FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

February 26, 2015

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. REMINGTON, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2014-315 A.C. No. 46-09230-336310 Mine: Winchester Mine

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 Secretary has filed a motion to approve settlement.[1] The originally assessed amount was $15,794.00, and the proposed settlement is for $9,500.00, a reduction of 40% overall. The Secretary requests that the three alleged violations in this proceeding be modified. The support, such as it is, is noted in **bold** print, below.

For Order No. 8156851, the *entirety* of the Secretary's motion provides the following reasoning:

> Order No. 8156851 was issued to the Respondent on April 30, 2013, and alleged a violation of 30 C.F.R. § 75.370(a)(1) and § 104(d)(1) of the Act, 30 U.S.C. § 814(d). The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could be reasonably expected to be permanently disabling; that the violation was significant and substantial; that seven persons were affected; and that the operator's conduct in the violation demonstrated a high degree of negligence. The Secretary assessed a penalty of $10,705.00. **The Respondent disputes the**

[1] In paragraphs 3 and 4 of the Motion to Approve Settlement, the Secretary continues to stake out his position that he need not explain the basis for settlement, a position which is immaterial and impertinent to the issues legitimately before the Commission. Those paragraphs incorrectly cite and interpret the case law and misrepresent the statute, regulations, and Congressional intent regarding settlements under the Mine Act.

alleged violation and contends that the alleged degree of negligence and the allegation of unwarrantable failure are not supported by the evidence in that there were circumstances present that mitigated the operator's negligence in that the operator had taken two air readings prior to mining coal and the second reading had shown an amount of air that complied with the approved ventilation plan. And, the Respondent states they would present evidence to that effect. In light of the contested evidence and the costs and uncertainties of pursuing further litigation of this matter, the Secretary has agreed to reduce the alleged negligence from High to Moderate, to modify the 104(d)(1) unwarrantable-failure order to a 104(a) citation, and to reduce the penalty to $6,500.00, and the Respondent has agreed to pay the reduced amount.[2]

For Order No. 8156865, the *entirety* of the Secretary's motion provides the following reasoning:

> Order No. 8156865 was issued to the Respondent on May 8, 2013, and alleged a violation of 30 C.F.R. § 75.503 and § 104(d)(1) of the Act, 30 U.S.C. § 814(d). The Secretary determined that the violation was unlikely to cause an injury; that an injury from the cited condition could be reasonably expected to be fatal; that the violation was not significant and substantial; that one person was affected; and that the operator's conduct in the violation demonstrated a high degree of negligence. The Secretary assessed a penalty of $2,748.00. **The Respondent disputes the alleged violation and contends that the alleged degree of negligence and the allegation of unwarrantable failure are not supported by the evidence in that the two small wires found by the inspector to be protruding from the scoop were not in plain sight or obvious as the light was mounted in a recessed area between the frame and the battery and, therefore, the failure to observe and address the wires did not constitute high negligence or unwarrantable failure. And, the Respondent states they would present evidence to that effect.** In light of the contested evidence and the costs and uncertainties of pursuing further litigation of this matter, the Secretary has agreed to reduce the alleged negligence from High to Moderate, to modify the 104(d)(1) unwarrantable-failure order to a 104(a) citation, and to reduce the penalty to $1,500.00, and the Respondent has agreed to pay the reduced amount.

For Order No. 8156866, the *entirety* of the Secretary's motion provides the following reasoning:

> Order No. 8156866 was issued to the Respondent on May 8, 2013, and alleged a violation of 30 C.F.R. § 75.512 and § 104(d)(1) of the Act, 30 U.S.C. §

[2] As reflected above, the putative grounds for each settlement ends with the same refrain to the Secretary's settlement song, with the chorus intoning, "In light of the contested evidence and the costs and uncertainties of pursuing further litigation of this matter, the Secretary has agreed to reduce the alleged negligence from High to Moderate, to modify the 104(d)(1) unwarrantable-failure order to a 104(a) citation, and to reduce the penalty [with the vocalist inserting the figure here.]"

