can be viewed as an aggravating, not a mitigating circumstance. *Eagle Energy*, 2001 WL 1631431, (Dec. 2001). Whether a foreman should have known of a condition is a relevant consideration.

By now, it should be apparent that the motion routinely failed to provide sufficient information for the Court or the Commission to carry out its responsibility under section 110(k) of the Mine Act. This chronic shortcoming continued with Citation No. 8176823, which avers that the citation "be modified from '8' to '4' persons affected in that not all the persons on the section would reasonably be expected to receive injury from the cited condition," to support the proposed 30% reduction. It is hard to fathom the basis for this unilluminated claim, especially when one appreciates that the cited provision pertains to lifelines which were entangled with other cable, a condition requiring escaping miners to release the lifeline at that location. The Citation adds that 8 miners were working inby the break where the violation was detected. The

motion offers no information to support the claim that the miners affected were half the number listed in the Citation. The lifeline had to be relocated to abate the Citation. Obviously, this proposed reduction does not provide a basis for the Court to conclude that the decrease in the assessment is warranted.

For Citation No. 8176742, requesting that it be modified from "Moderate" to "Low" negligence on the basis that the section foreman was unaware that the area had not been cleaned and rock dusted, the same deficiencies noted in Citation No. 7318190 are present here. In this instance the rock dust was not being maintained to 80% incombustible content. Float coal dust up to 4 inches in depth was found in two stretches and the areas had to be scooped, shoveled and bulk rock dusted to abate the conditions.

Citation No. 8176824 involving accumulations of loose coal and coal dust , seeks a 30% reduction from the proposed penalty "due to legitimate questions of fact regarding the level of negligence attributable to the operator." Those "legitimate questions of fact" are not disclosed and the issuing inspector only listed the negligence as "moderate." This would mean that the negligence was "low," but again the Court is provided with no information to understand the basis for that "low negligence" conclusion.

For Citation No. 8176743, the motion repeats the same verbiage presented in Citation No. 8176824, next above, that the reduction is warranted "due to legitimate questions of fact regarding the level of negligence attributable to the operator." The Court responds with same reaction expressed in Citation 8176824. The motion is deficient for the same reason.

The Court can only surmise that, by this point in the motion, the representative was sapped of energy as the next 4 citations addressed in the motion simply present the same, inadequate, explanation for the proposed reductions for Citations Nos. 8176826 , 8176744, 8176845 and 8176846. Each of those repeat the refrain that there were "legitimate questions of fact regarding the level of negligence attributable to the operator." Each of the 4 offer nothing more and consequently, these are also fatally insufficient. Except for a break for Citation No. 8176747, which is discussed below, Citation Nos. 6631200 and 8176830 pick up with the mantra that the sought-after reduction is supported "due to legitimate questions of fact regarding the level of negligence attributable to the operator." As with each of these, nothing is presented beyond the plain claim that such undisclosed "legitimate questions of fact" exist. Accordingly, none of these meet the required level of information to support the proposed reductions.

In the last of the Citations within this docket, No. 8176747, seeks a 40% reduction from the proposed assessment resulting from modifying the negligence from "Moderate" to "Low," and from reducing the persons affected from 9 to 1. The justification offered is that "the machine is only examined on a weekly basis and only the equipment operator would receive injury from this condition." Involved was a 12 volt DC battery on a manbus that was not secured, a subject of the cited standard, 30 CFR 75.1910(j). What is unexplained in the motion is the basis for the assertion that only one person would be affected. The location of the unsecured battery on the

manbus and the relative proximity between the battery and the operator and riders needs to be disclosed. As with other instances in this motion, the date of the most recent weekly exam should be disclosed, along with information, if any, from the issuing inspector's notes as to the length of time the battery had been unsecured.

Accordingly, for the reasons set forth, the Secretary's Motion to Approve Settlement is DENIED. The Motion fails to provide sufficient information for the Court to carry out its review responsibilities under section 110(k) and the insufficient submission highlights, once again, the importance of the Commission's statutory role to ensure that no proposed penalty which has been contested before the Commission shall be compromised, mitigated, or settled except with the approval of the Commission. It is hoped that, prior to re-submitting the motion with the required additional information, rather than reflexively and defensively maintaining that all proposed settlements were appropriate as originally submitted, each citation will be reviewed anew to determine if any of the proposed amounts need to be adjusted.

/s/ William A. Moran
William A. Moran
Administrative Law Judge

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