FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
Phone: (202) 434-9933 | Fax: (202) 434-9949

May 25, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2015-1036
Petitioner,	:	A.C. No. 46-09415-391343
v.	:	
	:	
BUNDY AUGER MINING, INC.,	:	Mine: Lost Flats Highwall Miner
Respondent.	:	

DECISION DENYING SETTLEMENT MOTION

Before: Judge Moran

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act") and 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 for Decision and Order Approving Settlement ("Secretary's Motion," or "Motion"). The originally assessed amount was $6,300.00, and the proposed settlement is for $4,410.00. Upon review, as explained below, the Court concludes that the proffered settlement does not meet the criteria set forth in section 110(i) of the Act, because the Secretary has not provided sufficient facts to justify its sought-after penalty reduction. Accordingly, the Motion is **DENIED** and this case will be set for hearing.

Involved are 2 (two) specially assessed alleged violations of the Mine Act. One is a section 104(d)(1) citation, No. 9082933, and the other is a section 104(d)(1) order, No. 9082935. While the proposed penalty amounts differ, $2,900 in the case of No. 9082933, with a settlement figure of $2,030, and $3,400 in the case of 9082935, with a settlement figure of $2,380, both reductions amount to the ubiquitous 30% penalty reduction that has appeared in other cases. *See The American Coal Company et al.*, 38 FMSHRC 1972, 1981 (2016).

Understanding the deficiency in the Motion begins with an appreciation of the standards alleged to have been violated. The section 104(d)(1) citation, No. 9082933, involves 30 C.F.R. § 77.1004(b), titled "Ground control; inspection and maintenance; general," which provides at subsection (b) that "Overhanging highwalls and banks shall be taken down and other unsafe ground conditions shall be corrected promptly, or the area shall be posted."[1] 30 C.F.R. § 77.1104(b).

The (d)(1) citation states,

> The operator failed to take down, correct or post an unsafe ground conditions [sic] located along the measured [sic] the measured 60 to >80 vertical spoil low-wall for a horizontal distance of approximately 231 feet in the active Pit #0001. Oversteepend [sic] spoil slopes and loose rocks/soil measuring several inches in diameter were observed laying on the pit floor 3 to 4 feet from the unprotected low-wall toe area and in the middle of the active haul road to the active pit end. Large rocks 2 to 4 feet in diameter were observed on top of the > 60 foot spoil pile. The approximately 20 foot wide pit access and haul road traveled along the unprotected toe of the low-wall/spoil pile toe and immediately behind the Highwall Miner (SHM #06). Fallen loose rocks approximately 3 to 4 inches in diameter were observed laying along the toe of the oversteepened [sic] spoil pile. An excavator and loader was [sic] observed loading coal below the unprotected low-wall and oversteepened [sic] spoil slope. Loader tire tracks were observed from 1 to 5 feet from areas of the low-wall /spoil pile. 1 Excavator, 3 loaders, 1 pick-up, multiple coal dump trucks and the 3 person Highwall Miner crew were observed actively traveling to and from the pit. Continued mining will require the miners to continue pit and highwall development to remove at least two more highwall miner holes. Measurements were taken with the Laser Technology Impulse electronic measuring device (EDM). The mine operator's haul trucks, loader, and highwall miner crew have traveled the area at least day shifts for the last seven months and would continue pit work for at least a [sic] 2 or 3 shifts of mining. Miner's, [sic] including agents of the operator, have traveled the area at least 2 dayshifts since the condition was recorded, but not corrected, in the daily onshift examination dates March 31, 2015 to April 2, 2015. The mine operator allowed and directed miners to work and travel with a [sic] unsafe condition not corrected or posted in the active pit. The mine operator has engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard.

Citation No. 9082933.

[1] Subsection (a) of 30 C.F.R. § 77.1004 provides "Highwalls, banks, benches, and terrain sloping into the working areas shall be examined after every rain, freeze, or thaw before men work in such areas . . ." and it ties into the other standard cited in this matter by referencing that "such examination shall be made and recorded in accordance with § 77.1713." 30 C.F.R. § 77.1004(a).

