FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 8, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. LEHIGH CEMENT COMPANY, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. PENN 2022-0133 A.C. No. 36-00190-562077 Mine: Nazareth Plant I

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. The Conference and Litigation Representative, ("CLR"), has filed a motion to approve settlement. The originally assessed amount was **$35,274.00** and the proposed settlement is for **$17,610.00**, **representing a 50% overall reduction in the penalty for this docket**. The changes are reflected in the following table:

Citation/Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9667158	$8,549.00	$3,841.00	Modify to Low negligence. **55% reduction in the penalty**
9667164	$1,869.00	$378.00	Change "injury or illness" to "unlikely; and not significant & substantial. **80% reduction in the penalty**
9667165	$1,869.00	$378.00	Change "injury or illness" to "unlikely; and not significant & substantial. **80% reduction in the penalty**
9667160	$296.00	$296.00	None
9667161	$3,274.00	$1,472.00	Modify to Low negligence. **55% reduction in the penalty**

9667163	$661.00	$296.00	Modify to Low negligence. **55% reduction in the penalty**
9667166	$3,274.00	$3,274.00	None
9667167	$4,884.00	$662.00	Change "injury or illness" to "unlikely; and not significant & substantial. Modify to Lost Workdays or Restricted Duty. **86% reduction in the penalty**
9667168	$4,884.00	$3,274.00	Modify to Lost Workdays or Restricted Duty. **33% reduction in the penalty**
9667169	$4,884.00	$3,274.00	Modify to Lost Workdays or Restricted Duty. **33% reduction in the penalty**
9667170	$169.00	$169.00	None
9667171	$661.00	$296.00	Modify to Low negligence. **55% reduction in the penalty**
TOTAL	**$35,274.00**	**$17,610.00**	**50% (fifty percent) overall reduction in the penalty for this docket**.

Citation No. 9667165, issued by MSHA Inspector Kyle C. Stofko, invoked 30 C.F.R. § 56.14112(a)(1). That standard speaks to the construction and maintenance of guards. It plainly and clearly provides that "[g]uards shall be constructed and maintained to (1) [w]ithstand the vibration, shock, and wear to which they will be subjected during normal operation." Here, the inspector found "the tail guard of the 694 conveyor *was missing* the left *and* right guards. This condition has exposed the winged tail pulley to contact approximately 36" f[ro]m the catwalk. *The rear guard was also bent and deformed creating jagged edges and openings to the tail pulley* and is against the travelway. Guards shall be constructed and maintained to withstand the vibration, shock, and wear to which they will be subjected during normal operation. The area is accessed on a regular basis. This condition has existed for an unknown amount of time and exposes persons to permanently disabling injuries. **Photos taken**."

Penalty Petition at 18 (emphasis added).

The Secretary requests Citation No. 9667165 be modified to unlikely and to delete the significant and substantial designation, resulting in an **80% reduction in the penalty** from **$1,869.00 to $378.00** for this now-admitted violation. The Secretary's motion states that "the Respondent would present evidence that the tail section of 694 conveyor *had guards* in place to prevent accidental contact. The framework and location of the emergency stop cable would make contact with the moving machine parts difficult." Motion at 3. (emphasis added).

Analysis for Citation No. 9667165 with its 80% penalty reduction

In violations such as this, the Court believes it should be able to view critical, likely dispute-ending, photographs.

Further, the Secretary should cease advancing irrelevant considerations on the subject of significant and substantial violations, as the United States Courts of Appeal have definitively addressed that subject.

In putative support for reducing the penalty to $378.00, the Secretary offers two assertions: 1. the Respondent's claim that the conveyor had guards in place and 2. the emergency stop cord would make contact with the moving machine parts difficult.

As to the first assertion, there is direct conflict with the inspector's words that the tail guard of the 694 conveyor *was missing* the left and right guards. Further, the motion says nothing about the third hazard identified in the citation – that the rear guard was also bent and deformed, creating jagged edges and openings to the tail pulley and against the travelway. Inspector Stofko wisely took photographs of what he observed. The Court applauds the inspector's taking photographs as they can provide useful supportive evidence. The Secretary makes no mention of the photographs in the motion.

