

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 26, 2015

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

v.

REMINGTON, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2012-533
A.C. No. 46-09230-275179

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 \$8,325.00, and the proposed settlement is for \$4,163.00. The Court has reviewed the Secretary’s motion but has reservations about the basis offered for the 50% reduction in the penalty for Citation Nos. 8120822 and 8120824.

For No. 8120822, the cited standard, 30 C.F.R. § 77.1606, entitled “Loading and haulage equipment; inspection and maintenance,” provides that “[m]obile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation [and that] [e]quipment defects affecting safety shall be recorded and reported to the mine operator.” Thus, the focus of the standard is upon the inspection of equipment for defects prior to its use.

The Secretary’s motion states, in relevant part:

The Operator asserts that policies were properly in place for any independent contractors working on its property regarding the proper examination and maintenance of equipment. Additionally, all such independent contractors were

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.

required to undergo training before working on the mine's property. Given the steps taken by the mine operator to ensure that independent contracting companies on its property work in a safe manner, questions exist as to whether the citation was properly issued as highly likely or moderate negligence.

It is noted that, except for a minimal change in the rationale, and with absolutely no substantive changes to the text of the rationale, the second Citation, No. 8120824, repeats the language presented to justify Citation No. 8120822.

Examining the Secretary of Labor's offered language for Citation No. 8120822, it may be broken down into 2 asserted justifications:

1. The Operator's policies were properly in place for any independent contractors working on its property regarding the proper examination and maintenance of equipment.
2. All such independent contractors were required to undergo training before working on the mine's property.

From that, the Secretary asserts that "[g]iven *the steps taken* by the mine operator to ensure that independent contracting companies on its property work in a safe manner, questions exist as to whether the citation was properly issued as highly likely or moderate negligence." (emphasis added). Yet, the Secretary's motion does not contend that the gravity or negligence findings should be modified. The only change is the 50% reduction in the penalty.

Therefore, it becomes necessary to analyze exactly what were "the steps taken by the mine operator to ensure that independent contracting companies on its property work in a safe manner." This means, of course, steps taken *in advance of* the alleged violation. However, the motion does not identify at all the policies that were in place regarding the proper examination and maintenance of equipment, nor are any details provided about the training that "all such independent contractors were required to undergo [] before working on the mine's property."

Set against the detail-free rationale are the allegations of the citation, which relate that an accident occurred with a loaded tractor-trailer coal truck in which the driver sustained a lost-time injury. That citation asserts that following an accident, it was found that 6 of 10 brakes on a tractor-trailer coal truck were not functioning properly. This was especially significant, as the truck lost power, began rolling backwards, and turned over and, as noted, with the driver being injured. In addition, there was another significant defect beyond the brake defects in that the seat belt tether was not connected to the body of the truck cab. As the Inspector stated in the citation, those defects should have been observed in the pre-operative check of the vehicle. Adding to the seriousness, the citation noted that the haul road where the accident occurred "is used by all persons, including miners and vendors traveling to and leaving the mine site."

The citation concludes with the Inspector's statement that the operator "failed to provide adequate oversight to ensure the safety of persons on the mine property." In abating the violation, the truck was removed from service and additional training was provided to truck operators.

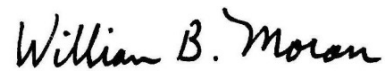
In the Court's view, the Secretary's motion fails to identify the steps taken in advance to ensure that there are proper examinations of equipment, nor does the motion provide detail about the training provided for independent contractors prior to working on the mine's property. The claim that "policies were properly in place" for proper examinations is not supported in the motion and the facts alleged in the citation refute that claim. Thus, it is disconcerting for the Secretary to tout "the steps taken by the mine operator to ensure that independent contracting companies on its property work in a safe manner."

The second citation alleges a violation of 30 C.F.R. § 77.404, entitled "Machinery and equipment; operation and maintenance," which requires that "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." The citation involves the same tractor-trailer truck and accident identified in Citation No. 8120822. The focus of this alleged violation is the requirement for *maintaining equipment in safe condition and removing such equipment when it is not safe*. The body of the citation essentially provides additional details concerning the statement in Citation No. 8120822, that 6 of the 10 brakes on the tractor trailer were not working. The post-accident investigation revealed that the truck's brake shoes were not contacting their drums, and that this was easily determinable. For the trailer itself, "all four brake units [on it] were functionally inoperable," and those defects were likewise easy to detect. The citation also added to the information provided in the first citation that the "truck operates in congested areas and travels [a] steep haulroad (*sic*)." For the abatement, the citation relates that "[t]he truck and trailer have been removed from service and *additional* truck inspection and maintenance programs have been implemented." (emphasis added).

The Motion's assertion that the operator had proper examination and maintenance procedures in place is negated by the statements in the citation that show that they were plainly ineffective. Policies claimed to be "properly . . . in place" cannot support a 50% reduction in a penalty, where those policies, properly in place or not, miss obvious defects. The citation makes this point, asserting that the operator failed to provide adequate oversight or programs to ensure that contractor equipment is being maintained in safe operating condition. In its rawest form, the Motion essentially seeks the large reduction for an examination and maintenance program which was demonstrably ineffective. Accordingly, merely repeating the inadequately supported justification offered for Citation No. 8120822 does not work for Citation No. 8120824 either. Therefore, the rationale for this 50% reduction is also unsupported. It seems obvious that, based on the citation's statement, which was not challenged in the Motion, the equipment was not being properly maintained and the defects were, as the citation alleges, easily detectable. Further, the Secretary cannot claim as the basis for its penalty reduction, that the training, alleged to have been provided for proper examination and maintenance, was properly in place where there was a need to implement additional truck inspection and maintenance programs.

In sum, an inspection program to ensure that defects affecting safety are detected, a training program to ensure that those who make such inspections are competent, and related training to ensure that unsafe equipment is immediately removed from service cannot be cited as the basis for a penalty reduction, let alone a reduction on the order of 50%, where such programs utterly fail to detect obvious defects and patently unsafe equipment. Accordingly, the Secretary's Motion is DENIED.

The Secretary is directed to either provide the required information to support the claims about the nature of the mine operator's policies that were in place and the details of the training provided prior to the accident and to then explain how those translate into a justification for a 50% penalty reduction, or to prepare for hearing. The Secretary is further directed to advise the Court of his intentions within two weeks from the issuance of this decision. The Court also directs the Secretary to advise it as to whether the contractor, Powers Trucking Company, was cited for these alleged violations, and if so, the status of such matters.


William B. Moran
Administrative Law Judge

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