

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 27, 2023

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

v.

GREENBRIER MINERALS, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2023-0036
A.C. No. 46-02140-563930

Mine: Saunders Preparation Plant

DECISION APPROVING SETTLEMENT

Before: Judge William 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 CLR has filed a motion to approve settlement. The originally assessed amount was \$1,189.00 and the proposed settlement is for \$878.00.

| Citation/Order | MSHA's Proposed Penalty | Settlement Amount | Other modifications to citation/order |
|----------------|-------------------------|-------------------|--|
| 9567361 | \$626.00 | \$626.00 | |
| 9567358 | \$563.00 | \$252.00 | Modify to low negligence; 55% (fifty-five percent) reduction in penalty |
| TOTAL | \$1,189.00 | \$878.00 | |

This Motion to Approve Settlement involves two violations of 30 C.F.R. § 77.1605(a); both were regularly assessed, with one paid in full, and the other with a 55% reduction. The standard pertains to loading and haulage equipment, and its requirements can aptly be described

as ‘clear as glass,’ because it requires that “[c]ab windows shall be of safety glass or equivalent, *in good condition* and shall be kept clean.” (emphasis added).

Citation No. 9567358; the citation with the 55% reduction in the penalty.

Here, the issuing MSHA inspector, Curtiss Vance III, diligently noted:

“[t]he following windows on the D10R Caterpillar Dozer Co. No. 472 were not in good condition:

1. The left side door window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.
2. The right side door window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.
3. The front window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.
4. The rear window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.
5. The side windows were not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.

This dozer was being operated on the Coal Stockpile Area pushing to a underground feeder. Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean.”

Petition for Civil Penalty at 6

The Secretary requests Citation No. 9567358 be modified to Low negligence. The Respondent would argue that the window glass in the Caterpillar Dozer Co. **No. 472** had been replaced in the past. The *window* glass had not been reported to be damaged on the pre-operational checks. The mine management was not aware of the condition at the time of the inspection. Motion at 3 (emphasis added).

Citation No 956736; the citation paid in full.

This citation, which was issued by the same inspector and cited the same standard, 30 C.F.R. § 77.1605(a), differed in that it involved a different piece of equipment, but it was another D10R Caterpillar Dozer, **No. 031**. Otherwise, the violation is virtually indistinguishable from Citation No. 9567358, described above.

The condition or practice section of the citation informed:

The following windows on the DIOR Caterpillar Dozer Co. No. 031 were not in good condition:

1. The left side door window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.
2. The right side door window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.

3. The front window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.

4. The rear window was not in good condition. The window was scratched on the outside and dirty in between the outer glass and inner glass.

This dozer is operated on the Coal Stockpile Area, pushing to a underground feeder. Cab windows shall be of safety glass or equivalent, in good condition and shall be kept clean.

Petition for civil penalty at 8.

Analysis

To put it directly, the justification in this motion does not add up. As noted, these two, now-admitted, violations are virtually indistinguishable. *The two citations were issued by the same inspector, on the same day, and within an hour of each other. Both pieces of equipment were the same: D10R Caterpillar Dozers, and they were being operated in the same area – the Coal Stockpile Area – and doing the same task – pushing material to an underground feeder.*

Citation No. 9567361, the one paid as regularly assessed, differs from Citation No. 9567358, the one with a 55% penalty reduction, only in that No. 9567361 was assessed at \$63.00 more. To be clear, the inspector evaluated both violations the same – listing the likelihood of injury as ‘reasonably likely,’ resulting in lost workdays or restricted duty, with both denoted as ‘significant and substantial,’ and the negligence as moderate. In fact, of the two, Citation No. 9567361, is less egregious as it listed *four* distinct window locations on the equipment that were not in good condition, whereas Citation No. 9567358 listed *five* distinct window locations that were not in good condition. The difference for No. 9567361 is that the operator failed in compliance after the citation was issued to the point that a (b) order had to be issued for failing to demonstrate ‘good faith’ in achieving rapid compliance.

The Secretary makes matters worse with her position that she need not disclose the (b) order itself for the Commission to view, hiding the salient information from the Commission, all miners, and the public. One would have anticipated that the Secretary, whose obligation is to protect the safety and health of miners, not mine operators, would be at forefront on this issue, *insisting on disclosure of the (b) order*, not blocking it from view. That strident approach, blocking affected persons and entities from seeing the entire record, is inimical to the Secretary’s role. The Court would have rejected the Secretary’s motion for this deficiency alone but for the fact that its non-disclosure stance for (b) orders is before the Commission presently in another docket.

As noted, compounding this unjustified basis for the more than 50% penalty reduction in Citation No. 9567358 is that the affected dozer had “not good condition” issues with *five* distinct areas: the left side door window, the right side door window, the front window, the rear window and the side windows. And, make no mistake about it, this dozer is a large machine, weighing 144,190 lbs, with a length of more than 25 feet and a height at 13.5 feet.¹ These dimensions

¹ <https://www.ritchiespecs.com/model/caterpillar-d10r-crawler-tractor>

underscore the safety importance of all windows being maintained in good condition.

Except for the significant fact that the five identified safety deficiencies are not funny, the excuses offered in the motion for the large penalty reduction would be laughable. This is so because asserting that the glass had been replaced in the past counts for nothing in any penalty analysis. Further, the claim that the window glass had not been reported to be damaged on the pre-operational checks and that excuses mine management, shows only that a citation for failure to conduct genuine pre-op checks may have been in order. Inspectors should consider such citations when confronted with such claims. With *every* window deficient, a claim of operator ignorance cannot be deemed credible. Additionally, the idea that such excuses constitute “*considerable* mitigating circumstances,” the Part 100 requirement for “low negligence,”² would mean that nearly all violations could qualify under such a review standard.

It is this Court’s view that unsupported reductions in proposed regular assessments such as this run counter to the Mine Act’s purposes. Congress expressed that penalties are to be of sufficient magnitude, i.e. “cost,” to make compliance with the safety and health standards preferable to non-compliance. Results such as these, with the citation identifying more deficiencies, involving the same bulldozer model, doing the same work at the same time, and in the same location, but costing far less, gives the appearance of an unwarranted discount in the penalty, as opposed to valid justifications for penalty reductions.

Despite the many concerns expressed, the Court is presently precluded from making reasonable inquiry when presented with settlement motions. Per the Commission’s decisions on the scope of a judge’s review authority of settlements, the “information” presented in this settlement motion is sufficient for approval.

Accordingly, the Court has considered the Secretary’s Motion and approves it *solely* on the basis of the Commission’s decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission’s interpretation of section 110(k) of the Mine Act.

² 30 C.F.R. §100.3, and Table X.

WHEREFORE, the motion for approval of settlement is **GRANTED**. Citation No. 9567358 is modified to low negligence, with the penalty reduced to \$252.00 for that violation. It is further **ORDERED** that the operator pay the penalty of **\$878.00** within 30 days of this order.³ Upon receipt of payment, this case is **DISMISSED**.

William B. Moran

William B. Moran
Administrative Law Judge

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³ Penalties may be paid electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket and A.C. Numbers. It is vital to include Docket and A.C. Numbers when remitting payments.