FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

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February 5, 2018

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2017-0062
Petitioner,	:	A.C. No. 31-00074-424547
v.	:	
	:	Docket No. SE 2017-0063
HANSON AGGREGATES	:	A.C. No. 31-00074-424547
SOUTHEAST, LLC,	:	
Respondent.	:	Docket No. SE 2017-0137
	:	A.C. No. 31-00074-433046
	:	
	:	Docket No. SE 2017-0175-M
	:	A.C. No. 31-00074-436078
	:	
	:	
	:	
	:	Mine: Neverson Quarry
	:	

DECISION DENYING SETTLEMENT MOTION

Before: Judge Moran

Before the Court is the Secretary's Joint Motion to Approve Settlement ("Motion"). The Motion seeks a combined reduction for the four dockets from the Part 100 proposed figure of $33,756 to $11,801, a 65% reduction overall. For the reasons which follow, the Motion must be denied.

Most prominent among the alleged violations in these dockets is that a fatality was involved. According to the Section 104(d)(1) Order, No. 8816532, issued November 2, 2016, which is the lone matter in Docket No. SE 2017-0175-M, a haul truck operator died when the truck he was operating (a CAT 773E Haul Truck S/N BDA01082) drifted across the haul road, as he was descending the road's 9% grade, and went over a 201 foot highwall, landing upside down.[1] The Order asserts that the truck operator did not maintain control of the truck while traveling down the haul road and relates that there were no signs of evasive or corrective actions taken by the truck operator to maintain control. The Order also states that "[m]anagement engaged in aggravated conduct, constituting more than ordinary negligence by not ensuring that

[1] For reasons which will become apparent, the alleged violations are not discussed chronologically.

the victim could operate the truck safely knowing that he had only a few hours of sleep the night before. The violation is an unwarrantable failure to comply with a mandatory standard." Unsurprisingly, the Order was marked as S&S and with high negligence. The cited standard, 30 C.F.R. § 56.9101, titled, "Operating speeds and control of equipment," provides that "[o]perators of self-propelled mobile equipment shall maintain control of the equipment while it is in motion. Operating speeds shall be consistent with conditions of roadways, tracks, grades, clearance, visibility, and traffic, and the type of equipment used."

Though discussed in more detail *infra*, it is noted that this Order, No. 8816532, was regularly assessed (i.e. there was no special assessment) under 30 C.F. R. Part 100 at $12,075 and is proposed under the motion to be settled for $3,578, a 70.3% reduction.

Also issued that November day was a Section 104(d)(1) Order, No. 8816533, which is in Docket No. SE 2017- 0137-M. It too is the only matter in that docket. The Order repeats a good measure of the text from the Order just discussed above, No. 8816532, but adds that the "haul truck operator was not wearing a seat belt and was ejected from the truck." The Order then asserts that "[m]anagement engaged in aggravated conduct, constituting more than ordinary negligence by not ensuring the truck operators were wearing their seat belts and *by not correcting the altered state of harnesses in the haul trucks*." (emphasis added). The standard cited in this Order, 30 C.F.R. § 56.14131(a), is titled "Seat belts for haulage trucks," and provides "Seat belts shall be provided and worn in haulage trucks." As with Order No. 8816532, this Order also asserts that the violation was an unwarrantable failure to comply with a mandatory standard, and was marked as S&S and high negligence. As discussed further, *infra*, No. 8816533 was regularly assessed under Part 100 at $13,417 and proposed to be settled for $3,578, a 73.3% reduction.

The Court considers it to be significant that, less than two months before the fatality-related Orders described above were issued, MSHA cited Hanson Aggregates, on September 14, 2016, with two vehicle-related alleged violations, one of which involves a subject directly associated with the fatality described above. These alleged violations are part of this decision denying this settlement motion. From Docket No. SE 2017-0062, involved is a section 104(d)(1) citation, No. 8910208, alleging a violation of 30 C.F.R. § 56.14131(b). As noted, that standard is titled, "Seat belts for haulage trucks," but in this instance the subsection cited provides that "[s]eat belts shall be maintained in functional condition, and replaced when necessary to assure proper performance."