As noted, this matter was specially assessed. That special assessment stated,

> the vertical spoil low-wall and over-steepened slopes in active Pit #001 created hazards and were not corrected nor barricaded off before work or travel was permitted in the area. The gravity of the violation was considered serious. Over-steepened slopes and *loose rocks were laying on the pit floor near the unprotected low wall and in the middle of the haul road to the active pit*. Large rocks were on top of the *60-foot spoil pile*. This condition could have contributed to the cause of a serious injury or fatality, from the fall-of -materials, to the equipment operators that worked at the active pit. The violation resulted from the operator's high degree of negligence. *The over-steepened slopes and unprotected low-wall area conditions were extensive and had existed for an extended period of time. The operator was aware of the conditions – they had just been cited, for the same conditions, earlier during the week. No efforts were made to correct the obvious hazards and miners were allowed to continue normal mining operations*.

Narrative Findings for a Special Assessment at 1 (emphasis added).

Thus, the section 104(d)(1) citation, No. 9082933, which appears to be both detailed and well documented, alleges, at its heart, patently unsafe ground conditions involving a significant distance over a tall spoil wall. It is also troublesome that the Motion touts that the settlement involves "Penalty reduction[s] *only*," as if the reduction in the penalty amount sought is not a major concern. Motion at 1-2 (emphasis added).

Congress expressed otherwise, noting that penalties *are* important. As the D.C. Circuit found upon a review of the Mine Act's legislative history, "Congress was intent on assuring that the civil penalties provide an effective deterrent against all offenders, and particularly against offenders with records of past violations." *Coal Employment Project v. Dole*, 889 F.2d 1127, 1133 (D.C. Cir. 1989). The Supreme Court also found that civil penalties serve an important role in deterring future violations: "the deterrence provided by monetary sanctions is essential to [the] objective [of obtaining compliance with health and safety standards.]" *Nat'l Independent Coal Operators' Ass'n.*, 423 U.S. 388, 401 (1976). The Commission likewise found that

> the Act's legislative history, and numerous Commission and federal cases identify deterrence as a central tenet of the Mine Act and its penalty provisions. This leads to the inexorable conclusion that, in approving or rejecting a proposed settlement, a Commission Judge may take into account the deterrent effect of the penalty. Our decision in *Ambrosia* acknowledged the importance of the deterrent effect of penalties, citing to the pertinent legislative history and to the statement in *Consolidation Coal* recognizing the importance of civil penalties as deterrence. While acknowledging that "deterring future violations is an important purpose of civil penalties," we held in that case that deterrence could not be used as a separate component to adjust a penalty amount after the statutory criteria have been considered. To the extent that the case suggests that a Judge may not explicitly consider deterrence in the analysis of the six statutory factors and the overall penalty, we overrule it, as it is not consistent with the principles set forth

> above. Moreover, it forces our Judges to perform the unenviable - and perhaps impossible - task of attempting to distinguish between the supposedly permissible goal of achieving deterrence via a penalty based on the six statutory penalty criteria, and the supposedly impermissible utilization of the concept as a factor separate from the six criteria set forth in section 110(i). Our Judges should not be asked to perform such analytical hair-splitting. Simply put, we refuse to require our Judges to apply blinders when reviewing settlement proposals, and to ignore the central and most obvious purpose of civil penalties — to ensure operator compliance with safety measures - when deciding whether such penalties are appropriate. Deterrence is a principle basic to and underlying the entire statutory scheme of imposing civil penalties. Thus, deterrence can and should infuse the Judge's consideration of whether or not to approve a settlement.

Black Beauty Coal Co., 34 FMSHRC 1856, (Aug. 2012) (internal citations omitted).

The entire text of the 57 words offered as "justification" for the 30% reduction regarding the (d)(1) Citation, No. 9082933 states,

> Respondent presented evidence that it relied upon the representations of the owner Operator that it was only required to set the miner back 20 feet in order to be in compliance with the ground control plan. In consideration of this evidence and the risks inherent in proceeding to trial, the Secretary agreed to the reduction in penalty.

Motion at 3.

Upon subtracting the 21 words of boilerplate offered by the Secretary, "In consideration of this evidence and the risks inherent in proceeding to trial, the Secretary agreed to the reduction in penalty," which add nothing to explain the 30% reduction, one is actually left with 32 words. Reduced to its core, the proffered mitigation from the operator, advanced by the Secretary of Labor, is that "*the Respondent relied upon the representations of the owner Operator that it was only required to set the miner back 20 feet in order to be in compliance with the ground control plan.*" *Id.* (emphasis added).