Those photos would likely put to rest the issue of the guards, but the Commission forbids its front-line reviewers of settlement motions, its administrative law judges, from seeing the photographs. The federal courts have noted on numerous occasions that "[a] picture is worth a thousand words. A photograph, especially when coupled with text, can convey a powerful message." *Manzari v. Assoc. Newspapers*, 830 F.3d 881 (9th Cir. 2016), *Harris-Billups v. Anderson,* 61 F.4th 1298, 1300 (11th Cir. 2023). However, none of the thousands of pictorial 'words' in this docket are available for the Court to see.

The second assertion, that *the emergency stop cord* would make contact with the moving machine parts difficult, is to have no part in the analysis as it is not to be considered in evaluating whether a violation is "significant and substantial." Yet, despite the Court reminding the Secretary on many, many occasions that such irrelevancies are off the table, the Secretary continues to assert them. Whether out of brazenness or ignorance, the Court does not know why these continue. However, the federal courts of appeals have made it clear, rejecting such alternative safety measures as cognizable excuses. For example, in *Knox Creek Coal*, 811 F.3d 148 (4th Cir. 2016), that Court observed:

> "[i]f mine operators could avoid S & S liability—which is the primary sanction they fear under the Mine Act—by complying with redundant safety standards, operators could pick and choose the standards with which they wished to comply."…Such a policy would make such standards "mandatory" in name only. It is therefore unsurprising that other appellate courts have concluded that '[b]ecause redundant safety measures have nothing to do with the violation, they are irrelevant to the [S & S] inquiry.' *Cumberland Coal*, 717 F.3d at 1029; *see also Buck Creek*, 52 F.3d at 136.

Knox Creek Coal, 811 F.3d 148, 162 (4th Cir. 2016).

Further regarding this issue, in *Consolidation Coal*, 895 F.3d 113, (D.C. Cir. 2018), the D.C. Circuit, referring to its decision in *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Commission*, 717 F.3d 1020 (D.C. Cir. 2013), noted that it:

> interpreted the statutory text to focus on the "nature" of "the violation" rather than any surrounding circumstances. More to the point, the court held that "consideration of redundant safety measures,"—that is, "preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely"—"is inconsistent with the language of [Section] 814(d)(1)." *Id.* at 1028–1029.

Id. at 118-119.

As the D.C. Circuit further held in *Consolidation Coal*, 895 F3d 113 (D.C. Cir. 2018):

> Ample Commission precedent holds that such considerations are irrelevant to the likelihood-of-injury analysis. That is because the third prong of the *Mathies* test focuses on the risk of injury created by the safety violation itself. *See*, *e.g.*, *Secretary of Labor v. Black Beauty Coal Co.*, 38 FMSHRC 1307, 1313–1314 (2016) ("[T]he methane monitor, fire suppression system and devices, water sprays, CO monitors, fire brigade, breathing devices and turnout gear for firefighters are the sort of safety measures that we, and the appellate courts, have held to be irrelevant to the [significant and substantial] analysis under the Act."); *Secretary of Labor v. Brody Mining, LLC*, 37 FMSHRC 1687, 1691 (2015) ("When deciding whether a violation is [significant and substantial], courts and the Commission have consistently rejected as irrelevant evidence regarding the presence of safety measures designed to mitigate the likelihood of injury resulting from the danger posed by the violation."). The Commission itself has characterized this rule as "well settled." *Black Beauty Coal Co.*, 38 FMSHRC at 1312.
>
> The same is true of miner precaution. Because the safety standards are there to protect miners, the hope or expectation that miners will protect themselves "is not relevant under the *Mathies* test." *Secretary of Labor v. Newtown Energy Inc.*, 38 FMSHRC 2033, 2044 (2016); *see also Secretary of Labor v. Eagle Nest, Inc.*, 14 FMSHRC 1119, 1123 (1992) ("We reject the judge's conclusion that the 'exercise of caution' may mitigate the hazard."); *Secretary of Labor v. United States Steel Mining Co.*, 6 FMSHRC 1834, 1838 (1984) (dismissing argument that the violation of a cable marking requirement was not reasonably likely to cause injury because miners could determine the identity of cables by process of elimination); *Secretary of Labor v. Great W. Elec. Co.*, 5 FMSHRC 840, 842 (1983) (considering miner skill "ignores the inherent vagaries of human behavior"). As

the Commission has pointed out, while "miners should, of course, work cautiously, that admonition does not lessen the responsibility of operators, under the Mine Act, to prevent unsafe conditions." *Eagle Nest, Inc.*, 14 FMSHRC at 1123. This reading also has the benefit of advancing the stated purpose of the Mine Act, which gives "the first priority and concern" to the "health and safety of its most precious resource—the miner," in view of "an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm." 30 U.S.C. § 801(a), (c).

