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

June 9, 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 APPROVING AMENDED 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. On May 25, 2017, the Court issued its Decision Denying Settlement Motion and following that, the case was set for a hearing scheduled to commence on August 29, 2017. On June 1, 2017, the Secretary filed a Motion for Reconsideration.[1] That Motion for Reconsideration included an Amended Motion for Decision and Order Approving Settlement, which contained significant additional information in support of the proposed settlement and, as a consequence, the Court is now able to approve the settlement.[2] Motion for Reconsideration at 16-22. However, while the settlement can now be approved, the Motion continues to include disconcerting assertions which are antithetical to the Commission's Congressionally delegated statutory obligation under 30 U.S.C. § 820(k) and which require additional comment from the Court.

Background

In the Court's May 25, 2017 Decision Denying Settlement Motion, it was noted that "2 (two) specially assessed alleged violations of the Mine Act [were in issue]. One is a section 104(d)(1) citation, No. 9082933, and the other is a section 104(d)(1) order, No. 9082935.

[1] As distinct from the e-CMS filing date, the Motion for Reconsideration and the accompanying Amended Motion for Decision and Order Approving Settlement are dated May 31, 2017.

[2] Because this decision approves the Amended Motion, **the previously scheduled hearing is now CANCELLED.**

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."[3] Decision Denying Settlement at 1.

The section 104(d)(1) citation, No. 9082933, involved 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." 30 C.F.R. § 77.1104(b). The Court noted that "[t]he entire text of the 57 words offered as 'justification' for the 30% reduction regarding the (d)(1) Citation, No. 9082933 state[d], '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.

However, once boilerplate language was removed, the essence of the justification offered was 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*. The Court then explained that the Motion was insufficient because the standard does not speak at all in such terms. Rather,

> [i]t 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 [and it] 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. [Further, the Motion offered] 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 [nor did the Motion explain] the asserted relevance of the claim that, if the miner was set back 20 feet . . .

Id. at 4-5.

Problems of the same ilk existed for the other matter, the section 104(d)(1) order, No. 9082935. That involved standard 30 C.F.R. § 77.1713(a), titled, "Daily inspection of surface coal mine; certified person; reports of inspection," which provides 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 designated by the operator to conduct such examinations for

[3] The originally assessed total amount was $6,300.00, and the proposed settlement total is for $4,410.00.

> 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).

The Order alleged that "[t]he 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." Decision Denying Settlement Motion at 5.

As set forth in more detail in the Decision Denying Settlement Motion, effectively only 17 words were offered to support the penalty reduction and those words were simply an echo of the justification presented for the other matter, Citation No. 9082933. As the Court noted, the justification was empty, being "devoid of any meritorious explanation for the proposed reduction." *Id.* at n.3.

The Secretary's Motion for Reconsideration

In conjunction with the Secretary's "Motion for Reconsideration," ("Reconsideration") the Secretary provided an "Amended Settlement Motion *with additional factual support*." ("Amended Motion"). Reconsideration at 1 (emphasis added).

Near the end of its lengthy resubmission, most of which is a regurgitation of material previously submitted, the Secretary finally offers in its Amended Motion for Citation No. 9082933 that

> [t]he subject violations were issued in the course of a technical compliance investigation of the Ground Control Plan submitted on March 9, 2015 for the *Moran Coal Company's*[4] Taylor Highwall Mine owned by ARJ Construction Co. ("owner Operator"). Bundy Auger is the independent contractor retained by ARJ to mine the Taylor Highwall. **ARJ was also issued citation No. 9082934 and Order No. 9082936 for violations of the same standard. Those violations were accepted as issued.** In reaching this settlement, the Secretary considered evidence gathered during a related 110(c) investigation that revealed that when similar over-steepened spoils were cited on March 26, 2015, Bundy Auger's foreman was instructed by the owner-operator that the only remedial effort required was moving the miner 20 feet back from the highwall. Respondent presented evidence that its agents were never instructed to develop or maintain berms along the base

