

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 2, 2016

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

v.

LONE MOUNTAIN PROCESSING, INC.,
Respondent.

LONE MOUNTAIN PROCESSING, INC.,
Contestant,

v.

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

CIVIL PENALTY PROCEEDING

Docket No. KENT 2014-817
A.C. No. 15-17234-359230

Mine: Huff Creek No. 1

CONTEST PROCEEDINGS

Docket No. KENT 2014-441-R
Citation No. 8386694;03/19/2014

Docket No. KENT 2014-442-R
Citation No. 8386695;03/19/2014

Docket No. KENT 2014-443-R
Citation No. 8386696;03/19/2014

Huff Creek No. 1
Mine ID 15-17234

DECISION APPROVING SETTLEMENT

Before: Judge Simonton

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. Pursuant to 29 C.F.R. § 2700.1(b) and Fed. R. Civ. P. 12(f), I strike paragraphs three and four from the Secretary's Motion as immaterial and impertinent to the issues legitimately before the Commission.

The paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act. Instead, I have considered the provided specific factual explanations for the agreed upon settlement per sections 110(i) and 110(k) of the Act.

Background

This docket contains three citations issued following a fatal rock burst accident on August 6, 2013 at the Respondent's Huff Creek mine. The rock burst occurred in a retreat mining section¹ 1640 feet below the surface and killed Continuous Miner Operator Mr. Lenny Gilliam and seriously injured two other miners.

On March 19, 2014, MSHA Inspector Charles Ramsey issued three citations and orders for alleged violations of the mine's roof control plan. Collectively, the citations allege that the Respondent: 1) failed to respond to core data that indicated increased pressure; 2) deviated from the mine's standard retreat mining protocol by advancing beyond the "gob-shadow effect"; and 3) continued retreat mining despite the occurrence of a burst/bump incident on the morning of the fatal accident.

On December 11, 2015, the parties submitted a joint settlement motion and requested an order approving the settlement agreement. In summary, the parties proposed removing the unwarrantable failure designation from Citation/Order Nos. 8386694 and 8386695, reducing the negligence from high to moderate for Citation No. 8386694, and vacating Citation No. 8386696. The parties also agreed to reduce the total monetary penalty from \$148,893.00 to \$75,000.00.

Within the original motion, the parties provided a brief four paragraph summary of the factual basis for the proposed modifications. After reviewing the proposed settlement motion and the mine's accident and roof fall history, the court requested additional information supporting the proposed modifications.

The Respondent timely filed a detailed rebuttal of the primary factual allegations contained in Citation Nos. 8386694 and 8386695. In summary the Respondent contends that: 1) the limited core data available did not indicate hazardously rigid floor or roof conditions; 2) the pillars in place at the accident area had been designed to support the roof even without the benefit of the "gob shadow effect"; and, 3) the bump incident alleged by the inspector was a circuit breaker "knock" on the continuous mining machine rather than a structural burst/ bump.

The parties also affirmed that the Secretary had modified the text of Citation Nos. 8386694 and 8386695 on November 25, 2015 to conform to deposition statements that contradicted some sections of the original citation.² In response to the court's request for the Secretary's position on the Respondent's technical arguments, the Secretary stated that, "The Secretary believes that the Court could find Respondent's technical arguments to be persuasive."

¹ Retreat mining is the process of removing coal support pillars in underground seams that have previously been mined on a room and pillar pattern. The process involves planned roof collapses as the support pillars are removed. The National Institute for Occupational Safety and Health (NIOSH) has stated that unplanned collapses and rock bursts are an inherent risk of the process.

<http://www.cdc.gov/niosh/mining/features/RetreatMining.html>

² The parties did not specifically detail or provide a copy of the November 15, 2015 textual modifications within the original settlement motion. Counsels are advised to provide a complete record of all formal modifications in future settlement motions.

Analysis

Commission Procedural Rule 31 provides that a “proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion,” and expressly requires a party seeking the approval of a settlement to submit “[f]acts in support of the penalty agreed to by the parties.” 29 C.F.R. § 2700.31(b) (3).

Accepted as true, the Respondent’s filings indicate that the operator substantially adhered to the MSHA approved roof control plan and standard geotechnical monitoring procedures. At the same time, the parties’ filings also imply that retreat mining can lead to violent outbursts even when an operator complies with all MSHA required protocols. Indeed, MSHA had noted prior to the accident that the risk of rock bursts below 1,000 feet becomes increasingly likely and that with certain depths and risk factors,

No combination of currently available mining sequences, administrative procedures, or monitoring techniques can be relied upon to reduce the risk posed by coal bursts during pillar recovery to an acceptable level.

