**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
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NOV 29 2017

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 2017-0052 |
| Petitioner, | : | A.C. No. 12-02372-422572 |
| v. | : | |
| | : | |
| SOLAR SOURCES, INC., | : | Mine: Antioch Mine |
| Respondent. | : | |

## DECISION DENYING MOTION TO APPROVE 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. The docket involves three citations, with each relating to an accident which occurred on July 25, 2017 when a miner fell nearly 14 feet, while trying to exit the cab of the equipment he had been operating. The Secretary has filed a motion to approve settlement. The originally assessed overall amount, as set forth in the Secretary of Labor's Petition for the Assessment of a Penalty, was $77,396.00, an amount derived in large measure through MSHA's special assessment provision to one of the three citations. The proposed settlement is $13,644.00, which is more than an 82% penalty reduction.

Here, the Secretary simply discarded the special assessment of its client, MSHA, and reverted to the Part 100 regular assessment formula to arrive at the $13,644.00 figure. However, the Secretary provided *no facts* to support the change. Borrowing from it tack in settlements of all stripes, to wit, the Secretary of Labor need not explain its settlements to anyone, he now extends this authoritarian approach to his client's special assessments. This attitude may come as a surprise to Congress, as it would seem that august body does not include statutory provisions idly, especially where that legislative branch of government provided, regarding settlements, that "[n]o proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). To be clear, this matter *is* before the Commission.

In view of the fact that the Secretary's 82% reduction offers no facts to support its settlement – indeed, the Secretary expressly refused to provide facts requested by the Court, the settlement motion is **DENIED**. The Secretary is directed to make himself available for a conference call, so that this matter may be set for a prompt hearing.

**Background**

As noted, three Section 104(a) are involved in this docket. Citation Nos. 9102709 and 9102711 are settled at the amounts originally proposed – each at $4,548.00. However, the other citation, No. 9102710, was specially assessed at $68,300 and now the Secretary seeks to have that citation reduced to the same $4,548 assessed for the others. Thus, for the one specially assessed citation, the reduction is more than 93%.

Before focusing on the citation involving the 93% reduction, it is important to appreciate the nature of the other two citations because they are of a piece, as they all relate to the same piece of equipment. Citation No. 9102709 speaks to

> [a] handrail chain with defects affecting safety [which] was not corrected before equipment was used on the company number 1199 end dump in the 001 pit. An accident occurred on 7/8/2016 in which a miner fell through the chain and caused it to break. The miner fell 13 feet and 10 inches to the ground. The handrail chain has severe corrosion from rust and a minimum of 4 links are corroded together and are no longer flexible links.

Citation No. 9102709.

So too, for Citation No. 9102711, the same piece of equipment was involved. That citation asserted,

> [e]quipment defects affecting safety were not recorded on 7/7/16 2nd shift. Defects were reported to a mechanic but were not recorded in the pre op record book. The pre op record book shows no defects for the shift. The defects are in the form of a corroded handrail chain that has severe rust and thin links that provides fall protection from a miner on the catwalk of the end dump on the company number 1199.

Citation No. 9102711.

The specially assessed citation, No. 9102710, a section 104(a) citation, citing 30 C.F.R. § 77.1101(c), and issued on 7/25/2016, asserts that

> [p]lans for escape and evacuation do not include proper maintenance of adequate means for exit of all areas where persons are required to work or travel including buildings and equipment and in areas where persons normally congregate during the work shift. An accident occurred on 7/8/2016 where a miner was attempting to get out of the cab on company number 1199 end dump when a rope tied from the cab to the mirror impeded his exit and caused him to lean against a chain which broke and allowed him to fall 13 feet and 10 inches to the ground. The rope was 57 inches to 59 inches high across the entire 14 inch catwalk. A CB antenna cord is routed along the catwalk that also creates a tripping hazard when accessing the ladder on the front of the end dump.

Citation No. 9102710.

