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May 22, 2023

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. GREENBRIER MINERALS, LLC, Respondent	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0166 A.C. No. 46-09514-569163 Mine: Muddy Bridge

DECISION APPROVING SETTLEMENT

Before: Judge Moran

It is **ORDERED** that the Conference and Litigation Representative (CLR), Ray A. Cartwright, be accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Resources Corporation*, 16 FMSHRC 2359 (Nov. 1994).

This case is before me upon a Petition for Assessment of a Civil Penalties filed under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The motion is brought by non-attorney representatives, known as "conference and litigation representatives ("CLRs"). The CLR has filed a motion to approve settlement of the violations involved in this matter. The parties have moved to approve the proposed settlement as follows:

Citation/Order No.	MSHA's Proposed Assessment	Settlement Amount	Modification
WEVA 2023-0166			
9568959	$1,069.00	$535.00	Modified from "Reasonably Likely" to "Unlikely", and consequentially removing the "Significant and Substantial" designation
TOTAL	**$1,069.00**	**$535.00**	**50% reduction in penalty from regular assessment figure**

Involved in this matter is a section 104(a) citation for a now-admitted violation of 30 C.F.R. §75.1725(a). That standard, titled "Machinery and equipment; operation and maintenance," provides at the cited subsection that "Mobile 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."

In issuing the citation, MSHA Inspector Emory Pack found that a Mac 12 emergency ride, company number 001, had a non-functioning parking brake. The inspector noted that the machine is used to transport miners from the end of the track to the No. 1 section. Petition for Civil Penalty at 17. As the inspector marked the violation as reasonably likely to result in an injury producing lost workdays or restricted duty, he properly designated it as significant and substantial. The negligence was listed as moderate. *Id.*

That the inspector properly so evaluated the non-functioning brake was borne out by the fact that the parking brake was replaced. *Id* at 18

The Motion asserts the following in support of the modification and the 50% penalty reduction:

> Respondent disputes the level of likelihood of injury characterized by the citation. Respondent contends the **service brakes**[1] on the personnel carrier were working properly when tested. **Respondent further contends the terrain the personnel carrier travels is slightly rolling and not very steep. When the personnel carrier is parked and unattended, the transmission is left in reverse, and the wheels are turned into the rib.** Respondent states this citation does not have a confluence of factors to support the S&S determination. The Secretary does not necessarily agree with Respondent's position but does recognize a legitimate factual and legal dispute and believes that settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act. Therefore, the Secretary agrees to modify the citation from "Reasonably Likely" to "Unlikely" and to delete the "Significant and Substantial" designation. The Secretary also agrees to accept a reduced penalty, which reflects the modification to the issuance.

Motion at 3 (emphasis added).

Analysis

The support offered is a display of irrelevant considerations, because it is entirely composed of factors that are not to be considered, per the clear directions from the United States Courts of Appeals. Those Courts have rejected the 'alternative safety measures' raised by the Respondent when analyzing the significant and substantial designation. Accordingly, redundant safety measures are not to be considered in evaluating a hazard.

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

[1] The citation was for the non-functioning parking brake, *not the service brake.*

> '[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.

Such irrelevancies do not acquire legitimacy in the context of settlements because to do so, would mean that a lesser standard is applied. It is disconcerting that the Secretary's non-attorney representatives continue to advance these rejected justifications[2] for penalty reductions, as it displays a lack of respect for the holdings of the Courts of Appeals and Congress' explicit direction that penalties must be sufficient to encourage operators to comply with safety and health standards, as opposed to noncompliance with the attendant benefit of paying greatly reduced penalties.

Despite the above observations, the Court is not permitted to make reasonable inquiry about settlement motions. With that restriction, 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. The Court must and does adhere to all Commission precedent. 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.

[2] As the CLRs are not attorneys, the Court realizes they simply follow the orders from the Solicitor as to the claimed justifications, even if they are without merit.

Accordingly, the motion to approve settlement is **GRANTED**, the citation contained in this docket is **MODIFIED** as set forth above, and it is **ORDERED** that **Greenbrier Minerals, LLC** pay the Secretary of Labor the sum of **$535.00** within 30 days of this order.[3]

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.
It is vital to include Docket and A.C. Numbers when remitting payments.