[4] There is no "Moran Coal Company." The Secretary acknowledged this in an email response to the Court's inquiry about this, advising, "References to Moran Coal were made in error. The Taylor Highwall Mine (ID No. 1800794) is owned by ARJ Construction. The related violations which were issued to ARJ, copies of which are attached, were not contested and accepted as issued. Citation 9082934 was assessed a penalty of $5,200 and Order 9082936 was assessed a penalty of $6,100. Both penalties have been paid in full." June 6, 2017 email to the Court from Solicitor's Office Attorney Helga Spencer

> of the low wall. In addition, the contracting agreement between ARJ and Bundy provided that the responsibility of maintaining the pit rested solely with ARJ. After the miner was relocated, Bundy auger resumed mining of the highwall as it understood that this had been approved by MSHA per representations made by agents of the owner-operator. The Operator contends, and the issuing Inspector does not dispute that there was probable confusion concerning Bundy's understanding of what was required of it after similar conditions were cited by him on March 26.The evidence presented tended to indicate that Bundy Auger's agents were acting in good faith and with the understanding, albeit mistaken, that its actions were in compliance with MSHA and Inspector Jones' instructions. Therefore, the Secretary believes Respondent's negligence, while high was somewhat less than originally assessed and that the reduction of the assessed penalty in this particular case is consistent with his enforcement responsibility under the Mine Act.

Amended Motion at 4-5 (emphasis added).

The Amended Motion also provided, with regard to Order No. 9082935, that

> [e]vidence presented by Respondent and gathered during the course of MSHA's investigation indicate that in the week preceding the issuance of the subject violations, Bundy Auger's foreman had been conducting the requisite examinations and recording conditions in the pit, including instances of over-steepened spoils. Respondent presented evidence indicating, however, that it did not have the authority or the equipment necessary to lower the height of the low wall or expand the width of the pit and that such authority rested solely with ARJ. Additionally, the evidence presented indicated Bundy Auger's agents were acting in good faith and with the understanding that its actions were in compliance with MSHA and Inspector Jones' instructions. Therefore, the Secretary believes that the reduction of the assessed penalty in this particular case is consistent with his enforcement responsibility under the Mine Act.

Amended Motion at 6-7.

Accordingly, with this new submission, the Secretary now has provided facts sufficient to support the proposed penalty reduction and on that basis, the settlement is now approved. However, more must be expressed about persistent disconcerting elements in the amended settlement motion.

Although this Court has already provided in a number of its previous orders denying insufficiently supported settlements several examples from *the Secretary's own submissions* which contain the kind of facts needed in order to justify penalty reductions for proposed settlements, by the Amended Motion *in this very case*, the Secretary has again demonstrated that he fully knows how to provide the kind of supporting information required for the Commission to perform its statutory responsibilities under section 110(k) of the Mine Act and that it is neither burdensome nor difficult to provide this information.

Yet, before ultimately providing the needed supporting information, and then only in the context of its Amended Motion, the Secretary begins once *again* with his new formulation, which is an undisguised attempt to avoid presenting violation-related facts to support the reduced penalties.

Thus, the Secretary now routinely offers up, in place of useful information, the following language:

> In reaching the settlement, the Solicitor's Office reviewed Citations, the inspector's notes, and discussed at length, with the issuing inspector and other MSHA personnel, the positions between the parties during the course of negotiations. . . . In this case, the mine operator and the Secretary reached a compromise to resolve a docket of 2 contested violations and proposed the terms of the settlement agreement in a motion to the Court. [with the motion often adding that] [u]nder the proposed settlement, [mine operator's name inserted here] agreed to accept the violations as issued by the MSHA inspector, including the levels of gravity and negligence alleged [and the operator] also agreed to pay [some percentage of the original] penalty proposed by MSHA. . . . In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all alleged violations are resolved and violations that are accepted can be used as a basis for future enforcement actions. A resolution of this matter in which all violations are resolved is of significant value to the Secretary and advances the purposes of the Act. Thus, the Secretary requests that Court (sic) to reconsider rejection of the proposed settlement agreement.

