FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
Phone: (202) 434-9933 | Fax: (202) 434-9949

December 28, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2017-0141
Petitioner,	:	A.C. No. 15-09636-428765
v.	:	
	:	
BLUE DIAMOND COAL COMPANY,	:	Mine: No. 77
Respondent.	:	

DECISION DENYING SETTLEMENT MOTION

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 Conference and Litigation Representative (CLR) has filed a joint motion to approve settlement. ("Motion") Because the CLR has not complied with the practice provisions of the Commission's Procedural Rules,[1] and also because the motion is insufficiently supported and also because the math doesn't add up, it must be DENIED.

Six citations are involved in this docket. One citation, No. 8410728, was assessed at $615.00 and is proposed for settlement at $350.00, with a modification to low negligence. Another citation, No. 8410730, was assessed at $484.00 and is proposed for settlement at $300.00, with no modifications. The Respondent has agreed to pay the remaining four citations in full, with no modifications.[2] Per Exhibit A, the total proposed penalty amount was $3,198.00. and the proposed settlement, according to the CLR, is for $2,699.00. However, adding the settlement amounts produces a total of $2,749, not the figure the CLR derives.[3]

[1] The Secretary has delegated a number of civil penalty petitions to Conference and Litigation Representatives ("CLRs"). Per 29 C.F.R. §2700.3 (b)(4), addressing non-attorneys, "Other persons" may practice before the Commission "with the permission of the presiding judge or the Commission." According to the official file, the CLR, Mr. Oliver, never filed a notice of limited appearance. Therefore, the Secretary has not complied with this practice provision.

[2] Citation Nos. 8410429 and 8318993 alleged violations of 30 C.F.R. § 75.202(a); Citation No. 8410721 alleged a violation of 30 C.F.R. § 75.517; and Citation No. 8410722 alleged a violation of 30 C.F.R. § 75.400.

[3] The Motion's math is wanting at page 4 of the submission as well. There, in a table listing four of the six citations, the CLR calculates a total of $800.00, but the assessed penalties actually add

The CLR presents the following bases for the proposed reductions and modification:

Regarding Citation No. 8410728, which alleged a violation of 30 C.F.R. § 75.604(b),

> Basis of compromise: A reduction in the level of negligence on behalf of the operator. There are factual disputes regarding the likelihood of an injury producing event and the level of negligence on behalf of the operator. The Respondent asserts there was unlikely [sic] for an accident to occur that would result in any injuries and there was no negligence on behalf of the operator. The Respondent argues the shuttle car is equipped with a cable reel so that miners do not have to handle the cable by hand during normal mining operations and there was no damage to the inner insulated conductors. The Respondent further argues that the damaged splice was not present during the previous weekly electrical examination, that it was located on the cable reel where it would not have been easily seen, no one had any knowledge of the condition and would not have had a reason to believe it was present until the cable was pulled off of the reel and checked during the next scheduled weekly electrical examination. Therefore the Respondent concludes it was unlikely for an accident to occur that would result in any injuries and there was no negligence on behalf of the operator given the aforementioned facts. For the purpose of settlement, the Petitioner proposes and the Respondent accepts a reduction in the level of negligence from "Moderate" to "Low". The parties have discussed the citation and the surrounding circumstances and in light of these considerations the Secretary has reevaluated the 110(i) factors, and the parties propose a revised penalty of $350.00, which is sufficient to ensure future compliance with the Act.

Motion at 5.

Regarding Citation No. 8410730, which also alleged a violation of 30 C.F.R. § 75.604(b),

> Basis of compromise: A reduction in the proposed penalty amount by the Office of Assessments. There are factual disputes regarding the likelihood of an injury producing event and the level of negligence on behalf of the operator. The Respondent asserts there was unlikely for an accident to occur [sic] that would result in any injuries and there was no negligence on behalf of the operator. The Respondent argues the bolt machine is equipped with a cable reel and that miners wear rubber gloves in accordance with written company policy when moving or hanging the cable. The Respondent further argues that the damaged splice was not present during the previous weekly electrical examination and that no one had any knowledge of the condition or have had a reason [sic] to believe it was present until the cable was checked during the next scheduled weekly electrical examination. Therefore the Respondent concludes it was unlikely for an accident to occur that would result in any injuries and there was no negligence on behalf of

---

up to $2,099.00.

> the operator given the aforementioned facts. For the purpose of settlement, the Petitioner proposes and the Respondent accepts a reduction in the proposed penalty amount by the Office of Assessments. The parties have discussed the citation and the surrounding circumstances and in light of these considerations the Secretary has reevaluated the 110(i) factors, and the parties propose a revised penalty of $300.00, which is sufficient to ensure future compliance with the Act.

Motion at 6.

Discussion

As noted, six citations are at issue in this docket. Four were settled for the amount originally proposed by the Secretary, and the other two are proposed for reduction and/or modification, as detailed above. Apart from the twice incorrectly stated math, substantively, in support of the proposed changes for both of these citations, the Secretary states: "The parties have discussed the citation and the surrounding circumstances and in light of these considerations the Secretary has reevaluated the 110(i) factors, and the parties propose a revised penalty…which is sufficient to ensure future compliance with the Act." Motion at 5, 6. The Motion is insufficient to meet the Court's obligations under section 110(k) of the Mine Act.

The Court has previously advised the Secretary that in most instances it cannot make the leap to infer that he acknowledges the plausibility of a Respondent's representations in support of proposed reductions in civil penalties. It is not burdensome, assuming that such acknowledgements are accurate, for the Secretary to include language to the effect that the Respondent's contentions present legitimate, substantial, factual disputes which are genuinely in issue and which disputes can only be resolved through the hearing process. For example, in WEVA 2017-0458, the Court advised the Secretary on December 22, 2017 that it

> needs an acknowledgement, if appropriate, with words to the effect that the Respondent's arguments are at least plausible. For [a] frame of reference, but not in any way intended as a directive as to the substance of the Secretary's response, this is sometimes achieved through a statement from the Secretary, employed in previous motions, that the Secretary 'recognizes that these facts are in dispute and 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 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 [and accordingly] [t]he Secretary agrees to accept a reduced penalty.' The Court also notes that a key line in such submissions is the Secretary's remark that "the ALJ may find some merit in the facts and contentions raised by Respondent.' While the Court does not prescribe specific language that is needed, in this instance the Secretary offers little to help the Court determine whether to accept or reject the instant motion. Short of language along these lines, the Court is left only with making an inference about the Secretary's view of the Respondent's arguments. The Court does not believe that it is too much to ask for the Secretary to

> acknowledge, again if that is the Secretary's genuine view, that the Respondent's contentions have plausibility and therefore are not in the realm of being farfetched and completely unsupportable factual contentions.

November 22, 2017 email from the Court to the parties in WEVA 2017-0458.

The same principles apply in this instance. Accordingly, for the reasons set forth above, the Joint Motion is **DENIED.** The parties are directed to either submit an amended motion providing the needed information, including the correct math, a notice of appearance, with a request for permission to practice in this matter, and substantive support, all as explained above, or to prepare for a hearing. The parties are directed to advise the Court within 10 (ten) days of their intentions.

William B. Moran
Administrative Law Judge

Distribution:

Gary W. Oliver, Conference & Litigation Representative, U.S. Department of Labor, MSHA, 3837 S. US Hwy 25E, Barbourville, KY 40906

John R. Opperman, Blue Diamond Coal Company, 3228 Summit Square Place, Suite 180, Lexington, KY, 40509

/JM