814(d). The Secretary determined that the violation was unlikely to cause an injury; that an injury from the cited condition could be reasonably expected to be fatal; that the violation was not significant and substantial; that one person was affected; and that the operator's conduct in the violation demonstrated a high degree of negligence. The Secretary assessed a penalty of $2,341.00. **The Respondent disputes the alleged violation and contends that the alleged degree of negligence and the allegation of unwarrantable failure are not supported by the evidence in that the two small wires found by the inspector to be protruding from the scoop were not in plain sight or obvious as the light was mounted in a recessed area between the frame and the battery and, therefore, the Respondent's examination, which missed these wires, did not constitute high negligence or unwarrantable failure. And, the Respondent states they would present evidence to that effect**. In light of the contested evidence and the costs and uncertainties of pursuing further litigation of this matter, the Secretary has agreed to reduce the alleged negligence from High to Moderate, to modify the 104(d)(1) unwarrantable-failure order to a 104(a) citation, and to reduce the penalty to $1,500.00, and the Respondent has agreed to pay the reduced amount.

Determination of the Court

For the reasons which follow, the settlement must be rejected. At the outset, it must be noted that the Secretary, at the behest of some top level official, includes in virtually *every* one of his motions for decision and order approving settlement his objection that he really need not be bothered with the process of complying with Section 110(k) of the Mine Act and its relevant provision that "no 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."

Instead, it is the Secretary's position that, notwithstanding Section 110(k), all he need do is to advise, in the rote fashion he invokes with each settlement, that

> the Secretary has evaluated the value of 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 [and that t]he Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated below.

Given his view that he need not provide more to the Commission than an unsupported conclusion that a given settlement is sufficient, it should not be surprising that, when the Secretary alternatively does provide some justification, usually, as here, it is a minimalist effort. An examination of the grudging submission by the Secretary in this instance demonstrates its inadequacy.

For the first matter, a section 104(d)(1) order, Order No. 8156851, dealing with an alleged ventilation plan violation, for which a penalty of $10,705.00 was proposed, the Secretary seeks a 39% reduction from the proposal based on Respondent's disputing the violation, but more particularly, as noted above, because it

> contends that the alleged degree of negligence and the allegation of unwarrantable failure are not supported by the evidence in that there were circumstances present that mitigated the operator's negligence in that the operator had taken two air readings prior to mining coal and the *second reading* had shown an amount of air that complied with the approved ventilation plan. And, the Respondent states they *would present evidence to that effect*.

Motion at 2 (emphasis added).

It is noted that the Secretary has not disclosed whether discovery has taken place, nor that the Respondent has offered more than the claim that it *would* present evidence to the effect that the negligence and the unwarrantable failure claims are not supported by the evidence. The only mitigating factor articulated was that *one* of two air readings met the ventilation plan. Accordingly, the Court notes that the Secretary's Motion does not declare that the Respondent has actually presented evidence in support of its claim.[3]

In contrast, when one examines the MSHA Mine Inspector's (d)(1) Order, one learns that document asserts:

> **Order # 8156851**
> The operator [has] failed [to] follow the Approved Section Specific Methane and Dust Control Plan Page, FACE VENTILATION section, Item C 003-0 MMU. Upon arriving at #3 entry Bk#14 on West #2 belt, the miner was cutting in #3 with the scrubber on. Accompanied with the Eve Shift Mine Foreman and with the attendance of the Section Foreman found the Joy 14CM15 Continuous Miner (Serial #JM6484) cutting in the #A cut. When asked to take air reading, the C/M was pulled back to the intersection and the quantity behind the line curtain was measured 3,024 CFM. Section Foreman took air reading and confirmed the violation. After pulling the curtain further and putting rocks on it to keep it away from the rib and tighten the curtain down, the reading was 4,410 CFM. 2 readings were [taken] by the section foreman confirming the violation. There were 4 miners working in the West section at the time of citation. Black Lung[] is the most lethal disease and hazard for coal miners. The operator is engaged in aggravated conduct constituting more than ordinary negligence. Ventilation plan requirements are of fundamental importance in assuring a safe working

[3] A vivid way to examine the Secretary's submission is that, out of the 228 words pertaining to the settlement for Order No. 8156851, only 67 relate to settlement information, but when examined closer, only 17 of those words present actual settlement justification information. Regardless of the word count, the few words offered are empty of useful supportive information.

