FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 2, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. YORK 2014-2-M A.C. No. 43-00042-332434
v.	Docket No. YORK 2014-135-M A.C. No. 43-00042-348071
VERMONT QUARRIES CORPORATION, Respondent.	Mine: Danby Quarry

DECISION DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge Moran

The Secretary has submitted a motion to approve settlement. Originally, the proposed penalties totaled $42,122.00. Under this submission the proposed reduction would be $30,200.00. Because the reductions have been insufficiently explained, the motion must be denied.

From Docket No. YORK 2014-2-M,[1] in Citation No. 8715409, originally assessed at $2,901.00[2] and now proposed to be settled at $2,200.00, the Secretary "alleges that the Respondent failed to install wood cribbing between freestanding slabs of marble and the steel frame of the Simec saw structure resulting in an injury to a miner." Mot. to Approve Settlement and Order Payment 4. The Respondent contends that the citation should be reduced to a section 104(a) citation

> because ***no one from management*** *directed the miners or was aware this was happening.* ***Company policy*** *requires that miners lower the hydraulic table the slabs are on, put in spacers between the slabs with spreader bars and block the slabs with wood cribbing. The two hourly employees involved were trained on this policy but disregarded it and were disciplined accordingly.* At hearing, the Secretary would have presented evidence to refute this assertion. Without conceding any merit to Respondent's arguments, the Secretary acknowledges that there may be legitimate factual and legal disputes regarding gravity and

[1] Docket No. YORK 2014-2-M contains a single citation.

[2] One must not lose sight of the fact that before the reduction, the penalty proposed already includes a 10% reduction for good faith. Thus, the penalty was originally assessed at $3,224.

> negligence at hearing and therefore has agreed for settlement purposes to modify the 104(d)(1) citation to a 104(a) violation and to reduce the proposed penalty from $2,901.00 to $2,200.00[, an additional 25 % reduction].

Mot. at 4 (emphasis added).

The problem with the Secretary's representation is that it does not address the inspector's statement that an "**[a]cting foreman . . . was one of the miners attempting to push over the marble slabs, which each weighed about 1,000 pounds.**" Citation No. 8715409 (emphasis added). Therefore, the issuing inspector concluded that as the acting foreman knew that the company policy was to install wood cribbing between the slabs of marble and the steel frame, this was aggravated conduct and therefore beyond ordinary negligence, prompting the section 104(d)(1) citation issuance. The extent of the injury is not disclosed in the official file.

A serious omission, the Secretary's motion makes no disclosure that one of the hourly employees was an acting foreman. The Secretary has not explained why an "acting foreman" should not be treated as a foreman in terms of imputing the negligence. Instead, the motion implicitly endorses the claim that "no one from management directed the miners or was aware this was happening." Case law does not appear to support the idea that an acting foreman is not part of management. For example, in *Sec'y of Labor v. Auxvasse Stone & Gravel and Robert Kuda*, 19 FMSHRC 384, 389 (Feb. 1997) (ALJ), involving both a section 104(d)(1) citation and a 110(c) action as well, the judge there noted that the cited defective conditions were very obvious *and the inspector determined* that the *acting foreman* was aware that these conditions had existed. That court noted that "[a]s a management employee, a foreman, Mr. Kuda is held to a high standard of care with regard to the safety of the men who work at his direction." *Id.* at 390; *see also Sec'y of Labor v. A & L Coal Co., Inc.*, 6 FMSHRC 2549 (Nov. 1984) (ALJ).

A second problem with the submission is the representation that "the two hourly employees involved were trained on this policy but disregarded it." Mot. at 4. Apart from inaccurately repeating the status of one of the employees, this part of the motion appears to be at odds with the issuing inspector's statement that "[t]he mine operator needs additional time *to write the policy and procedures* for the securing of the finished slabs of marble in the Simec saw, implement the policy and procedures and *provide the training* to the miners." Citation 8715409-01.

Accordingly, the fundamental problem is that, while the Secretary claims that its evidence would refute the Respondent's claims, it then asserts that there are "legitimate factual and legal disputes." Given the foregoing, these disputes have not been adequately set forth.

From Docket No. YORK 2014-135-M, **in Citation No. 8797772**, Respondent was cited for a violation of 30 C.F.R. § 57.3200. Here, the Secretary proposes a 62% reduction in the penalty down from the $1,304.00 to $500.00.[3] The motion provides:

[3] The Court will not repeat that for each of the matters that the proposed penalties already bestow a 10% reduction. For example, the proposed assessment of $1,304.00 was actually set at $1,449.00.

