FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
721 19th St., Suite 443
Denver, CO 80202-2500
Office: (303) 844-5266/Fax: (303) 844-5268

October 17, 2018

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2018-0177
Petitioner,	:	A.C. No. 21-00831-458957
	:	
v.	:	
	:	
NORTHSHORE MINING COMPANY,	:	
Respondent.	:	Mine: Northshore Mining Company

DECISION APPROVING SETTLEMENT

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a motion to approve settlement and has set forth the factual basis for the proposed modifications. Respondent has agreed to the proposed changes. The originally assessed amount for the citations at issue was $17,856.00 and the proposed settlement amount is $3,706.00. The proposed settlement is as follows:

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
Docket No. LAKE 2018-0177			
9380347	$589.00	$118.00	Modify negligence from moderate to low. Modify severity of injury from fatal to lost workdays/restricted duty.
9380348	$311.00	$138.00	Modify negligence from moderate to low.
9380353	$429.00	$191.00	Modify negligence from moderate to low.
9380354	$811.00	$243.00	Modify severity of injury from fatal to lost workdays/restricted duty.
9380351	$1,421.00	$191.00	Modify negligence from moderate to low. Modify severity of injury from fatal to lost workdays/restricted duty.

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
9380366	$691.00	$208.00	Modify severity of injury from fatal to lost workdays/restricted duty.
9380374	$395.00	---	Vacate.
9380377	$8,947.00	$1,806.00	Modify likelihood of injury from reasonably likely to unlikely. Remove S&S designation.
8896277	$243.00	---	Vacate.
9380381	$4,019.00	$811.00	Modify likelihood of injury from reasonably likely to unlikely. Remove S&S designation.
TOTAL	**$17,856.00**	**$3,706.00**	

The Secretary filed the initial motion to approve settlement on July 24, 2018. The Secretary was at the time represented by a non-attorney conference and litigation representative (CLR), George F. Schorr. Upon my review of the motion, the parties were asked to provide additional facts to justify the significant reduction in penalty from $17,856 to a total of $3,706, a reduction of more than 80%. The case was then transferred from the CLR to an attorney from the Solicitor's Office, Dana L. Ferguson. Ferguson submitted an amended settlement motion on behalf of the Secretary on August 3, 2018, which also lacked sufficient information to determine if the large penalty reductions were appropriate. As a result, a conference call was held on August 13, 2018, and the parties were again directed to provide additional information in support of the settlement. The request was also made in an email sent to the parties after the call. The Secretary submitted a second amended motion to approve settlement on August 23, 2018. The motion did not include any additional facts or information from the Secretary but included a recitation of purported case law concerning settlements. It also included a statement, at paragraph 11, that the parties are resubmitting the proposed agreement with the same reductions but the "Respondent submits additional information for the three citations..." which were specifically discussed with the parties during the telephone conference. The representations from the Respondent were not joined by the Secretary. Based on my review of the additional information provided by Respondent, I conclude that the settlement is appropriate based upon the information submitted by the Respondent.

In evaluating proposed settlements, the Commission has directed its judges to consider "whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *Am. Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016). The ALJ must consider all of the relevant penalty criteria in determining if a settlement is appropriate. To enable judges to make this determination, Commission Rules require that a motion to approve a penalty settlement must include "facts in support of the penalty agreed to by the parties." 30 C.F.R. § 2700.31(b). The facts submitted may include "a description of an issue on which the parties have agreed to disagree. The Commission does not require concessions from parties in settlement as long as the parties provide mutually acceptable facts" that meet the standard. *Rockwell Mining, LLC*, No. WEVA 2017-220, 40 FMSHRC __, slip op. at 3 (Aug. 2, 2018).

The Secretary's initial motion to approve settlement included a summary of the modifications and proposed penalty reductions for each citation. Sec'y Mot. 3-9. The Secretary conveyed arguments made by the operator during settlement negotiations regarding the modified citations, but did not include sufficient fact to support the modification. For some of the citations, the Secretary set forth some conclusory statements and added that he had "determined that Respondent's arguments have merit." Sec'y Mot. 3-5. With respect to three of the citations, however, the Secretary declined to say whether the respondent's arguments had merit. *Id.* at 6-9. Instead the Secretary stated only that "the information presented by the Respondent could be viewed as mitigating," and that he agreed to the modifications "while not admitting the relevancy or significance of Northshore Mining Company's arguments, and the possibility that the Administrative Law Judge might find that the Respondent [sic] argument has merit." *Id.* The three citations, Nos. 9380381, 9380377, and 9380351, each involved penalty reductions of 80 percent or more and included few if any facts, to support such a proposed reduction. As stated above, the Commission does not require concessions from parties in settlement. *Rockwell*, slip op. at 3. Nevertheless, the parties are required to provide some basis from which the judge can conclude that the proposed settlement is "fair, reasonable, appropriate under the facts, and protects the public interest." *Am. Coal Co.*, 38 FMSHRC at 1976.