This court's precedent is of the same mind. In *Secretary of Labor v. Federal Mine Safety & Health Review Commission* (*Jim Walter Resources, Inc.*), 111 F.3d 913 (D.C. Cir. 1997), this court held that the Commission could not rely on aggravating facts external to a safety violation to conclude that the violation was of such nature as to significantly and substantially contribute to a hazard, *id.* at 915. The Secretary's reading of *Mathies* relies on this same principle in reverse: that circumstances external to a violation cannot be used to reduce the likelihood that harm will ensue.

Likewise, in *Cumberland Coal Resources, LP v. Federal Mine Safety & Health Review Commission*, 717 F.3d 1020 (D.C. Cir. 2013), this court again interpreted the statutory text to focus on the "nature" of "the violation" rather than any surrounding circumstances. More to the point, the court held that "consideration of redundant safety measures,"—that is, "preventative measures that would have rendered both injuries from an emergency and the occurrence of an emergency in the first place less likely"—"is inconsistent with the language of [Section] 814(d)(1)." *Id.* at 1028–1029."

Consolidation Coal, 895 F.3d 113,118-119 (D.C. Cir. 2018)

Yet, in the face of these decisions from the federal courts of appeals, the Secretary, in this instance through its non-attorney representatives – Conference Litigation Representatives, in this case, Mr. Ridley, habitually repeat such rejected bases. The Court places this continued use of such irrelevant claims squarely on the Secretary. As non-attorneys, the CLRs are fed these assertions, merely reciting what they are told by the Solicitor to include in the motions. It is unfair to foist their misstatements on them. They simply repeat what they are told to include in settlement motions. As such, the Secretary, through the façade of CLRs, cannot deliberately misstate or ignore case law that is unfavorable to her position. *See, Teamsters v. B&M Transit,* 882 F.2d 274, 280 (7th Cir. 1989),[1] *Robb v Electronic Data,* 990 F.2d 1253 (5th Cir. 1993), *EEOC v Taylor Electric*, 155 F.R.D. 180, (N.D. Ill. 1994), *Home Casual Enterprise,* 2013 WL 4821311

[1] *Teamsters v. B&M Transit* cites a host of other cases for this principle: a party is not entitled to deliberately **ignore or misstate case law** that is unfavorable to its position. *See Fred A. Smith Lumber Co. v. Edidin,* 845 F.2d 750, 753 (7th Cir. 1988); *Szabo Food Service,* 823 F.2d at 1081. *Id.*

(W.D. Wis. 2013) (citing *Teamsters v. B&M Transit, Inc.,* at 280).

Citation No. 9667164

For Citation No. 9667164, MSHA Inspector Stofko found a nearly identical, and arguably worse, violation of the same guarding standard, 30 C.F.R. § 56.14112(a)(1). This now-admitted violation was found on the *same day* as Citation No. 9667165, a mere 15 minutes earlier.

The Inspector's description of the condition informed:

> While inspecting the finish mill located at plant 1, it was found that the 633 conveyor head section and the Gypbelt head section ***were both missing multiple guards*** for the pulleys and drive components. The conveyor head sections were directly stacked over each other. This area is accessed on a regular basis for travel greasing and maintenance. Guards shall be constructed and maintained to withstand the vibration, shock, and wear to which they will be subjected during normal operation. All unguarded hazards were less than 7' from the catwalk. These conditions have existed for an unknown amount of time. Persons injured as a result of the violation cited would receive permanently disabling injuries. **Photos taken**.

