FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 2, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2016-0120
Petitioner,	:	A.C. No. 12-02295-397991
v.	:	
	:	
PEABODY MIDWEST MINING, LLC,	:	Mine: Francisco Underground Pit
Respondent.	:	

DECISION APPROVING AMENDED MOTION TO APPROVE PARTIAL 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 ("Act" or "Mine Act"). On October 4, 2017 the Secretary filed a motion to approve partial settlement. Upon review of the motion, the Court sent an email to the parties advising that it was unable to approve it because the Secretary failed to specify facts which were genuinely in dispute. In response, the Secretary then filed an amended motion to approve partial settlement on October 19, 2017 ("Amended Motion"). The original motion and the amended motion are discussed below.

Three citations and one order are in this docket. Order No. 9036624, with a proposed penalty of $4,000.00, is not part of this settlement motion.[1] The three citations which are the subject of this settlement motion are proposed for penalty reductions, and Citation No. 9036832 is also proposed for modification. The originally proposed penalty for Citation No. 9036832 was $35,500.00 and the proposed settlement amount is $21,300.00. Another citation, Citation No. 9036721, was assessed at $10,700.00 and is proposed for settlement at $7,000.00. Finally, Citation No. 9036722 had an original proposed penalty of $8,000.00 and the proposed settlement amount is $5,000.00. Thus the total proposed penalty amount for these three citations was $54,200.00, and the proposed settlement totals $33,300.00.

Following a review of the parties' initial settlement motion, on October 13, 2017 the Court contacted the parties via e-mail, advising that it was unable to grant the motion. The Court informed the parties that "where the facts support settlement motions," it is pleased to approve them. Court's October 13, 2017 E-mail to the Parties. The Court added that it has "no

[1] As this matter has been consolidated with Docket No. LAKE 2016-0140, Order No. 9036624 remains set to be heard beginning November 7, 2017.

predisposition to deny such motions and [that] this view applies to all cases before [it]. However, as [the Court has] obligations under 110(k), [it] need[s] to have motions that are adequately supported." *Id*.

The Court went on to explain that its "overall problem [with the motion] is that the Secretary has failed to specify the facts which are genuinely in dispute. Instead the Secretary only asserts, repeatedly, that '[t]he reduced civil penalty on this citation is appropriate in light of the factual disputes raised by the parties.' See, e.g., Motion at 4, 6 (emphasis added)." *Id.*

To illustrate the inadequacy, the Court explained that "[f]or Citation No. 9036721, an alleged violation of 75.220(a)(1), the suitable roof control plan standard, the motion, after reciting the alleged conditions, states '*[t]he Respondent argues* that the excess width did not result in any adverse roof conditions. *According to the Respondent*, the entries are allowed to exist at this width with supplemental support, so there is nothing inherently unsafe about the width. *The Respondent* also argues that the negligence should have been reduced because the entire rib was not wide, only a portion at the bottom due to rashing, and it occurred because of a mud separation in the coal seam, which could have occurred at any time. Respondent further argues that it did not know and did not have reason to know of the cited conditions.'" Motion at 4-5 (emphasis added).

In response, the Motion advises, "*MSHA disagrees* with Respondent's characterization of the widths being safe without supplemental support, as was found during this inspection. *Further, MSHA disagrees* with Respondent's argument that it was not negligent because only a portion of the rib was wide and that it had no reason to know of the conditions." Motion at 5 (emphasis added).

Yet, inexplicably in the Court's estimation, the Motion then continues "[n]evertheless, after further review of the substantial factual disputes, MSHA determined that the citation should be removed from Special Assessment and a modified penalty is in order. The reduced civil penalty on this citation is appropriate in light of the factual disputes raised by the parties." *Id.*

The Court, then informed that it "is aware of and read the narrative findings for the special assessment in its entirety [and that] [t]he assertions in paragraphs 4 and 5 were particularly noted." Court's October 13, 2017 E-mail to the Parties. Summing up the motion's shortcoming, the Court stated, "[t]o put it very simply, as alluded to above, after disagreeing with each of the Respondent's contentions, the Secretary only asserts there are 'substantial factual disputes,' but he identifies none. It is insufficient to simply infer that the Secretary views the Respondent's assertions as creating legitimate factual disputes. Accordingly, to be approved, the Secretary will need to identify the legitimate, substantial, factual disputes which are genuinely in issue." *Id.*

The Court's email then addressed Citation No. 9036722, which presented the same problem as Citation No. 9036721. Involved with Citation No. 9036722 is an alleged violation of 75.360(b)(3), the preshift exam in working sections provision. The Court noted that "[a]fter reciting the alleged conditions, the motion states '[t]he Respondent argues the preshift examination was not inadequate *because excess width did not result in any adverse roof*

conditions, and there is insufficient evidence to prove the condition existed at the time of the most recent preshift examination. Respondent also argues that it did not know of the cited condition and had no reason to know of its existence.'" Motion at 5-6 (emphasis added).

In response, MSHA states that it "disagrees with Respondent's characterization of there not being sufficient evidence to support the fact that the conditions existed at the time of the most recent preshift examination. Further, MSHA disagrees with Respondent's argument it was not negligent because it did not know nor had reason to know of the wide entries. Nevertheless, after further review of *the substantial factual disputes*, MSHA determined the citation should be removed from Special Assessment and a modified penalty is in order. The reduced civil penalty on this citation is appropriate in light of the factual disputes raised by the parties." Motion at 6 (emphasis added).