Of course the standard speaks not at all in such terms. It deals only with unsafe ground conditions, requiring that they "shall be corrected promptly, or the area shall be posted." 30 C.F.R. § 77.1004(b). The standard makes no mention of ground control plans. Further, the Motion offers nothing to explain how the claim that Bundy Auger Mining was allegedly told by the "owner Operator," that "it was only required to set the miner back 20 feet in order to be in compliance with the ground control plan," applies to the requirements of the standard. Motion at 3.

The Motion is deficient in other ways too, as there is no explanation of the relationship between Bundy Auger and the unnamed "owner Operator," nor how that relationship would absolve Bundy from compliance with the standard or reduce the amount of its penalty liability. Further, the asserted relevance of the claim that, if the miner was set back 20 feet, the mine

would be in compliance with the ground control plan vis-à-vis the standard, is not explained. The absence of such an explanation does not strike the Court as a mystery, because the standard plainly speaks in terms of the prompt correction of unsafe *ground conditions*.

For T\the section 104(d)(1) order, No. 9082935, involved is 30 C.F.R. § 77.1713(a), titled, "Daily inspection of surface coal mine; certified person; reports of inspection."

The standard provides at subsection (a) that

> At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.[2]

30 C.F.R for § 77.1713(a).

Order No. 9082935 alleges,

> The operator failed to conduct an adequate on-shift examination to identify hazardous conditions in the active working area at the Taylor Highwall Mine, Pit #001, see Citations # 9082933 and #9082934, that were issued for failure to correct or post an unsafe ground condition. The hazardous conditions existed at least two shifts when examinations were to occur and was [sic] not adequately reported or corrected in examinations recorded for March 31 to April 2, 2015. At least five miners (1 loader operator, 1 excavator operator and 3 person highwall miner crew) were observed working and traveling approximately 1 to 5 feet from the toe of the oversteepened [sic] and unstable low wall/spoil. The hazardous conditions were obvious, extensive and easily identifiable to a person trained to recognize hazards with highwalls and spoil banks. The mine operator has

[2] Although the importance of subsection (a) is plain, subsections (c) and (d) underscore this by providing at (c) that "After each examination conducted in accordance with the provisions of paragraph (a) of this section, each certified person who conducted all or any part of the examination required shall enter with ink or indelible pencil in a book approved by the Secretary the date and a report of the condition of the mine or any area of the mine which he has inspected together with a report of the nature and location of any hazardous condition found to be present at the mine. The book in which such entries are made shall be kept in an area at the mine designated by the operator to minimize the danger of destruction by fire or other hazard," and at (d) that "All examination reports recorded in accordance with the provisions of paragraph (c) of this section shall include a report of the action taken to abate hazardous conditions and shall be signed or countersigned each day by at least one of the following persons: (1) The surface mine foreman; (2) The assistant superintendent of the mine; (3) The superintendent of the mine; (4) The person designated by the operator as responsible for health and safety at the mine; or, (5) An equivalent mine official." 30 C.F.R. §77.1713 (c) and (d). Subsection (b), not invoked here, addresses only imminent dangers.

> engaged in aggravated conduct constituting more than ordinary negligence. This violation is an unwarrantable failure to comply with a mandatory standard. The operator immediately removed miners from the active pit and highwall area. Standard 77.1713(a) was cited 1 time in two years at mine 4609415 (1 to the operator, 0 to a contractor).

Section 104(d)(1) Order No. 9082935.

The Special Assessment for this Order notes that the cited standard is one of the "Rules to Live By," and, as such, the standard has been identified as among those "that most commonly contribute to fatalities in the mining industry." For such standards, about which the mining industry has been made aware, MSHA expects mine operators to have "heightened awareness" of the hazards associated with them. The Special Assessment continues, in line with the inspector's assertions in his Order, that the conditions were "obvious, extensive and easily identified to a trained examiner." Special Assessment at 2. Further, that Special Assessment asserts that members of management had been in the work areas *and that such management failed to exercise* "*the slightest degree of care for miner safety*." *Id*. (emphasis added).