> environment underground. Serious lack of reasonable care exacerbates the likelihood for accidents to occur. ***The operator has been made aware of the need for greater effort toward compliance and the need of the ventilation plan requirements through citations, discussions and notices. There are no mitigating factors in the issuance of this citation observed by the inspector.*** **The line curtain was tight and the fly pad on all entries were tight and doubled.** The existence of these ventilation hazards have increased exponentially the reasonable likelihood that a serious injury of a reasonably serious nature will occur. Where safety standards are not complied with safety diminishes.

(emphasis added). The Order continues, noting that "**Standard 75.370 (a) (1) was cited 31 times in two years at mine 4609230** (31 to the operator, 0 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard[.]" (emphasis added).

Given the text of the Order, it was incumbent upon the Secretary to provide more information, if any actually exists, to demonstrate the evidence actually presented for the first and second readings, and beyond that, to explain how the second reading served to mitigate the violation, especially in light of the Inspector's remarks about continuing ventilation problems at this mine. Further, the Inspector, in conference with the mine, already allowed for mitigating circumstances with the effect that the injury was reduced to permanently disabling, instead of fatal, and the number affected was reduced from 14 to 7.

Accordingly, the settlement motion for this Order is rejected. It should be obvious that this rejection is *not* suggesting that any settlement would be insufficient. Rather, the Secretary is directed to provide adequate information to support it or to prepare for hearing. This observation applies equally to the other Orders.

For the second matter, Order No. 8156865, another section 104(d)(1) order, which was proposed at $2,748.00 and for which the Secretary now seeks a 45% reduction, reducing the penalty to $1,500.00, as noted, the Secretary offers up the following in support of its proposed settlement amount and the revisions to the terms of the order:

> The Respondent disputes the alleged violation and contends that the alleged degree of negligence and the allegation of unwarrantable failure are not supported by the evidence *in that the two small wires found by the inspector to be protruding from the scoop* ***were not in plain sight or obvious*** *as the light was mounted in a recessed area between the frame and the battery and, therefore, the failure to observe and address the wires did not constitute high negligence or unwarrantable failure. And, the Respondent states they* ***would*** *present evidence to that effect.*

Motion at 3 (emphasis added).

The first observation is the echoing of much of the supporting rationale for this matter, as with the previously discussed order, above. Both make the same claim that "[t]he Respondent

disputes the alleged violation and contends that the alleged degree of negligence and the allegation of unwarrantable failure are not supported by the evidence."[4] That, of course, tells the Court precisely nothing.

When the motion finally comes around to providing specifics, it advises that

> the two small wires found by the inspector to be protruding from the scoop *were not in plain sight or obvious* as the light was mounted in a recessed area between the frame and the battery and, therefore, the failure to observe and address the wires did not constitute high negligence or unwarrantable failure. And, the Respondent states they *would present evidence* to that effect.

Motion at 3 (emphasis added).

As with the discussion of the first Order, above, the Secretary's Motion does not contend that, in fact, through discovery or otherwise, that the Respondent *actually provided* such evidence. Instead, the Secretary simply proceeds from the Respondent's claims and returns to its repeated phraseology that

> [i]n light of the contested evidence and the costs and uncertainties of pursuing further litigation of this matter, the Secretary has agreed to reduce the alleged negligence from High to Moderate, to modify the 104(d)(1) unwarrantable-failure order to a 104(a) citation, and to reduce the penalty to [ ] and the Respondent has agreed to pay the reduced amount."

Equally troubling is that, putting aside that the settlement does not declare that the Respondent actually provided such evidence, as opposed to what it "would present," the mine inspector's Order flatly contradicts the "not in plain site or obvious" assertion.