> Specifically, the Secretary alleges that the Respondent allowed dangerous ground conditions in the form of ice buildup overhead to accumulate without taking it down or installing barriers to prevent miners from entering the area. Respondent takes the position, and would have alleged at hearing, that the gravity and negligence should have been reduced because Respondent has two 10 foot culverts which have been placed in the past to protect miners traveling this escape way and Respondent was going to place the culverts there as in the past but inspector was in this area before culverts could be placed. At hearing, the Secretary would have presented evidence to refute this assertion.

Mot. at 4-5. As with each proposed reduction, the Secretary asserts, but with no express articulation, "that there may be legitimate factual and legal disputes regarding gravity and negligence at hearing."

The citation informs that ice buildups present at the secondary escapeway portal of the Brook Quarry consisted of a 3 foot by 8 foot piece and a 3 foot by 4 foot piece. The Inspector, noting that with a height of about 40 feet, if the ice were to fall fatal injury "would be expected." The problem with this reduction is that, rather than helping the Respondent, the defense hurts the position taken as it acknowledges that it knew of the issue *from past and present experience*, and that it was going to place the culverts but that the inspector found the condition first.

Accordingly the Secretary has not identified the "legitimate factual and legal disputes" it contends exist. The Court would also note that photographs were taken by the inspector, although these have not been viewed by the Court as they were not provided with the motion. A persistent problem with the Secretary's motions for settlement is the absence of any statement that the Secretary has consulted with the issuing inspector for input and reaction to the mine operator's claims. With the important and diligent efforts made by MSHA's inspectors, it seems to this Court that the Secretary should make such inquiries to its inspectors when assessing such claims. Here, a natural line of inquiry would involve the inspector's input as to the amount of time it would take for such an ice buildup to develop. If consultation with the issuing inspectors is not occurring, it would be a natural consequence for inspectors to become discouraged with their efforts to guard the safety and health of miners.

In Citation No. 8797784, Respondent was again cited for a violation of 30 C.F.R. § 57.3200, this time a mere six days after the condition noted in **Citation No. 8797772**, above. For this one, the Secretary seeks better than a 63% reduction, down from $8,209.00 to $3,000.00. "Specifically, the Secretary alleges that the Respondent allowed dangerous ground conditions in the form of ice buildup overhead in the entry portal to the Norcross Quarry to accumulate without taking it down or installing barriers to prevent miners from entering the area." Mot. at 6. This should sound familiar; it is the same hazard identified the week prior per **Citation No. 8797772.** While at a different location, it still involved the same mine.

In this instance, the motion relates that the "Respondent takes the position, and would have alleged at hearing, that the gravity and negligence should have been reduced because Respondent addresses the ice buildup several times per day using an excavator to scale down ice and therefore, the buildup was not likely to lead to an injury." Mot. at 6-7. The Secretary asserts that at hearing it would have presented evidence to refute this assertion but, without elaboration, states that "there may be legitimate factual and legal disputes regarding gravity and negligence." Mot. at 6-7.

Review of the Citation, the statements therein not being challenged, reveals that the ice buildup was about 15 feet high by 30 feet wide and 3 inches thick and about 30 feet above the portal. As with **Citation No. 8797772**, the Inspector stated that such an ice fall could be expected to result in a fatality if a miner were struck. At odds with the claim that the mine addresses the ice buildup *several times per day* using an excavator to scale down ice and, therefore, the buildup was not likely to lead to an injury, is the Inspector's termination note that "the mine operator *has developed* a written SOP for maintaining and inspection for the ice build up at the Norcross portal." Here again, a consultation with the Inspector and an averment in the motion that such a consultation occurred is an important inclusion for a motion seeking a penalty reduction of this magnitude. This consultation should include inquiring whether such an ice buildup could occur if it was truly being addressed several times per day. One could fairly ask why there was a need to develop a plan to address ice buildup while maintaining that the ice buildup is addressed *several times per day*. As with the other ice buildup citation, the Secretary has not identified the "legitimate factual and legal disputes" he contends exist.

In Citation No. 8797785, Respondent was cited for a violation of 30 C.F.R. § 57.11001. This citation is connected with **Citation No. 8797784** in that it addresses the same condition and makes the connection that the Court was concerned about for **Citation No. 8797784**; namely, the period of time that it would take for such an ice buildup to develop. The difference is that the former two citations dealt with § 57.3200, addressing ground conditions that create a hazard to persons and requiring that they are to be taken down or supported before other work or travel is permitted in the affected area, and that until corrective work is completed, the area shall be posted with a warning against entry and, when left unattended, a barrier is to be installed. However, for **Citation No. 8797785**, the focus is upon a safe means of access being provided and maintained to all working places. This citation *does not duplicate* the hazard identified in **Citation No. 8797784** as it speaks to ice buildup on the *walkway* for access to the Norcross portal face and it presented a slip and fall hazard. In fact, the citation relates that miners had been exposed to that hazard that morning. To correct the hazard, a man tube was installed and the walkway was sanded. Photos were taken here as well.