The Secretary's amended motion filed on August 3, 2018, provided additional mutually acceptable facts for a number of the citations. However, the added facts did not provide sufficient justification for all of the reductions. Specifically, Citation No. 9380377 concerned flooding in the old MCC room at the mine. The original citation alleged both slip-and-fall hazards and electrical hazards, and the citation was issued as S&S. In the amended settlement motion, the parties agreed that there were no energized transformers in the room, any electrical panels were more than three feet above the ground, and the electrical components were adequately grounded. Sec'y Am. Mot. 6. They concluded that injury was therefore unlikely to occur. However, the parties did not explain why those few facts would change the penalty so drastically. In addition, the motion did not address the likelihood of a slip-and-fall injury. The S&S designation may have been sustainable based on that hazard alone. *See Consol Pa. Coal Co.*, 39 FMSHRC 1893, 1900 (Oct. 2017) ("The Commission has long recognized that broken bones and other injuries likely to result from a trip-and-fall accident are sufficiently serious in nature to support an S&S designation."). The additional facts provided were insufficient to demonstrate that the proposed reduction in penalty from $8,947.00 to $1,806.00 was appropriate.

Similarly, Citation No. 9380351 alleged that there was a broken electrical conduit between an on/off switch box and an LB connector in a storage area at the mine. The inspector found that an injury caused by the condition could reasonably be expected to be fatal. The parties proposed a reduction in penalty from $1,421.00 to $191.00 based in part on a modification of the injury designation from "fatal" to "lost workdays or restricted duty." In the amended motion, the Secretary stated that the parties had agreed that even if the inner conductors were contacted, the resulting injury would not be fatal. Sec'y Am. Mot. 5. There was no information provided to support that conclusion, however. The Secretary also stated that the location of the conductors would prevent inadvertent contact, but that fact had already been addressed in the initial penalty proposal, which alleged that injury was unlikely to occur. Regarding negligence, the Secretary explained that the negligence designation should be

modified from moderate to low because the operator had no knowledge of the condition. However, the essential inquiry in a negligence analysis is whether the operator *should have* known about the violation. *See Brody Mining, LLC*, 37 FMSHRC 1687, 1704 (Aug. 2015) ("actual knowledge . . . is only part of the inquiry"). The Secretary did not address that issue. The facts provided by the Secretary did not adequately justify the significant reduction in penalty from $1,421.00 to $191.00.

The Secretary filed the most recent second amended motion to approve settlement on August 23, 2018. The Secretary makes a number of legal arguments for why the settlement should be approved on the basis of the two motions already filed. For one, the Secretary argues that the settlement is supported in part by the justification that the case "fits into his overall enforcement strategy." Sec'y 2d Am. Mot. 6 (quoting Sec'y Mot. 2-3). The Commission has recently observed that an operator's acceptance of citations as originally issued may be of value to the Secretary in future enforcement actions, and thus that the operator's acceptance of citations as written may provide support for approval of a settlement. *Am. Coal Co.*, No. LAKE 2011-13, 40 FMSHRC __, slip op. at 7 (Aug. 2, 2018). In this case, however, the operator agreed to accept the citations not as originally issued, but rather in modified form. The Secretary provides no explanation for his assertion that the modified citations would be valuable in future litigation, and accordingly I give little weight to the statement. *See id.* (Comm'r Cohen, separate note) ("The Secretary's boilerplate recitations of having evaluated the value of the compromise, the prospects of coming out better or worse after a trial, and 'maximizing his prosecutorial impact' add nothing."). I am not persuaded that the Secretary's statements regarding enforcement strategy demonstrate the appropriateness of the settlement in any significant way.