For this matter, 69 words were presented by the Secretary of Labor to justify the settlement. Removing, the same rubric as for the other matter, the 21 words of boilerplate from the Secretary regarding "consideration of this evidence and the risks inherent in proceeding to trial…" 48 words remain.[3] Those words advise, "Respondent presented evidence that the required examinations had been conducted by its agents and that Respondent reasonably believed it was in compliance with the ground control plan and safety procedures because it had set the miner back 20 feet from the highwall as instructed by the owner operator." Motion at 3-4. Translated fairly, 17 words remain to justify the 30% reduction and they constitute the same mitigating reason that was presented for Citation No. 9082933, to wit: the Respondent "reasonably believed" it was in compliance with the ground control plan and safety procedures because "it had set the miner back 20 feet from the highwall as instructed by the owner operator." *Id*.

Thus, the Secretary merely parrots the Respondent's same claim that was offered up for the other matter – someone else, the unidentified owner operator, allegedly told Bundy Auger that, if the miner was set back 20 feet from the highwall, the working shift examination requirement for hazardous conditions for each active working area would be met.

[3] The Court wishes to make it plain that it is not engaging in bean counting. The purpose of noting the few words offered is twofold. First, brief as the justifications are, a large number of the few words are still empty, devoid of any meritorious explanation for the proposed reduction. Second, when examining the few words that seem to provide some justification, even those words are empty. This is true for both of the distilled words offered as justification for these (d)(1) matters.

This defense is inadequate because it sidesteps the requirements of the cited standard, and implies that the unidentified ground control plan can supersede those requirements. Plain and simple, the standard, as noted above, requires that,

> [a]t least once during each working shift, *or more often if necessary for safety*, each active working area and each active surface installation shall be examined by a certified person . . . for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

30 C.F.R. § 77.1713(a).

As discussed above with regard to Citation No. 9082933, the standard at issue in Order No. 9082935 (30 C.F.R. § 77.1713(a)) also makes no mention of ground control *plans*.

Conclusion

The "justifications" for both of these matters – the (d)(1) citation, No. 9082933, and the (d)(1) order, No. 9082935 – suggest that the blame rests to some degree upon the "owner Operator." However, the Motion does not identify that owner Operator, nor does it inform how long Bundy Auger Mining has been operating the mine, the "Lost Flats Highwall Miner." Further, the Motion fails to explain how the claimed representations from the "owner Operator" insulate or excuse Bundy from compliance with the cited standards. Beyond that, neither standard allows exceptions for compliance with promptly correcting or posting unsafe ground conditions and the duty to have a certified person examine for hazardous conditions at least once during each working shift and to report any such hazards found to the operator and to have such hazards corrected by the operator. Importantly, neither of the cited standards infers that how far the miner is set back is the test or a factor for compliance – instead, hazardous conditions are the trigger.

Thus, neither of the cited standards allows for, or makes an exception to, compliance with their requirements. The parties have utterly failed to explain how shifting the blame to the "owner Operator" justifies the 30% penalty reduction. Yet, in stating that the Respondent relied upon representations of the owner Operator, the Secretary seems to be suggesting in his "Rationale" that the Respondent had no duty to do more than to rely upon such claimed representations, or at least that pointing to another entity justifies the 1/3rd reduction. This is in the face of the inspector's statement that the cited conditions existed since they were recorded on March 31, some 3 days before the citation and order were issued. Therefore, the inspector asserted that the conditions were known and the Court again notes that the cited standard speaks in terms of the presence of hazardous conditions – unsafe ground – not how far a miner is to be set back.

The motion does not inform if the Respondent's contention was brought to the attention of the issuing inspector for his reaction. The Court has commented previously that settlement motions should advise whether the assertions advanced by a respondent were brought to the attention of the issuing inspector, as such individual is MSHA's only eyewitness to the alleged

violations.

With submissions such as this, it is not surprising that Congress wisely determined that the Secretary could not have unbridled authority for settlements and that it included section 110(k) in the 1977 Mine Act for that reason. The legislative history for the origin of the provision and Congress' intention for the provision's inclusion have already by repeatedly cited by the Commission.

Accordingly, for the reasons stated, the Secretary's Motion for Decision and Order Approving Settlement is DENIED. This matter is now to be set for a prompt hearing. The parties are directed to participate in a conference call with the Court on **Thursday, June 1, 2017 at noon EDT.** The call-in number will be separately provided to the parties.

William B. Moran
Administrative Law Judge

Distribution:

Joseph G. Jacobs, Bundy Auger Mining, Inc., PO BOX 249, Stanville, KY 41569

Helga P. Spencer, Esq., U.S. Department of Labor, Office of the Regional Solicitor, 170 S. Independence Mall West, Suite 700 East, Philadelphia, PA 19106-3306