The issuing inspector marked the citation as significant and substantial, of moderate negligence, with an injury reasonably expected to result in lost workdays or restricted duty. *Id.* As noted, the injury was marked as "occurred." *Id.*

An extension was allowed so that the operator could make modifications to its plan and resubmit it to MSHA and, on 8/02/2016, the operator having submitted a modified plan, the citation was terminated.

**The Secretary's Motion**

The Secretary's Motion acknowledges, as it must, that "The Federal Mine Safety and Health Review Commission has jurisdiction over these proceedings." Motion at 2.

After first proclaiming that in settlements he need not provide any facts to the Commission, [1] the Secretary then "presents the following information in support of the penalties agreed to by the parties"

> Citation No. 9102710[2] – The $4,548 penalty is appropriate for this citation because there are factual and legal issues in dispute. The citation was issued in response to a non-fatal accident at Respondent's Antioch mine. A miner fell from a catwalk on an end dump due to an obstruction on the catwalk and a defect in a corroded handrail chain. Respondent asserts the cited standard is not applicable to an end dump because catwalks on an end dump cannot be considered areas where persons work or travel, as those terms are used in the standard and in practice. Respondent also asserts that the special assessment for the citation was not justified. The Secretary asserts that the citation is valid as written, but agrees that *the facts* do not support the special assessment and the citation should have been regularly assessed pursuant to Part 100. In light of the parties' interests in settling this matter amicably without further litigation and in recognition of the nature of the citation and the uncertainties of litigation, the parties wish to settle the matter as follows: (a) The negligence and gravity determinations for this citation are

[1] As with virtually all of his settlement motions, the Secretary's initial, fact-free, position is repeatedly invoked that *he* has weighed the matter, considered the cost of going to trial, formed the belief that *he* has maximized his prosecutorial impact, and settled the matter, which in *his sole judgment*, is on appropriate terms, and which ends with his unusual conclusion that *even if he won at trial*, and *even if the judgment were greater than the settlement*, such a result would not necessarily be a better outcome. Motion at 2-3.

[2] The first page of Citation No. 9102710 was missing from the file and the Court then instructed the Secretary to provide that document. That missing page has now been inserted into the official file. Also, the official file contained a citation, number 9102712, which is not part of this docket, but perhaps could have been because it was issued to the same mine on the same date as the other three citations.

> unchanged and remain as issued. (b) Removing the special assessment from the citation, and applying the penalty factors found in Part 100, the penalty assessment for the citation, as modified herein, is reduced from $68,300 to $4,548. Respondent agrees to pay the total, revised penalty of $13,644, and agrees that Citation Nos. 9102709 and 9102711 are not modified by this agreement.

Motion at 3-4 (emphasis added).

On November 6, 2017, the Court, through its Attorney Advisor, advised the parties that it was "reviewing the settlement motion for this matter [and] would like to look at a copy of the inspector's notes, and any photographs that may be included with those notes." Court's November 6, 2017 E-mail to the Parties. The Secretary responded the same day that he "respectfully declines to provide the requested documents and rests on his settlement motion." Secretary's November 6, 2017 E-mail.

The Court then advised the parties that it was "unable to properly review the settlement motion until the inspector's notes and the accompanying photographs are sent to [the Court]. If the Secretary continues to decline submitting these materials, [the Court] will simply issue a published denial of the settlement motion." November 13, 2017 Email From the Court To the Parties. The Secretary responded that he "has reconsidered the Court's request for the inspector's notes and photographs, but still respectfully declines to provide those documents. We rest on the settlement motion filed in this matter." November 15, 2017 Response From the Secretary.

**MSHA's Special Assessment**

One starts with the premise that MSHA's invoking the Special Assessment process under 30 C.F.R. § 100.5 is both a thoughtful and fact-based analysis. If either of these presumptions are not true, then the entire special assessment process is suspect. In this case, MSHA presented its "Narrative *Findings* for a Special Assessment." Petition Ex. B (emphasis added) ("Narrative"). That Narrative begins by noting that MSHA can elect to waive its regular assessment formula, "if it deems that *conditions* concerning the violation warrant." *Id.* Here, the Narrative advises "MSHA *carefully evaluated* the *conditions cited* and the inspector's *relevant information and evaluation.* The proposed penalty reflects the results of an appraisal of *all the facts presented.*" *Id.* (emphasis added).