Reconsideration at 2-3.

It must therefore be directly called out that what is going on here is a power struggle. As the language quoted above now appears routinely in the Secretary's settlement motions, it was not created by some maverick attorney within the Solicitor's Office but rather obviously originated at some higher level. But this is not a power struggle over some ambiguous provision of the Mine Act, the language for which it can be claimed equally by the Commission and the Secretary of Labor as containing unclear or indefinite terms. Rather, the terms of section 110(k) could not be more clear, providing, without ambiguity on the subject of "Compromise, mitigation, and settlement of penalty," that **"[n]o** proposed penalty **which has been contested**

before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled **except with the approval of the Commission**." 30 U.S.C. § 820(k) (emphasis added). Although the words in the provision could not be clearer, the legislative history also confirms the statutory terms and the Commission has made note of this fact in its decisions on this issue. Yet, the Secretary has treated the words in that Congressionally-expressed legislative history as "old," as if they had an expiration date. It should also be noted that one will not find the words "The Secretary" anywhere in section 110(k) and Congress certainly knew how to refer to the "Secretary of Labor" when it wanted to, as it defined "Secretary" in the Mine Act to mean the "Secretary of Labor" and then proceeded to refer to the Secretary of Labor *hundreds* of times in that Act, but with no such reference to the Secretary in section 110(k).

As the Court noted in its May 2, 2017 Order Denying Settlement Motion

> in the larger picture, if this formulation were to be accepted by the Court, apart from the failure to meet 110(k)'s language, *every case* the Secretary submitted for settlement hereafter could adopt essentially the same language presented here. In that way, though it failed to prevail before this Court, and then failed *again* before the Commission and, effectively, failed for a *third time*, after he decided to *withdraw* his appeal before the United States Court of Appeals for the District of Columbia of those prior denials, this non-factually based language in his present motion, if accepted, would enable the Secretary to achieve his original goal of unfettered, unreviewable settlement offerings before the Commission.

Order Denying Settlement at 6-7.

Emphasis about this point was made in the Court's May 19, 2017 Order Denying Secretary's Motion to Certify May 2, 2017 Order for Interlocutory Review, in *The American Coal Company* ("Interloc Denial") where it was observed that if the Secretary's position were accepted that

> [b]ased on the calculations above of litigation risk, a 30 percent reduction is reasonable from the Secretary's perspective in exchange for a guarantee that none of the violations will be set aside or modified.… Because the violations are all being admitted, an across-the-board reduction in penalties is reasonable," then "all dockets for which all violations are admitted, could form the justification for a 30% reduction. But that is not all. As just mentioned, applying the same reasoning, if the principle were to be accepted, it could be applied to justify any other across-the-board percentage figure that the Secretary tossed out.

2017 WL 2306332 at *5 (emphasis omitted).

Restated, the Court also noted that

> if the Secretary's expression was deemed sufficient here, then in future cases, the Commission could not logically assert any section 110(k) considerations where all violations were admitted. Such a result would effectively neuter the

> Commission's review authority under section 110(k). Beyond ignoring the plain language of that section, the Commission could not reasonably object to a higher percentage reduction. Accordingly, if the Secretary's position were adopted, a 40 or 50 percent reduction, or more, would also fit within the Secretary's authority.

Id. (emphasis omitted).

WHEREFORE, with the above-described chronic problems identified, the amended motion for approval of settlement having provided legitimate factual grounds in support of the reduced penalties, the Motion is now hereby **GRANTED**.

Within 30 days of the date of this Order, Respondent shall send a check in the amount of $4,410 made payable to "U.S. Department of Labor/MSHA", to P.O. Box 790390, St. Louis, MO 63179-0390. Upon receipt of payment, the case is dismissed.

SO ORDERED.

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