For this matter, **Citation No. 8797785**, the Secretary's motion seeks a 68% reduction, from the proposed $3,143.00 to $1,000.00 on the basis that "miners had been instructed not to enter the area until proper sanding had been done." Mot. at 7. This "defense" means that the mine was aware of the condition. Given that admitted awareness, it is difficult to appreciate the reduction sought. In fact, the Secretary, while seeking the near 70% reduction, steadfastly maintains it would be able to refute the Respondent's claim. Again, the Secretary has not identified the "legitimate factual and legal disputes" it contends exist.

Next, there is **Citation No. 8797786**, in which Respondent was cited for a violation of 30 C.F.R. § 57.3401. As with the previous alleged violation, the Secretary seeks a 68% reduction from the proposed $3,143.00 to $1,000.00. It, too, involves the Norcross Quarry as, in combination, these three alleged violations become, to borrow a phrase, "curiouser and curiouser." In relevant part, the cited section provides:

> Examination of ground conditions. Persons experienced in examining and testing for loose ground shall be designated by the mine operator. Appropriate supervisors or other designated persons shall examine and, where applicable, test ground conditions in areas where work is to be performed, prior to work commencing, after blasting, and as ground conditions warrant during the work shift.

30 C.F.R. § 57.3401.

The Secretary alleges that the "Respondent failed to have a designated person present at the mine to inspect changing ground conditions, which was needed because of the weather and icy conditions." Mot. at 7. To justify the nearly 70% reduction, the Secretary relates Respondent's position that "the gravity and negligence should have been reduced because the Respondent was *in the process of assigning another miner to inspect ground conditions* at the time that this citation was issued." Mot. at 7-8 (emphasis added). This is nearly an echo of Respondent's defense for Citation No. 8797772, in which Respondent contended that *it was going to place the culverts there* as in the past, but the Inspector was in this area before culverts could be placed.

Once again, without explaining how Respondent's claim warrants a 68% reduction, the Secretary merely states that "Respondent was in the process of assigning another miner to inspect ground conditions at the time that this citation was issued." This does more than admit knowledge of the problem, and the citation itself reveals no such mitigating factor, but instead asserts that the mine had not designated another person to perform the examination task. In fact, indicative of a deeper problem, the abatement reveals that the mine wrote a new SOP for the examination of ground conditions, an odd need to address the absence of the designated person unless it was a chronic problem. Then, additional time was needed to conduct training for this new SOP and that training included how to conduct a proper inspection of ground conditions prior to each shift, another odd result in the wake of a designated person's absence.

Again, the Secretary has not identified the "legitimate factual and legal disputes" it contends exist to support this very large reduction.

Finally, we come to **Citation No. 8797791**, in which the Respondent was cited for a violation of 30 C.F.R. § 57.4533(a). That provision provides that "Surface buildings or other similar structures within 100 feet of mine openings used for intake air or within 100 feet of mine openings that are designated escapeways in exhaust air shall be— (a) Constructed of noncombustible materials." Very directly, the Secretary "alleges that the Respondent failed to ensure that the brattice cloth that was hung in the entrance way/escapeway for the Norcross Quarry was made of noncombustible material." Mot. at 8. The motion relates that "Respondent

takes the position . . . that the gravity and negligence should have been reduced because the tarp in question would not burn under direct fire and therefore there was no likelihood of injury." *Id.* On that assertion, the Secretary, while not conceding any merit to Respondent's arguments, acknowledges that there may be legitimate factual and legal disputes regarding gravity and negligence at hearing and proposes a 56% reduction in the penalty from $1,657.00 to $735.00.

Even if the claim that the tarp would not burn under direct fire is true, something which the Secretary does not concede, the motion fails to address the citation's inclusion of dry lumber to which the tarp was fastened along with the notation that the cited escapeway is the only way out of the mine. Further, the implication of the defense is that the brattice cloth was noncombustible. Yet, it is not explained why, if the tarp would not burn under direct fire, fire resistant brattice cloth was then purchased.

As with each of the foregoing, the Secretary needs to provide the basis for its claim that there are "legitimate factual and legal disputes" which exist to support this very large reduction.

The Secretary is directed to either provide additional information to support the settled order and citations in these two cases, or to prepare for hearing. The Secretary is further directed to advise the Court of his intentions within two weeks of the issuance of this decision.

William B. Moran
Administrative Law Judge

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