Of the three citations involved in this docket, only one, Citation No. 9102710, was specially assessed. The mine was cited for a violation of 30 C.F.R. §77.1101(c) "because the plans for escape and evaluation did not include proper maintenance of adequate means for exit from all areas where persons are required to work or travel including buildings and equipment and in areas where persons normally congregate during the work shift."[3] *Id.*

[3] The language employed in the Special Assessment tracks that of the cited provision, section 77.1101 at subsection (c), which provides: "Plans for escape and evacuation shall include the designation and proper maintenance of adequate means for exit from all areas where persons are required to work or travel including buildings and equipment and in areas where persons

The Narrative then addressed the gravity, stating that it "was considered serious and the violation contributed to the cause of a fall of person accident. A mobile equipment operator received serious injuries resulting from an accidental fall from a haul truck." *Id.*

Speaking to the negligence, the Narrative related that the

> violation resulted from the operator's moderate degree of negligence. A serious accident occurred which resulted in non-fatal injuries to an equipment operator who fell from a Euclid 3500 haul truck. The equipment operator was attempting [to] exit the cab of the haul truck when a rope, which was tied from the cab to the mirror, impeded his exit. The rope was approximately 57 inches to 59 inches high and spanned the 14 inch catwalk. The miner was ducking underneath the rope in order to dismount the truck when the rope caught the miner's hard hat. While trying to retrieve his hard hat, the operator leaned against a badly corroded handrail safety chain which subsequently broke and allowed him to fall 13 feet and 10 inches to the ground.[4] A CB antenna cord was also routed along the catwalk that could have created a tripping hazard for the operator as he attempted to exit the haul truck via the access ladder on the front of the haul truck. The severity of the corrosion observed on the handrail safety chain suggested that the corrosion had existed for an extended period of time and management knew or should have known of the hazardous condition and made no effort to correct the violation. . . . [t]he violation was cited during an investigation of a serious fall of person accident that occurred at the [Antioch Mine] on July 8, 2016.

*Id.*

**Discussion**

The Code of Regulations' Provision addressing special assessments is, to put it mildly, concise, stating "*MSHA* may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment," and "[w]hen *MSHA determines* that a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in § 100.3(a). All findings shall be in narrative form." 30 C.F.R. §100.5 (a), (b) (emphasis added).

However, the process for approving a special assessment is noteworthy. Beginning with the inspector who issues a violation, if appropriate, that individual completes part of a special

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normally congregate during the work shift." 30 C.F.R. § 77.1101(c).

[4] To visualize a fall of 13 feet 10 inches, think of falling into the deep end of an empty swimming pool. Typically such pools are not more than 10 feet deep. Then add nearly another 4 feet and you will get a sense of the magnitude of the fall. In this instance, the official file does not reveal the extent of the miner's injuries, but it does note that a month after the fall the miner had not returned to work. Official file at 18; related Citation 9102712-01, August 24, 2016.

assessment form and the operator is notified that a special assessment may ensue. Next, upon the inspector's supervisor's review of the information in the form, it is sent to the District Office. At that point the information is in suspension for ten days. During that interval the mine may request a "Manager's conference." Requested or not, the Assistant District Manager of Inspections then reviews the matter. Following that, the District Manager makes a recommendation about whether to proceed with a special assessment. It does not end there, because the Administrator then signs the special assessment form together with that individual's recommendation as to the proper course of action. *See,* MSHA's Program Policy Manual, Volume III, 100.5; MSHA's Special Assessment Review Form, 7000-32, Revised August 2006, and Chapter 4 of the General Coal Mine Inspection Procedures and Inspection Tracking System Handbook.