Penalty petition at 16 (emphasis added)

Given the recounting above for Citation No. 9667165, one will not be surprised to read that the non-attorney representative for the Secretary offers the same serving for listing the gravity as 'unlikely,' and removing the significant and substantial designation:

> The Respondent would present evidence that the 633 conveyor and Gyp belt had guards in place to prevent accidental contact with the moving machine parts. *The location is not easily accessible to miners.*

Motion at 3 (emphasis added).

There is no indication that the federal appeals courts have said that such improper considerations would be acceptable when presented in settlement motions, as opposed to a hearing, as such an inconsistent stance would not be logical.

Analysis for Citation No. 9667164

Here too, the inspector's photos would likely resolve the claim about the presence, or lack thereof, of guards. There is no point in recounting the problems identified by the Court regarding Citation No. 9667165 because they are same. While the Court is obligated to follow Commission case law *and does so respectfully*, it is of the view that if important photographs cannot be viewed by the Commission's administrative law judges and if the Secretary is continued to be permitted to cite irrelevant considerations in settlements, forbidden by the federal

courts of appeals, in those situations section 110(k) is at risk of becoming a phantom requirement.

It is the Court's best recollection that only one commissioner expressed that the Commission's judges may not see photographs when reviewing settlements. These subjects were not expressly covered in 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. It is the Court's hope that as these identified problems were not addressed in those decisions, and therefore not contemplated, the Commission may address them.

Citation No. 9667167

This now-admitted violation of 30 C.F.R. § 56.20003(a), was also issued by MSHA Inspector, Kyle Stofko. The standard, titled, "Housekeeping," provides that "Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly." The citation stated in the condition or practice section:

> Located in the area of the 523 pan drive it was found that the floor contained spillage and various debris throughout the floor. This area was traveled through in the condition cited. The spillage was clinker up to 2" in size on the smooth floor. There was also found piled machine parts in areas that would require travel for the 521disconnect. The affected floor area containing spillage was approximately 20' x 15'. Workplaces and passageways shall be kept clean and orderly. This condition has existed for an unknown amount of time and exposes persons to permanently disabling injuries. **Photos taken**. **Standard 56.20003(a) was cited 37 times in two years** at mine 3600190 (36 to the operator, 1 to a contractor).

Penalty petition at 22. (emphasis added).

> The motion presents the following:
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> The Secretary requests Citation No. 9667167 be modified to unlikely and delete the significant and substantial designation with lost workdays or restricted duty. The Respondent would present evidence that the area of the 523-pan feeder is located under the stairwell and is not regularly traveled or in a regular travelway. The injury expected from a slip trip or fall to the floor would result in lost workdays or restricted duty. No miners were in the area at the time of the inspection.

Motion at 4.

Analysis for Citation No. 9667167

No stranger to the requirements of this "Housekeeping" standard, *in this docket alone*, **fully eight (8) of the twelve (12) citations involved violations of 30 C.F.R. § 56.20003(a). All eight have been admitted to being violated.** Not mentioned by the CLR in the motion, and not disputed, is that the affected area had clinker up to 2 inches in size on the smooth floor and piled machine parts over the approximate 20 feet by 15 feet area.

The motion suffers from several significant deficiencies. The Respondent admits that the floor is traveled, contending *only* that it is not *regularly* traveled. The Respondent does not challenge that the floor contained spillage and various debris throughout the cited area, nor does it dispute the area involved, nor that the floor was smooth, nor that "[t]his area was traveled through in the condition cited." With no basis for the claim, the Respondent asserts that the expected injury would be lost workdays or restricted duty. The MSHA inspector listed the expected injury as 'permanently disabling.' Further, the claim that an injury would be limited to lost workdays or restricted duty qualifies as a reasonably serious injury and consequently does not impair the inspector's 'significant and substantial' designation.

