

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 1, 2023

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

APPALACHIAN RESOURCE WV LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2022-0555
A.C. No. 46-08930-560351

Mine: Grapevine South Mine

DECISION DENYING SECRETARY’S MOTION FOR APPROVAL OF SETTLEMENT

Before: Judge William Moran

This matter 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 non-attorney conference and litigation representative (“CLR”) filed a Motion to Approve Settlement. Upon reviewing the motion, on January 24, 2023, the Court noted that two section 104(b) orders were missing from the record. Citing Exhibit A, from the petition for assessment of a civil penalty, the Court noted that the missing orders were part of the paper issued in connection with Citation Nos. 9567103, and 9567108 for this docket. The Court also noted that for Citation No. 9567108, the motion included a reduction in the regularly assessed penalty. Accordingly, the Court requested that these documents be provided promptly to it.

Subsequently, an attorney for the Secretary filed a notice of appearance and, in a motion filed at that time, in sum and substance, denied the Court’s request for submittal of the orders.¹ Secretary’s Response to the Court’s Request for Documents. January 30, 2023.

It is noted that in prior litigation before this Court for which the Secretary refused to supply associated (b) orders, one of the asserted grounds was that as the matter was settled for the full amount assessed, that precluded the Commission from viewing such orders. The Court rejected that claimed basis for non-disclosure. Here, the Secretary takes it a step further, effectively claiming that even when a proposed penalty is reduced the Commission still has no business in viewing the entire record associated with violations.

¹ This decision denying the Secretary’s motion for approval of settlement addresses only the Secretary’s refusal to provide the full record with respect to the two citations for which (b) orders were issued. Three other citations involve reductions in the regularly assessed penalties while simultaneously standing by the issuing inspector’s evaluation. Analysis of those modifications is deferred until the (b) orders absences are resolved.

Examining the two citations for which (b) orders were issued in connection with them, both are humdingers. Citation No. 9567103 cites a now-admitted violation of 30 C.F.R. §77.1606(c). That standard, titled “Loading and haulage equipment; inspection and maintenance,” provides in subsection (c) that “Equipment defects affecting safety shall be corrected before the equipment is used.” Involving a CAT loader, the issuing inspector cited nine (9) independent bases in support of the citation. Any one of the defects would support the violation of the standard cited. First issued on June 13, 2022, the citation informs that the loader was then removed from service. Regularly assessed at \$626.00, effectively \$69.56 per defect, the motion informs that the penalty remained as assessed.

It is fair to state that compliance with the cited standard, 30 C.F.R. §77.1606(c), at this mine has been poor, with some 68 (sixty-eight) citations being issued for such failures in the past two years. By June 21st, the conditions cited not yet corrected, the inspector allowed additional time to make the repairs – extending the time for abatement to June 24th. On June 27th, the repairs still not completed, the inspector extended the date for abatement a second time, to July 4, 2022. At that point the record goes dark, other than Exhibit A reflecting that a (b) order was issued. It is that order that the Secretary seeks to shield from the eyes of the Commission, miners and the public.

The other citation, No. 9567108, cites the same standard as being violated – 30 C.F.R. §77.1606(c). This one, issued two days after the loader citation just described, involved a CAT truck. Eclipsing the number of defects identified for the loader, by a factor of more than two, the inspector identified 19 (nineteen) independent defects on the truck. Though the issuing inspector informed that the truck is used on steep grades, elevated roadways, in congested areas and at times near foot traffic, neither those conditions nor the number of defects impeded the Secretary from dropping the penalty by 54% (fifty-four percent).

Offering that the Respondent would argue that there were no operational issues with the steering or brakes and contending that the tire was a 58-ply tire with only 2 plies damaged, the Secretary stuck by guns but only in terms of the inspector’s evaluation. Monetarily, and inherently in conflict with being unwilling to change any part of the inspector’s evaluation, the Secretary nonetheless dropped the penalty by more than half. That the 19 defects did not present operational issues is dubious. Those undisputed defects seriously belie that claim.

When first issued, on June 15, 2022, by June 21st the defects were still not abated, but the inspector then extended the time to correct the problems to June 24, 2022. On June 30th, the defects still were not corrected, and the inspector then extended the time for abatement yet again, this time to July 7, 2022. After that, as with the citation described above, the record goes dark except for the notation in Exhibit A that a (b) order was issued.

As the Court has explained in other matters assigned to it for which 104(b) orders were missing from the record, once a matter is before the Commission, as is the case for this docket, perforce the matter is before the Commission, not simply those aspects that the Secretary wishes to disclose.

The Secretary of Labor’s role in mine safety and health matters is to protect the safety and health of our Nation’s miners. Full stop. What purpose the Secretary serves by secreting the

full enforcement record is a mystery. The Court cannot discern any benefit to the affected miners, nor to the public at large, nor to the Commission in fulfilling its statutory role under section 110(k) of the Mine Act. Acting this way, in the Court's opinion, is not a good look for the Secretary.

Accordingly, the motion and the request that it be approved is DENIED. As the issue in this matter is presently before the Commission, the Court will await that determination before acting further.

William B. Moran

William B. Moran
Administrative Law Judge

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