MSHA PIB P12-10, 4³ (agreeing with portions of February 2010 NIOSH report⁴ on deep cover retreat mining).

Although the Respondent was retreat mining 1640 feet below the surface when the accident occurred, the Respondent appears to have done so with at least the tacit permission of MSHA inspectors. Specifically, the Respondent has stated within the original settlement motion that,

.... its approved roof control plan was suitable for the mining conditions and that on the day of the accident two MSHA inspectors were present on the 006 MMU and did not issue any violations. The MSHA inspectors were aware that the operator was closing out with the middle pillar. The operator contends that two weeks prior to the accident, MSHA conducted a six month review of the operator’s roof control plan, including an inspection of the mine roof and found that the roof control plan was suitable for the mining conditions and that the mine roof presented no hazards.

Jt. Settlement Mot., 4.⁵

³ <http://publish.generationhub.com/document/2012/07/12/MSHA%20July%2011%20Pillar%20PIB.pdf>

⁴ http://www.cdc.gov/niosh/mining/UserFiles/works/pdfs/Report_on_Coal_Pillar_Recovery_under_Deep_Cover_02-10.pdf

⁵ The Secretary has only responded to the Respondent’s factual submissions with a standard boilerplate statement that, “While the Secretary does not necessarily agree with Respondent’s position, he recognizes a legitimate factual

Regardless of MSHA’s enforcement actions in the lead up to the 2013 accident, in October 2011 a large retreat mining roof collapse entrapped mining equipment at the Huff Creek mine, putting the Respondent on specific notice of the dangers of deep cover retreat mining. Additionally, a rib collapse in a retreat mining section 1760 feet below ground fatally injured Mr. Jimmy Carmack at the Respondent’s nearby Clover Fork No. 1 Mine in June 2010.⁶ The Respondent could not have considered this fatality an isolated accident as MSHA records indicate that twenty coal miners died from 2000 to 2010 in retreat mining roof collapse/rock burst incidents.⁷ Indeed, after the massive Crandall Canyon retreat mining collapse killed six miners and three rescue workers in 2007, the February 2010 NIOSH report stated that retreat mining has historically caused 25 percent of roof fall fatalities while only accounting for 10 percent of the country’s coal production.⁸

Nevertheless, the Secretary has sole responsibility for formulating and enforcing safety regulations to protect miners. The court is hopeful the Respondent will rigorously follow the risk matrix outlined in the MSHA June 30, 2015 Deep Cover Coal Burst Assessment PIB, including the advisement to “not min(e) in the areas of greatest risk.” MSHA PIB 15-03, Control Techniques.

For the purposes of evaluating the requested modifications, the court must examine the facts submitted and the Secretary’s enforcement practices as they existed at the time of the accident. The Respondent’s filings indicate that the operator attempted to comply with all existing MSHA protocols and the Secretary has affirmed that the proposed modifications are consistent with his enforcement responsibilities. Accordingly, the proposed modifications are **APPROVED** as set forth below.

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
KENT 2014-817			
8386694	\$70,000.00	\$25,000.00	Modify 104(d)(1) Citation to a 104(a) Citation Reduce Negligence from “High” to “Moderate”
8386695	\$70,000.00	\$50,000.00	Modify 104(d)(1) Citation to a 104(a) Citation
8386696	\$8,893.00	\$0.00	Vacate
Total	\$148,893.00	\$75,000.00	

and legal dispute and believes settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act.”

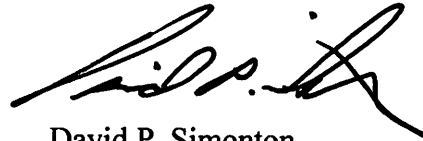
⁶ <http://www.msha.gov/FATALS/2010/FTL10c38.asp>

⁷ <http://www.msha.gov/fatals/fabc.htm>

⁸ http://www.cdc.gov/niosh/mining/UserFiles/works/pdfs/Report_on_Coal_Pillar_Recovery_under_Deep_Cover_02-10.pdf

ORDER

The motion to approve settlement is **GRANTED**, the citations contained in these dockets are **MODIFIED** as set forth below, and Lone Mountain Processing, Inc. is **ORDERED** to pay the Secretary of Labor the sum of **\$75,000.00** within 30 days of this order.⁹ Accordingly, Contest Dockets KENT 2014-441-R, KENT 2014-442-R, and KENT 2014-443-R are **DISMISSED**.



David P. Simonton
Administrative Law Judge

Distribution: (U.S. First Class Mail)

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⁹ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390