FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 9, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. JANNEY PAINTING, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. VA 2014-28-M A.C. No. 44-00022-333864-UXY Docket No. VA 2014-50-M A.C. No. 44-00022-337048-UXY Mine: Burkesville Plant

DECISION REJECTING SETTLEMENT MOTION

Before: Judge Moran

This case is before the Court upon a petition for assessment of civil penalties in these consolidated cases under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlement. The original, proposed, assessment for the citations at issue in these consolidated cases was $600.00, representing six section 104(a) citations, each with a proposed assessment of $100.00. The $100.00 per citation figure represents a 10% lopping off of the $112.00 penalty amount, derived upon application of the Part 100 penalty point computation, per 30 C.F.R. § 100.3(f), which provides a 10% discount in the penalty "where the operator abates the violation within the time set by the inspector."

Concerning the four remaining (i.e. non-vacated) citations that are the subject of the settlement motion, only one presents a problem. Three of the four are proposed to be settled for the full proposed penalty of $100.00 each, with no changes, that is to say, as the Secretary describes it, with "no modifications" to the citations. However, for one of the citations, while proposed to be settled for the same $100.00 proposed amount, the motion seeks to modify the negligence from "moderate" to "low."

While the Commission evaluates the degree of negligence associated with a given violation independent of Part 100's provisions, it is noted that, per section 100.3(d), "*Negligence*," moderate negligence is distinguished from low negligence. Both categories of negligence refer to a mine operator who knew or should have known of the violative condition or practice, but whereas moderate negligence allows that mitigating circumstances were present, "low negligence" involves "*considerable* mitigating circumstances." 30 C.F.R. § 100.3(d) (emphasis added).

Although, in the broader scheme, the Court recognizes that, *monetarily*, these dockets are small affairs, the Commission's responsibilities under section 110(k) operate irrespective of the dollar value involved. The problem with the Secretary's motion is language that it inserted which is plainly yet another gambit in its effort to erode the Commission's statutory review authority under that section. *See, Sec'y of Labor v. Am. Coal Co.*, 35 FMSHRC 515 (Feb. 2013) (ALJ) (on interlocutory review before the Commission, as granted in the Order dated July 11, 2014). To that end, the Secretary asserts that "[i]n light of the fact that there are no reductions in penalty *and in light of the fact that the Secretary has unreviewable authority to modify* or to vacate *citations or orders*, [the Commission has] no discretion to reject the proposed disposition of these cases." Secretary's Draft Order Approving Settlement at 1 (emphasis added).

The Court does not agree, as the Secretary contends here, that the Commission's authority under section 110(k) is limited to passing on the proposed dollar amount. Consequently, while for now[1] the Mine Act does not prevent the Secretary from vacating citations and orders, the *modification* of those enforcement tools is subject to the Commission's review.

The applicable Mine Act language provides that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). The reduction of the category of negligence from moderate to low negligence falls within the Commission's approval of contested penalties. Here, the Secretary's Motion fails to provide essential and required information to explain the basis for its diminished characterization of the negligence.

The motion therefore needs to identify both the mitigating circumstances originally listed and then identify the "*considerable* mitigating circumstances" that brought about the proposed change. The Joint Motion also misleads, in its summary portion, the true state of affairs for Citation No. 8725394, in that it speaks only in terms of the basis of compromise of the penalty, which it describes as "none," and merely notes that the proposed amount of the penalty from the Office of Assessments and the settled amount are the same.[2] Joint Motion at 3.

Although the requirement to present sufficient information for the Commission to appreciate the basis for compromising a citation applies in each instance, it is also noted that in this instance the violation was not merely a relatively harmless paperwork oversight. Involved was a 105 gallon diesel fuel tank in the back of flatbed truck which tank lacked "the required haz-com label to display the appropriate hazard warnings." The citation went on to allege that the absent label "exposes miners to a hazard of contacting a chemical and not knowing the physical hazards of that chemical. Permanently disabling injuries would be expected if miner[s]

[1] Whether the Secretary should continue to have unreviewable authority to vacate citations is not presently in issue. Perhaps the time for reconsideration of that unfettered authority has arrived.

[2] A table, at page 2 of the Joint Motion, does note for Citation No. 8725394 under "other modifications to citations," the change from "Moderate to Low Negligence." The table, as with the entirety of the Motion, offers no explanation of the basis for this reduction in the negligence level.

were to get the chemical in their eyes and not know the appropriate medical treatment. [The] Diesel fuel tank is available for use on a daily basis." Citation No. 8725394.

Regrettably, this Motion evidences that the Secretary continues to miss the larger point. Recall that in the Secretary's April 30, 2014 Motion for Reconsideration of this Court's denial of the Secretary's settlement motion in *American Coal*, it had to be pointed out that its Motion for Reconsideration contained *not a single word about the safety and health of miners*, the Secretary apparently forgetting that its client is the Mine Safety and Health Administration and that its ultimate clients are the men and woman who work in the Nation's Coal and other mines.[3] Order Denying Motion for Reconsideration of Settlement, May 13, 2014. Here, the Secretary, again unwilling to comply with the Commission's mandate under section 110(k) of the Mine Act, apparently continues to think that it is only about money, not miner safety.

As evidenced by the stock language it now inserts in nearly every settlement motion, the Secretary deigns to only tell the Commission that it "has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt." *See, e.g.*, the motion in this case, Janney Painting Settlement Motion at 2.

By this incantation, empty of any useful information, the Secretary believes that is all that the Commission, the public, and miners are entitled to know. But if this were accepted, the Commission's role in reviewing proposed penalties, which have been contested before it, would become a perfunctory and hollow process. As this Court has previously noted, the words of section 110(k) of the Mine Act, 30 U.S.C. § 820(k), the legislative history for that provision, and the decisions of the Federal Mine Safety and Health Review Commission each refute such a construction.

ACCORDINGLY, on the basis of the foregoing, the Joint Motion to Approve Settlement is **DENIED.** The Secretary is directed to resubmit its motion with the appropriate information included, justifying its proposed reduction in the negligence attendant to this citation, or to prepare for hearing.

William B. Moran

William B. Moran
Administrative Law Judge

[3] It was not until *after* the Court pointed out that Secretary said not a word about the Nation's miners in its Motion for Reconsideration that subsequent filings remembered to mention it.

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