Additionally, the Secretary argues that a judge may not review the Secretary's decision to remove an S&S designation for a citation in settlement. The Secretary argues that "Section 110(k) provides the Commission with authority to review penalty reductions only, and ... the Secretary possesses unreviewable discretion to withdraw an S&S designation." Sec'y 2d Am. Mot. 5. Citing the Commission decision *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996), the Secretary states that "ALJs may not designate a violation as S&S if MSHA has not already done so, because such an action falls within the Secretary's enforcement and prosecutorial discretion." *Id.* In *Mechanicsville*, the Commission determined that an ALJ could not designate a citation as S&S in a decision after hearing where the inspector had issued the citation as non-S&S and the Secretary had not requested a modification to the citation. 18 FMSHRC at 879-80. The Commission noted that the decision "to designate the citation as S&S in the first instance" was "an exercise of enforcement authority reserved for the Secretary." *Id.* In the instant matter, however, the citations at issue were designated as S&S "in the first instance" by the Secretary's authorized representative, the inspector. I am not persuaded that the reasoning in *Mechanicsville* is applicable to the settlement context where a citation was initially issued as S&S.

Aside from these legal arguments, the second amended motion provides factual assertions from the Respondent to support several of the penalty reductions. There is no explanation regarding the Secretary's position on these facts. For Citation No. 9380377, alleging flooding in the old MCC room, Respondent asserts that the operator did not discover the condition until the time of the inspection, and that the miner who entered the area at that time only did so in order to

shut off a valve to stop the flow of water. Sec'y 2d Am. Mot. 16. The company asserts that injury was unlikely to occur because there was no reason for anyone else to enter the room. *Id.* For Citation No. 9380351, Respondent asserts that the cited damaged components were located in an area of the mine that was no longer used, and even if someone were to enter the area, there would be no way for a person to contact live electrical components. *Id.* at 15. However, given the Secretary's unwillingness to provide further facts, the Respondent did provide an explanation for at least three of the citations that were drastically reduced. For example, for Citation No. 9380381, the proposed penalty was modified from $4,019.00 to $811.00. After two attempts, the Secretary's explanation was, "Respondent contends that the labels that were found on the electrical panels did provide sufficient information to persons working on electrical equipment, and that only authorized persons work on electrical equipment. The Secretary agrees that there is some labeling but that it is not adequate as it does not clearly identify which breaker energizes which circuit. Given the partial labeling and the credentials of miners accessing the area, the Secretary agrees to modify the likelihood of occurrence from Reasonable Likely to Unlikely, and to modify the violation form (sic) S&S to non S&S." The Secretary was asked, but did not provide the facts necessary to reach the conclusion that the violation was not S&S.

However, the Respondent added the following information: "The breakers were labeled. The manner of labeling had been accepted by MSHA in the past, including by the current field office supervisor. The Citation states that "no electrical schematics were available." This is not true. There were schematics available. During the inspection, the inspector asked a single electrician to provide the schematic. He was new and had difficulty retrieving it from the computer at the time of the inspection. However, the schematics were available and would have been retrieved and consulted prior to any work on the electrical panel. Only qualified personnel work on the panel. They know how to interpret the schematics and what breakers correspond with what labeling. This practice has been accepted by MSHA for decades."

As explained above, Commission case law requires that the parties provide mutually acceptable facts to demonstrate the appropriateness of a settlement. The facts asserted by Respondent were not "mutually acceptable" because the Secretary did not explain his position on them. Nevertheless, Respondent's assertions demonstrate that the parties had at least a dispute of fact on substantial issues with respect to several of the citations with significant penalty reductions. The Commission has found that a settlement may be justified based on "the description of an issue on which the parties have agreed to disagree." *Rockwell*, slip op. at 3. Further, Respondent's assertions advance the goal of transparency in the settlement process by forming a record of the factual basis for the settlement. *See Am. Coal*, slip op. at 5. Therefore, I find that the information provided in the second amended motion, and specifically the additional information provided by the mine operator, is adequate to show that the settlement is appropriate.

I accept the representations and modifications of the parties as set forth in the second amended motion to approve settlement, including the statements provided by Respondent. The reduced penalties correspond to the Secretary's scheme for assessing penalties under Part 100, and I find that they are appropriate to the violations as modified. I have considered the representations and documentation submitted, and conclude that the proposed settlement is appropriate under the criteria set forth by the Commission.

The motion to approve settlement is **GRANTED**, and Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $3,706.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. Certified First Class Mail)

Dana L. Ferguson, U.S. Department of Labor, Office of the Solicitor, 201 12th Street South, Suite 401, Arlington, VA 22202-5450

George F. Schorr, U.S. Department of Labor-MSHA, 515 W. 1st Street, Suite 333, Duluth, MN 55082-1302

Arthur M. Wolfson, Jackson Kelly PLLC, Three Gateway Center, 401 Liberty Avenue, Suite 1500, Pittsburgh, PA 15222