It is unclear if the identical haul truck involved in the fatality was cited, but it was the same truck model, a CAT 773 E haul truck, identified as No. 652252. The (d)(1) citation states that the "haul truck has a rag tied to both the lap and shoulder belt. This condition prevents its automated mechanical retraction to function as designed and will not allow the seat belt to fit firmly against the operator as intended by the manufacture [sic]. The seat belt in this truck has been used in this manner for at least three years and does not provided [sic] protection to the operator [adding, presciently] which could result in fatal injuries." The citation concluded with the statement that "[m]anagement has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard." Citation No. 8910208. For this alleged violation, the proposed penalty was regularly

assessed under Part 100 at $2,398.00, while the motion seeks a penalty to $722.00, a 69.9% reduction.

Following that, issued on the same September 14, 2016 date, and also part of Docket No. SE 2017-0062, was a 104(d)(1) order, No. 8910209, which order again invoked the same seat belt subsection, 30 C.F.R. § 56.14131(b). In this instance another haul truck, also a CAT 769 D, identified as No. 231508, was alleged to have the same rag arrangement tied to the lap and shoulder belt. The Order makes the same assertions about the safety hindrances created by the rag ties on the lap and shoulder belt and reaches the same conclusions about the length of time the rag arrangement had been in use and that it constituted aggravated conduct beyond ordinary negligence and was an unwarrantable failure to adhere to the standard. This alleged violation met the same result; originally proposed at $2,665.00, the motion seeks to have it settled for $722.00, representing a 72.9% reduction. [2]

Armed with that background information, the Court reviewed the Secretary's Motion. Once past the Secretary's customary boilerplate language that he has "evaluated the value of the

[2] The Court has an issue with one of the two alleged violations within Docket No. SE 2017-0063, Citation No. 8910212, which alleges a violation of 30 C.F.R. § 46.7(a). The cited standard is titled "New Task Training." Subsection (a) provides "You must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program. This training must be provided before the miner performs the new task."

The section 104(g)(1) citation alleges that four miners received their task training from a person who did not meet "the requirements of a competent person capable of performing the required task training." For that citation the settlement retains the proposed penalty but reduces the negligence from "High," to "Moderate." The motion relates, in part, that the Respondent asserts that the records, though admittedly labeled as "Task Training," were actually "an internal company record of an annual observation by the quarry foreman." Per usual, the Secretary offers nothing in support of, nor even in reaction to, the Respondent's claims. Instead, the Secretary only offers its familiar, empty, response that "[w]hile not admitting the relevance or significance of Respondent's arguments, [he] agrees to modify the negligence to moderate and maintain the original penalty of $803.00." Motion at 6.

The Court has no issue with the other alleged violation in this docket, No. 8910210, which is a section 104(a) citation alleging a violation of 30 C.F.R. §56.3130. That standard requires that "[m]ining methods shall be used that will maintain wall, bank, and slope stability in places where persons work or travel in performing their assigned tasks. When benching is necessary, the width and height shall be based on the type of equipment used for cleaning of benches or for scaling of walls, banks, and slopes." The Citation alleges that the benches were not sufficient to prevent falling material from reaching the roadway and work area below. Assessed at $2,398.00, the Motion settles that citation for the amount proposed and with no changes to the inspector's evaluation.

compromise, the likelihood of obtaining a better settlement … etc." the Secretary presents empty language in support the motion. Therefore, as the Motion fails to satisfy section 110(k) of the Mine Act, it is rejected.

Discussion

Beginning with the fatality-related issuances, the Section 104(d)(1) Orders, Nos. 8816532 and 8816533, the Respondent contends that at a hearing, for Citation No. 8816532, the standard requiring one to maintain control of equipment, "it would present evidence that it is *likely* that the miner suffered a cardiac incident while operating the haul truck which *might* have caused him to drift across the road and berm and fall 200 feet into the pit below. Respondent would also argue that the symptoms of a cardiac incident *may* also account for his having removed his seatbelt. Respondent would further argue that the miner was a properly trained, experienced haul truck operator and that the physical evidence shows that the miner left the haul road suddenly and there were no signs of corrective steering or breaking. Respondent would also offer evidence to show that the road and berms were in good condition, the weather played no role in the incident, there were no other vehicles in the area, and the truck was in good operating condition." Motion at 6. (*italics* added). The Secretary endorses none of it, "not admitting the relevance or significance of Respondent's arguments." *Id.* Yet, for reasons unknown, he "agrees to reduce the negligence from high to moderate and reduce the penalty [by 73.3%] to $3,578.00."