> **Order# 8156865** states:
>
> The operator has failed to maintain the permissible electrician's maintenance scoop CO# 508, S/N 488-2111 in a permissible condition. When checked the scoop outby the loading point, found the offside rear light's explosion-proof enclosure ***has 2 wires sticking out of it and connected together with a wires nut.*** When asked to de-energize the scoop and open the enclosure, found that these 2 wires are the light bulb wires. When disconnected the wires the light bulb didn't work. This scoop is a maintenance scoop. ***Only electrician[s] are allowed to perform electrical duties on it. The sticking out wires were very obvious to the***

[4] It will not be surprising to learn that the same verbiage appears for the third matter, that "[t]he Respondent disputes the alleged violation and contends that the alleged degree of negligence and the allegation of unwarrantable failure are not supported by the evidence," but at least in this last matter, the repetition can be defended on the basis that both Order Nos. 8156865 and 8156866 arose out of the same electrical hazard on a maintenance scoop, with the former involving face equipment not being maintained in permissible condition while the latter cites the related violation for *not properly examining* and maintaining such equipment, per section 75.512.

> ***average observer.*** **The electrician who change[d] the light bulb last was supposed to check for flange openings to assure the enclosure permissibility. The enclosure lid was shut tight with 4 bolts and [its] washers mashing down the sticking out wires.** **The wires nut had a burned spot from the light's heat.** The operator's Agent is engaged in aggravated conduct[] constituting more than ordinary negligence. Permissibility examination[s] are of fundamental importance in assuring a safe working environment underground. Serious lack of reasonable care exacerbates the likelihood for accidents to occur. **The operator has been made aware of the need for greater effort toward permissibility's compliance and the need of the adequate electrical examination through citations, discussions and notices. There are no mitigating factors in the issuance of this order observed by the inspector.** There were 14 miners working on the section at the time of the order. **The scoop was examined by agent of the operator on 5/8/2013.** The condition was not detected, reported or corrected.[5]

Further, it is noted in the Order that the alleged violation of the permissible equipment requirement, "Standard 75.503[,] was cited 31 times in two years at mine 4609230 (31 to the operator, 0 to a contractor. This violation is an unwarrantable failure to comply with a mandatory standard." To the Court, that seems like a high number of repeat violations, but the subject is not addressed in the motion either.

Subsequently, the Inspector noted that the light was repaired, eliminating the openings in the explosion proof enclosure. The Inspector, apparently displaying a reasonable posture, subsequently recorded that due to mitigating factors, the order was modified to reduce the number of persons affected from 14 to 1, *but this reduction was already reflected in the proposed penalty amount* of $2,748.00. *See* Exhibit A.

Thus, the Secretary's submission is deficient in that not only does it refer solely to what the Respondent *would* provide but also it does not deal with the contradictory assertions in the Inspector's Order.[6]

For the third matter, Order No. 8156866, the entirety of the Secretary's motion provides the following reasoning:

[5] In other words, the Order was issued on the same date that the exam had been made, thereby eliminating any claim that the condition had recently arisen.

[6] As the Court noted in its recent denial of the settlement motion in *Janney Painting*, Docket Nos. VA 2014-28-M, VA 2014-50-M (Feb. 9, 2015), "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." Given the paucity of information so often provided by the Secretary in its settlement motions, and remembering that, even the information which is reluctantly provided comes with an objection over its disclosure, with that attitude, it is fair to inquire what protections there are for the safety and health of miners when a matter is simply vacated. Presently, no explanation from the Secretary is required at all. Perhaps the affected community will demand more.

> Order No. 8156866 was issued to the Respondent on May 8, 2013, and alleged a violation of 30 C.F.R. § 75.512 and § 104(d)(1) of the Act, 30 U.S.C. § 814(d). The Secretary determined that the violation was unlikely to cause an injury; that an injury from the cited condition could be reasonably expected to be fatal; that the violation was not significant and substantial; that one person was affected; and that the operator's conduct in the violation demonstrated a high degree of negligence. The Secretary assessed a penalty of $2,341.00. **The Respondent disputes the alleged violation and contends that the alleged degree of negligence and the allegation of unwarrantable failure are not supported by the evidence in that the two small wires found by the inspector to be protruding from the scoop were not in plain sight or obvious as the light was mounted in a recessed area between the frame and the battery and, therefore, the Respondent's examination, which missed these wires, did not constitute high negligence or unwarrantable failure. And, the Respondent states they would present evidence to that effect**. In light of the contested evidence and the costs and uncertainties of pursuing further litigation of this matter, the Secretary has agreed to reduce the alleged negligence from High to Moderate, to modify the 104(d)(1) unwarrantable-failure order to a 104(a) citation, and to reduce the penalty to $1,500.00, and the Respondent has agreed to pay the reduced amount.

