FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 6, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2016-0514
Petitioner,	:	A.C. No. 46-06618-411984
v.	:	
	:	
ROCKWELL MINING, LLC,	:	Mine: Gateway Eagle Mine
Respondent.	:	

DECISION APPROVING 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.[1] The CLR has filed a motion to approve settlement. The originally assessed amount was $4,611.00, and the proposed settlement is for $3,704.00. The CLR also requests that several citations be modified, as indicated below.

The Court has considered the representations submitted in this case and concludes that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amounts are as follows:

Citation No.	Assessment	Settlement Amount
9066897	$392.00	$392.00
9064821	$745.00	$521.00
9066787	$745.00	$521.00
9066899	$392.00	$392.00
9064822	$585.00	$585.00
9066900	$224.00	$224.00
9064219	$873.00	$611.00
9064220	$263.00	$184.00
9066905	$392.00	$274.00
TOTAL:	**$4,611.00**	**$3,704.00**

[1] It is **DETERMINED** that the Conference and Litigation Representative (CLR) is accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

The Secretary presents the following bases for the proposed reductions and modifications in this case:

Regarding Citation No. 9064821,[2] which alleged a violation of 30 C.F.R. § 75.370(a)(1):

> Respondent contends that the negligence of the citation was over-evaluated. Respondent would argue at hearing that this citation was observed half-way through the mining cycle. The section foreman stated that he took a proper air reading and adjusted the line curtain prior to the start of this particular cut. He states they were in compliance with all aspects of their approved ventilation plan at that time of his examination. Respondent contends that after the initial ventilation check performed by the foreman, he had not returned to the entry where the violation existed prior to when the inspector observed and cited the conditions listed in the citation. The required cfm was 9,000 and the amount observed was 7,917 cfm. This condition was found to be less than 13% deficient of the required methane and dust control plan. Foreman states the condition was caused by shuttle cars running through check curtains, while traveling from the continuous mining machine to the section dump and equipment operator error. No visible dust was observed during cutting cycle. Therefore, since no dust was observed, the operator never thought to shut down for another air reading. The remaining cited conditions would have occurred after the start of the cut and as the continuous miner had advanced into the cut. The Secretary agrees to modify the negligence by reducing the negligence from "moderate" to "low", and reduce the original penalty from $745 to $521.

[2] The Court would note that while the motion relates that although the foreman stated that the condition was caused by shuttle cars running through check curtains, while traveling from the continuous mining machine to the section dump, and by equipment operator error, the citation asserts that the line curtain had been "rolled up" to the 5th row of permanent supports. In connection with another ventilation plan violation issued three days later, Citation No. 9066787, it is noted that the miners were retrained on the ventilation plan.

Regarding Citation No. 9066787,[3] which alleged a violation of 30 C.F.R. § 75.370(a)(1):

> Respondent contends that the negligence of the citation was over-evaluated. Respondent would argue at hearing that this citation was observed half-way through the mining cycle. The section foreman stated that he took a proper air reading and adjusted the line curtain prior to the start of this particular cut. He states they were in compliance with all aspects of their approved ventilation plan at that time of his examination. Respondent contends that after the initial ventilation check performed by the foreman, he had not returned to the entry where the violation existed prior to when the inspector observed and cited the conditions listed in the citation. The required cfm was 9,000 and the amount observed was 5,100 cfm. Foreman states the condition was caused by shuttle cars running through check curtains, while traveling from the continuous mining machine to the section dump and equipment operator error. No visible dust was observed at the miner during the cutting cycle. Therefore, since no dust was observed, the operator never thought to shut down for another air reading. The remaining cited conditions would have occurred after the start of the cut and as the continuous miner had advanced into the cut. The Secretary agrees to modify the negligence by reducing the negligence from "moderate" to "low", and reduce the original penalty from $745 to $521.

Regarding Citation No. 9064219, which alleged a violation of 30 C.F.R. § 75.512:

> Respondent contends that the gravity of the citation is over-evaluated. Respondent would argue at hearing that this particular citation is considered a fire hazard for the continuous mining machine cable, not an electrical shock hazard. If an accident occurred it would more likely cause smoke inhalation, resulting in lost workdays. The Secretary agrees to modify the gravity by reducing the injury or illness from "fatal" to "lost workdays", and reduce the original penalty from $873 to $611.

[3] This citation alleges that "upon approaching the continuous mining machine extracting coal in the crosscut, visible dust is airborne in the entry." This conflicts with the mine operator's assertion that "[n]o visible dust was observed during cutting cycle [and] . . . . since no dust was observed, the operator never thought to shut down for another air reading." The motion does not address this conflict. It is also noted that, for this ventilation violation deficiency, there was a 43% reduction from the *minimum* 9,000 cfm requirement. It was this second alleged ventilation violation that triggered the inspector's requirement that the miners be retrained on the ventilation plan. The Court would also note its concern that, despite different facts, both citations received the identical reductions. For Citation Nos. 9064821, the 12% reduction from the required 9,000 cfm resulted in a settlement from $745 to $521. Yet, for Citation No. 9066787, a 43% reduction from the minimum brought about the same result, from $745 to $521. This has at least the appearance of undifferentiated reductions, especially where the same type of violation was cited a few days earlier.

Regarding Citation No. 9064220, which alleged a violation of 30 C.F.R. § 75.604(b):

> Respondent contends that the negligence of the citation was over-evaluated. Respondent would argue at hearing that this citation was observed when the inspector had the operator remove all the cable from the reel. At this time the opening was found in the cable, which would have been on the reel while the machine was in operation and would not have been seen by the operator. Respondent would also argue that the only examination required is a weekly exam, which is once per week (not every seven days). Therefore, the Secretary agrees that the cited condition could have occurred since the most recent examination and has no evidence as to when the condition occurred. The Secretary agrees to modify the negligence by reducing the negligence from "moderate" to "low", and reduce the original penalty from $263 to $184.

Regarding Citation No. 9066905, which alleged a violation of 30 C.F.R. § 75.604(b):

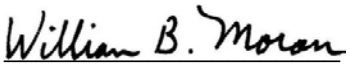
> Respondent contends that the negligence of the citation was over-evaluated. Respondent would argue at hearing that this citation was observed when the inspector had the operator remove all the cable from the reel. At this time the opening was found in the cable, which would have been on the reel while the machine was in operation and would not have been seen by the operator. Respondent would also argue that the only examination required is a weekly exam, which is once per week (not every seven days). Therefore, the Secretary agrees that the cited condition could have occurred since the most recent examination and has no evidence as to when the condition occurred. The Secretary agrees to modify the negligence by reducing the negligence from "moderate" to "low", and reduce the original penalty from $392 to $274.

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

It is **ORDERED** that Citation Nos. 9064821, 9066787, 9064220, and 9066905 be **MODIFIED** to low negligence.

It is **ORDERED** that Citation No. 9064219 be **MODIFIED** to lost workdays or restricted duty.

It is further **ORDERED** that Respondent pay a penalty of $3,704.00 within 30 days of this order.[4] Upon receipt of payment, this case is **DISMISSED**.



William B. Moran
Administrative Law Judge

Distribution:

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[4] 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