In asserting that "[n]o miners were in the area at the time of the inspection," the CLR, *and therefore the Secretary who instructs the CLRs what to assert in settlement motions*, ignores that the evaluation of whether a violation is 'significant and substantial' is measured by examining continued normal mining operations, *without* any assumptions as to abatement. *Mach Mining*, 809 F.3d 1259, 1267 (D.C. Cir. 2016). Thus, the remark that no miners were in the area *at the time of the inspection* is an impermissible consideration. "[I]njuries resulting in lost workdays or restricted duties … establishes that the hazard contributed to by the violations would be reasonably likely to result in an injury of a reasonably serious nature as required by our S&S analysis." *Spartan Mining*, 35 FMSHRC 3505, 3509 (Dec. 2013). The Secretary should instruct its non-attorney representatives to cease including impermissible factors in the evaluation of whether a violation is significant and substantial. [2]

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[2] This ignorance over the requirement that the 'significant and substantial' determination is to be measured by examining continued normal mining operations, without any assumptions as to abatement, and that alternative safety measures are not a cognizable excuse, is repeated throughout this settlement motion as noted below, with the bold text below showing the improperly asserted grounds which pertain to three of the other citations in this docket:

For Citation No. 9667163, the Secretary requests it be modified to Low negligence. **The Respondent would present evidence that the area of the 616-dust collector has been provided with hand tools and a suction hose that are readily available in case of any spillage. The miners have received training to clean the area prior to walking through the area.**

For Citation No. 9667168, the Secretary requests it be modified to lost workdays or restricted duty. The Respondent would argue that the injury expected from a slip, trip or fall in the area around the 522 elevator and the 521 conveyor would result in lost workdays or restricted duty. **The area has a significant handrail around that outer edge of the elevated platform to**

Not to be ignored is Citation No. 9667158.

Citation No. 9667158

This Citation for which the Secretary seeks a **55% reduction** in the regularly assessed proposed penalty presented and extremely serious situation, for which none of the facts in the Condition or Practice section are disputed. That section states:

> While inspecting the level 5 sump pumps in the Plant 2 quarry it was found that safe access was not maintained. The access path from the water truck fill area to the pump control switch was found to be along the edge of the pond that had a 9' shear drop to the water below. The path was uneven with large loose rock and found to be within 3' of the edge of the pond. The pump control switch was also within 4' of the edge of the pond. The catwalk access for the pumps was found to be broken away from the anchoring block and secured with a come-along and a cable. This condition created a gap between the anchoring block (That doubles as a flat access platform) and the catwalk. This access point also is located at the edge of the pond at the 9' drop to the water below. Safe means of access shall be provided and maintained to all working places. There was no personal floatation devices available in this area. The area is normally accessed by one person multiple times per day to fill the water truck and the pumps are accessed 2 times per month for pump maintenance. The conditions cited have existed since May of 2022. Persons injured as a result of the violation cited would receive fatal injuries. Photos taken.

Penalty Petition at 6.

Here again, the diligent Inspector Stofko took photographs to record what he observed.

The Secretary's Motion requests Citation No. 9667158 be modified to Low negligence. The Respondent would present evidence that a miner took it upon himself to use a frontend loader to modify the area without management's knowledge. The condition was not reported to the mine operator on the workplace exams.

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prevent falling to levels below.

For Citation No. 9667169, the Secretary requests that it be modified to lost workdays or restricted duty. The Respondent would present evidence that injury expected from a slip, trip or fall on the 550-dust collector landing would result in lost workdays or restricted duty. **The outer edge is provided with a significant handrail system consisting of a mid-rail and upper rail.**

To Inspector Stofko's credit, he also took photos for each of these now-admitted violations he observed: Citation No. 9667163, Citation No. 9667168, and Citation No. 9667169.

Analysis for Citation No. 9667158

The multiple, extensive, hazards, as described above, cannot be brushed aside on the frontend loader operator because several of them could not have been created by the operation of that machine. Further, while the offered excuse could arguably be a basis for moderate negligence, a level of negligence the issuing inspector bestowed on the operator, it could not be a basis for low negligence as no 'considerable' mitigating circumstances were offered in the settlement for this violation.

Conclusion

Despite the many troublesome aspects discussed in this decision, the Court is presently constrained when reviewing motions for approval of settlement. As such, it 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. 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 motion to approve settlement is **GRANTED**, the citations contained in this docket are **MODIFIED** as set forth in the table above and Lehigh Cement Company, LLC is **ORDERED** to pay the Secretary of Labor the sum of **$17,610.00** within 30 days of this order.[3] Upon receipt of payment, this case is DISMISSED.

William B. Moran

William B. Moran
Administrative Law Judge

Distribution:

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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.