Motion at 3 (emphasis added).

The same infirmities identified for the previous Orders exist here as well, as the motion offers the same platitudes about evidence that the Respondent *would* present, as opposed to identifying information obtained through discovery or otherwise.

In this instance, it is possible to view this Order as graver, in a sense, than the related Order, No. 8156865, addressing the scoop itself, because, more fundamentally, this Order reflects a problem with the examination process itself. As the Inspector contended in his Order, for **No. 8156866,** an

> [i]nadequate examination has been conducted on CO# 508 S/N 488-2111 maintenance scoop on 5/8/2013. Order # 8156865 was issued on 5/8/2013 for [an] *obvious safety hazard. The condition was very obvious, extensive and has . . . existed for* [*a*] *long time. The light bulb's wires were sticking out* [*of*] *the explosion-proof enclosure and the enclosure lid was closed tight*[,] *mashing the wires. It's* [a] *very serious part of the permissibility examination . . . to check for flange openings.* ***If the electrician would have checked for the flange openings he would have found the hazard.*** The condition was not detected, reported or corrected. The electrical examination records indicate[] no hazard for the scoop. *The condition had to exist for a period of time because there were accumulation*[s] *of dirt inside the bolt holes and lubricants had to be used to loosen*[] *the bolts.* The condition constitutes *that the explosion-proof enclosure has not been checked for flange openings* ***for* [*a*] *long time*** *because of the sticking*

> *out wires.* Permissibility[] and electrical examination[s] are considered [the] first line of defense in assuring a safe working environment underground and safe mobile equipment[] operation. Serious lack of reasonable care exacerbates the likelihood for accidents to occur.

(emphasis added).

The Order went on to state that "Standard 75.512 was cited 21 times in two years at mine 4609230 (21 to the operator, 0 to a contractor)." The Order also continued, noting that a

> certified electrician performed an examination on the same day the condition was cited. The condition wasn't detected, reported or corrected. . . . [and that upon] reviewing the notes and previous citations, the operator was put on notice [by the Inspector] for a greater effort toward electrical examinations and permissibility requirements on citation# 8156863 and during an official meeting with the company's upper management representatives on 5/8/2013.

None of these issues of concern were addressed in the Motion and, as with the others, mitigating factors were already taken into account in formulating the proposed penalty. The point, of course, is that the settlement motion offers nothing in the way of identifying further mitigating factors, nor does it address the serious deficiencies alleged in the Order.

Accordingly, the proposed settlement for this Order is also rejected.

Conclusion

Apart from the Commission's statutory role in approving settlements, one is left to wonder just exactly what the principled objection is that causes the Secretary, in its anti-transparency manner, to balk at explaining the basis for its settlements. One would think that, beyond Section 110(k), MSHA would be insisting that its lawyer, the Solicitor of Labor, show the public and the miners who depend upon effective enforcement of the Mine Act for their safety and health, the basis for its settlements. Instead, the Secretary offers the platitude that "the Secretary has evaluated the value of 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," essentially telling the affected community, "Move along, there's nothing to see here."

Settlement motions such as this, in the Court's view, raise a question of whether there is merely paper-pushing going on. This concern should not be interpreted as suggesting that the Court is stating matters should not be settled. To the contrary, it is simply a matter of providing the Court with real information to support the motion so that the Court can fulfill its statutory responsibilities and, as a bonus which all should embrace, so that the Secretary can show the Nation's miners, with genuine transparency, that the Secretary's motions comport with the statutory aims of the Mine Act rather than simply asserting that they do.

Accordingly, for the foregoing reasons, the Court has considered the representations submitted in this case and concludes that the proffered settlement is not appropriate under the criteria set forth in section 110(i) of the Act, and it is therefore DENIED.

William B. Moran
Administrative Law Judge

Distribution:

Robert Alan Kelly, Office of the Regional Solicitor, U.S. Department of Labor, Two Pershing Square Bldg., 2300 Main Street, Suite 1020, Kansas City, MO 64108

Jonathan R. Ellis, Steptoe & Johnson PLLC, Chase Tower, Eighth Floor, PO Box 1588, Charleston, WV 25326