The Secretary's vacuous responses to the Respondent's assertions do not permit the Commission to meet its Congressionally directed duty under Section 110(k) of the Mine Act. The Secretary's non-responses also fly in the face of his claims of "transparency" in settlement motions. Apart from the lack of any response to the Respondent's claims, as presented, those claims amount to nothing more than speculation. In fact, those claims are speculation upon speculation, as the Respondent, without supporting information, such as an autopsy report, speculates further that a cardiac incident may also have caused the deceased miner to remove his seat belt.

Though nearly unimaginable, the rationale offered up for Order No. 8816533, the seat belt requirement and the duty to wear such belt, is less than that of just discussed Order No. 8816532, and it adds a mysterious aspect. The Motion repeats the Respondent's claim that "the miner likely suffered a cardiac while operating the haul truck which might have caused him to remove his seat belt," this time adding that "mine management had no reason to know the miner was not wearing his seatbelt." Motion at 7. Disconcertedly, given MSHA's September 2016 twin citations to the Respondent for the unsafe rag-ties on the lap and shoulder belt arrangement, as discussed above, the Respondent asserts that the rags "did not interfere with the function of the seatbelt." *Id.*

The mysterious element is that the Motion inaccurately represents that "[*t*]*he Order* further alleges that there was dirt on the latch plate of the seatbelt and when coupled with the rags tied around the seatbelt that prevent retraction, indicate that the miner had not worn his seatbelt for some length of time." *Id.* (emphasis added). The *Order* only refers to the uncorrected altered state of harnesses in the haul trucks; it makes no specific mention of rags tied around the seatbelt and it makes no mention of the dirty seat belt latch plate. Thus, this had to

come from some other source, likely the inspector's notes.

To all of this the Secretary only robotically repeats "[w]hile not admitting the relevance or significance of Respondent's arguments, the Secretary agrees to reclassify the violation to a 104(a) S&S violation, reduce the negligence from high to moderate, and reduce the penalty [by more than 73%] to $3,578.00." *Id.*

Thus what has been presented here is a fatality, with very large settlement reductions, coupled with citations issued before this fatality addressing the same seat belt concerns and all of that with the absence of any substantive comment from the Secretary's representative about the Respondent's facially speculative claims in support of the motion's significant penalty reductions. In addition, there is the unidentified reference to dirt on the seatbelt latch plate, and the continued use of rags on the seatbelt.

Is the Court suggesting that no reductions could ever be justified for these violations? Absolutely not. The point is that reductions must be explained and that the only information offered in this instance is speculation from the mine operator and *no* useful information from the Secretary.[3] Given the recent history involving alterations to seat belts at this mine, the motion is particularly troublesome.

It is any wonder that, in circumstances such as these, Congress created section 110(k) to ensure that facially questionable settlements be explained to the Commission. The settlement motion being denied, the parties are directed to participate in a conference call to set this matter for a hearing. Further, the Secretary is directed to provide all of the inspector's notes (Inspectors Phillips and Caudill) for these citations/orders.

Accordingly, the Joint Motion to Approve Settlement and to Dismiss Civil Penalty Proceeding is **DENIED**.

SO ORDERED.

William B. Moran

William B. Moran
Administrative Law Judge

[3] Although the Court has, on occasion, in the context of a settlement motion, requested that the Secretary provide the inspector's notes and inquired whether the Secretary has conferred with the issuing inspector, regarding claims in support of mitigation made by a mine operator, often the Secretary has declined to provide the information. These reactions strike the Court as odd because, as to the former, one would think that the Secretary would, in the name of transparency, be eager to provide the notes. The same observation applies to the latter, as the issuing inspector is the only individual for the Secretary with firsthand knowledge of the violations. Therefore, it seems odd that the Secretary would be reluctant to inform that the respondent's contentions have been raised before the inspector. Unilateral acceptance of a respondent's claims would likely discourage inspectors from diligently performing their safety and health inspections duties.

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