As it did with Citation No. 9036721, the Court noted that it was "aware of and read the narrative findings for the special assessment in its entirety [and that] the assertions in paragraphs 8, 9, and 10 of that narrative were particularly noted." Court's October 13, 2017 E-mail to the Parties. Thus, the Court concluded that "as with Citation No. 9036721, the Secretary fails to identify in his motion the legitimate, substantial, factual disputes which are genuinely in issue." *Id.*

Finally, for Citation No. 9036832, an alleged 75.202(a) inadequate support or control to provide protection from falls of roof, face and ribs violation, the Court noted that, after reciting the alleged conditions, the motion set forth the Respondent's contentions. The motion recounted that *the Respondent argued* "that the gravity is excessive because the bolts at issue were fully grouted resin bolts that continue to provide protection against a major roof fall even if the bolt or the immediate roof is damaged. Once installed, the resin bolts provide a 'beam effect' in the roof that continues to provide support. Additionally, Respondent argues exposure to the cited condition was minimal, as the bolts were in a worked out area only accessed by a weekly examiner and the majority of loose material present was confined to the roof screening." Motion at 7.

In response, MSHA stated that it "disagrees with Respondent's argument that the bolts were such that even with the exposure of 10 inches of the bolt, they still provide protection against a major roof fall. Furthermore, MSHA argues that the unsupported roof could have fallen without any warning, and caused serious injury." *Id*. However, the Secretary, despite its disagreements, then stated, "[a]fter further review of *the substantial factual issues*, MSHA determined that the cited gravity should be modified from fatal to permanently disabling. The reduced civil penalty on this citation is appropriate in light of the modification of the gravity." *Id*. (emphasis added).

As it did with the first two citations in the motion, the Court informed that it was "aware of and read the narrative findings for the special assessment in its entirety [and that] [t]he assertions in paragraphs 5 and 6 were particularly noted." Court's October 13, 2017 E-mail to the Parties. Again, the Court explained that "the Secretary's Motion fails to identify the legitimate, substantial, factual disputes which are genuinely in issue." *Id.*

Given the above-described deficiencies, the Court stated that "absent a new, adequately supported motion, in which the Secretary identifies the substantial factual issues that are in dispute, these matters presently remain scheduled to be heard in the upcoming hearing." *Id.*

The Secretary then filed the aforementioned amended settlement motion. ("Amended Motion") That Amended Motion largely recounted the initial motion, presenting additional information concerning the parties' differing perspective of the facts but, significantly, for Citation No. 9036721, the Secretary added,

> in reply to Respondent's statements and contentions, [the Secretary stated] that he recognizes that these facts are in dispute and raise factual and legal issues which can only be resolved by a bearing 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 recognizes that the ALJ may find some merit in the facts and contentions raised by Respondent. The Secretary agrees to accept a reduced penalty.

Amended Motion at 4-5.

In a similar fashion, for the other two citations constituting the partial settlement motion, the Secretary's Amended Motion cured the deficiencies identified by the Court in the initial motion.

To the Secretary's credit, in the Amended Settlement Motion, the Secretary did not merely offer an incantation for each of the three citations. Instead, the Secretary's Counsel informed, for Citation No. 9036722,

> at hearing would present evidence that by failing to recognize the entry width exceeded the roof control maximum, that the Examiner conducted an inadequate pre-shift examination. The Secretary would also present evidence that by failing to identify entryways which exceeded the maximum width according to the roof control plan required additional two-foot long bolts in order to support the roof, the Examiner failed to conduct an adequate pre-shift examination at crosscut 93. The Secretary, in reply to Respondent's statements and contentions, states that he recognizes that these facts are in dispute and 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 Order to reflect a lower level of gravity or negligence or both. The Secretary recognizes that the ALJ may find some merit in the facts and contentions raised by Respondent. The Secretary agrees to accept a reduced penalty.

Amended Motion at 5-7.

Using the same, now informative approach, for Citation No. 9036832 the Amended Motion stated,

> MSHA has reviewed Respondent's additional mitigating arguments, especially regarding the loose material being confined to the roof screening and the effect, if any, on material falling on passing miners. The Secretary recognizes that Respondent's statements and contentions raise factual and legal disputes and also recognizes that the ALJ may find some merit in the facts and contentions raised by Respondent. The Secretary agrees that the cited gravity should be modified from fatal to permanently disabling. The reduced civil penalty on this citation is appropriate in light of the modification of the gravity. Therefore, the parties have agreed to settle the matter amicably without further litigation.

Amended Motion at 7-8

As detailed above, the amended motion now provides significantly more information in support of the proposed penalty amounts and the proposed modification by identifying the areas of factual dispute. With the additional information, the Court considered the representations submitted in this case and now is able to conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

The amended partial settlement motion, now having provided the needed information, is approved.

The settlement amounts are as follows:

Citation No.	**Assessment**	**Settlement Amount**
9036721	$10,700.00	$7,000.00
9036722	$8,000.00	$5,000.00
9036832	$35,500.00	$21,300.00
TOTAL:	**$58,200.00**	**$33,300.00**

Order No.	**Assessment**	**Settlement Amount**
9036624	$4,000.00	**not settled**

WHEREFORE, the motion for partial approval of settlement is **GRANTED**.

It is **ORDERED** that Citation No. 9036832 be **MODIFIED** from "fatal" to "permanently disabling."

Upon resolution of Order No. 9036624, the Court will issue a final Order disposing of the four matters in this docket and ordering payment.

William B. Moran
Administrative Law Judge

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