Settlement motions, whether the proposed penalties are initially derived via the regular or special assessment process must be supported by facts. In this instance, the Secretary's Motion provides no facts and therefore it must be denied. Instead, the Secretary employs a "he decides – the Commission follows" approach to Mine Act settlement motions. Associated with the lack of supporting facts, as part of its Congressionally delegated responsibility under 30 U.S.C. § 820(k), it is within the Court's prerogative to require the Secretary to submit the MSHA's inspector's notes and photos, if the Court believes that such information is necessary in determining if a compromise or mitigation in a settlement motion is appropriate.

It is important to note that this was not an instance when there was no special assessment and the Court essentially elected to create one. Here, following the fairly elaborate process, a special assessment was issued. Thus, this matter is quite distinct from the situation in *Secretary v. Mechanicsville Concrete*, which involved an instance when a judge made an "S&S" finding, *sua sponte*, though the citation made no such allegation. 18 FMSHRC 877 (June 1996).

It is also clear that, special assessment or not, all settlement motions are subject to review by the Commission, and in the first instance this review is by the administrative law judge to whom the docket has been assigned. As Judge Margaret Miller noted in *Teichert Aggregates*, 39 FMSHRC 1098 (May 2017),

> The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission and its judges 'authority to assess all civil penalties provided in [the] Act.' 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). The Secretary calculates penalties using the penalty regulations set forth in 30 C.F.R. § 100.3 or following the guidelines for special assessments in 30 C.F.R. § 100.5. When an operator notifies the Secretary that it intends to challenge a penalty, the Secretary then petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. Commission judges are not bound by the Secretary's penalty regulations or his special assessments. *Am. Coal Co.*, 38 FMSHRC 1987, 1990 (Aug. 2016). Rather, the Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the

> effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion 'bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme.' Id. at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

39 FMSHRC 1098, 1103. *See also, Warrior Coal*, 39 FMSHRC 509, 526 (March 2017)(ALJ), *The American Coal Co.*,2017 WL 4230949, at *3 (Sept. 2017)(ALJ).

In disputing the Commission's role in reviewing settlements, the Secretary has frequently invoked his claim that there be "transparency" with the process. However, the Secretary apparently employs what can be generously described as an unusual construction of that term, as he declines to show the Court the notes made and any photographs taken concerning this citation. One would think that, especially in instances where a 93% reduction from the initial proposal is being advanced, the Secretary would be, not merely willing, but anxious and insistent to fully, and yes, transparently, show the inspector's notes and photographs associated with the alleged violation. Further, the Secretary's approach seems to turn the attorney client relationship on its head. Typically, counsel advises, rather than directs, a client, especially where, as here, the client, MSHA, is charged in the first instance with protecting the safety and health of miners.

It seems antithetical to the mission of MSHA when, after thoughtfully employing the special assessment process, a process which, as noted, ultimately requires approval by the Administrator, that without explanation, the Secretary may simply discard that process, provide *no* new facts, and essentially say "nevermind," while simultaneously not changing any of the underlying findings in the citation. The effects of such a practice would be inherently discouraging to inspectors who, in carrying out their enforcement obligations in the name of protecting miners' safety and health, follow the process in place and, by that process, where the facts warrant it, urge that a special assessment be employed. It must also be discouraging to those at the management level who then apply that process, thinking in good faith that it is not a useless exercise. Further, in light of the thoughtful process employed by MSHA in determining that the conditions found warrant a special assessment, the Secretary's autocratic approach, telling the Court that – *no, you can't see the inspector's notes nor any photographs pertaining to the violation* – is antithetical to the overriding objective of the Mine Act.

Accordingly, based on the foregoing reasons, the Secretary's Motion to Approve Settlement is **DENIED**. This case is now to be set for a prompt hearing. Alternatively, the

Secretary may submit a properly supported motion, along with the requested photographs and inspector's notes for the Court's review.

**SO ORDERED.**

William B. Moran
Administrative Law Judge

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