**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
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June 12, 2023

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

VULCAN CONSTRUCTION MATERIALS, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2022-0200
A.C. No. 31-00095-561140

Mine: 115 Quarry

# 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"), who is not an attorney, has filed a motion for settlement. The originally assessed total amount for the two citations issued was $316.00 and the proposed total settlement is $183.00, as reflected in the following table.

| Citation/Order | MSHA's Proposed Penalty | Settlement Amount | Other modifications to citation/order |
|---|---|---|---|
| 9872489 | $133.00 | $50.00 | Negligence modified from Moderate to low **62 % penalty reduction** |
| 9872490 | $183.00 | $133.00 | Injury modified from Reasonably likely to unlikely & S&S to Non-S&S **27 % penalty reduction** |
| **TOTAL** | **$316.00** | **$183.00** | |

**Citation 9872489**

For this now-conceded violation of 30 C.F.R. § 56.15001, which speaks to "First-aid materials," the standard provides that "*adequate* first-aid materials, including stretchers and blankets, shall be provided at places convenient to all working areas. Water or neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored." (emphasis added).

The Citation asserted that the first aid kit had an expired bottle of eyewash. That the eyewash was out of date was not contested.

The CLR seeks to have the negligence for this citation reduced from moderate to low, producing a penalty of $50.00 (fifty dollars) stating that:

> The operator contends the citation was issued in error and should be vacated. The standard, 56.15001, states in part: "*Water or other neutralizing agents shall be available where corrosive chemicals or other harmful substances are stored, handled or used.*" This was a 4oz. bottle of eyewash that was sealed. It was out of date by only a few weeks. The eyewash was still safe to use. Nothing in the standard says anything about expiration dates on eyewash. The standard requires water or neutralizing agents to be available. If this was a violation, the operator contends the negligence should be lowered. The operator contends they provided multiple means for a miner to wash their eyes out and didn't realize the 4 oz. bottle of eyewash was out of date. The 4 oz. bottle was not part of the designated eyewash station and was not even required. It was part of a small first aid kit that had other first aid supplies in it. They contend that if the 4 oz bottle had not been in the first aid kit they still would have been in compliance with 56.15001 and a citation would not have been issued. The Secretary believes the operator was in violation of 56.150001 but recognizes that they have raised a legitimate factual or legal issue and agrees that Citation 9872489 should be modified from moderate to low negligence.

Motion at 3. (emphasis in original).

The standard doesn't directly speak to expired eye wash, but it does require that *adequate first-aid materials* shall be provided at places convenient to all working areas. The citation did not specifically assert a failure to have water or neutralizing agents available where corrosive chemicals or other harmful substances are stored, which is a separate requirement. The Court simply does not know if that separate aspect of the standard was being invoked by the inspector and, by Commission case law, it is not permitted to inquire about such issues in the context of settlement motions. Applying the Part 100 Criteria for Proposed Assessment of Civil Penalties, per Attachment A, the minimum penalty of $133.00 was derived. The Penalty Conversion Table with Part 100, Table XIV, lists that 60 penalty points *or fewer* results in the minimum penalty.

What the Court does know is that the $50.00 civil penalty sought in this motion is less than a parking meter violation in cities such as Los Angeles. https://www.csusm.edu/parking/adjudication/violationspenaltyamountsandpaymentinformation-.html To the Court, this raises the question of whether such a penalty is sufficient to deter operators from non-compliance. Congress has expressed that it wanted penalties to be of an order that it would be more expensive to not comply with the safety and health standards.

It is noted that, back in the day, in 1982, MSHA developed something it called the "single penalty assessment," a term that by itself was quite uninformative. However, its effect was not shrouded – it translated into a $20.00 (twenty dollars) civil penalty for all violations deemed to be timely abated and not significant and substantial. *Drummond*, 14 FMSHRC 661, 663 (May 1992). A bonus, until the United States Court of Appeals for the D.C. Circuit became involved, the original version of the 'single penalty' excluded those assessments from a mine operator's history of violations. *Coal Employment Project v. Dole,* 900 F.2d 367, (D.C. Cir. 1990)

It is interesting to note that $20.00 in 1982 translates into $60.92 in 2023. https://www.dollartimes.com/inflation/inflation.php?amount=20&year=1983 This means that the Secretary's proposed penalty today, at $50.00, is less than the 'single penalty' in 1982. To the Court, this does not seem to be progress.

The Court was unable to determine if settlements below the minimum penalty are unacceptable, although inferentially it would seem that MSHA's own Part 100 Criteria suggests they are not. Given the strictures upon Commission judges when reviewing settlements, it appears that there is no bottom figure. The Commission, of course, has the authority to direct review *sua sponte*, if it chooses. However, the Court's research has yielded that it is infrequently invoked, with that research indicating that it was last employed by the Commission nine years ago. *Mach Mining*, 36 FMSHRC 1525 (June 2014).

**Citation 9872490**

For this now-conceded violation of 30 C.F.R. §56.14132(a), addressing horns and backup alarms, and its rather clear requirement that "[m]anually-operated horns or other audible warning devices *provided on self-propelled mobile equipment as a safety feature* shall be maintained in functional condition," the operator contends the citation should be vacated or the gravity reduced. It is conceded that the backup alarm on the truck was not maintained in functional condition, as it failed to alarm when it was put in reverse motion. Thus, there is no question that the alarm on the truck was not functioning.

Here, the CLR seeks to have the violation modified from 'reasonably likely' to 'unlikely.' That change produces a **27%** reduction, bringing the dollar amount down to what, until the citation discussed above, Part 100 would list as the minimum penalty of $133.00.

In the support offered by the CLR, the motion advises that

> [t]he cited Ford shop truck was equipped with a back-up camera therefore it was not required to have a back-up alarm. Standard 56.14132(b)(1)(i) states, in part *"when the operator has an obstructed view to the rear, self-propelled mobile equipment shall have an automatic reverse-activated signal alarm."* The operator did not have an obstructed view to the rear due to having a back-up camera therefore an automatic reverse-activated signal alarm was not required. The standard that was cited, 56.14132(a) states: "Manually-operated horns or other audible warning devices provided on self-propelled mobile equipment as a safety feature shall be maintained in functional condition. Even though the truck was equipped with a back-up camera it was also provided with a back-up alarm. The standard requires audible warning devices provided on self-propelled mobile equipment to be maintained. The back-up alarm that was provided on the Ford truck is an audible warning device and therefore must be maintained as per the standard. The Secretary believes the operator was in violation of 56.14132(a) but recognizes that they have raised a legitimate factual or legal issue and agrees that Citation 9872490 should be modified from reasonably likely to unlikely and from S&S to Non-S&S.
> Motion at 3.

The problem with the analysis is at least two-fold. First, the MSHA inspector, Jeffrey W. Brown, did not cite the Respondent with a violation of 30 C.F.R. § 56.14132(b)(1)(i). **He cited a distinct provision: 30 C.F.R. §56.14132(a), as set forth above**. That latter provision does not offer that the former standard may be relied upon in lieu of a non-functioning backup alarm. Further, as the Court has stated in many, many decisions involving settlement motions, all to no avail, that federal courts of appeals have rejected the 'alternative safety measures' argument raised by Respondents 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 '[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.

In addition to the analytical flaws described above, the motion also misses the central point of the backup alarm – ***it's to warn others****, whether on foot or in other vehicles, of the potentially hazardous action underway*. A camera does not serve that purpose. At least the CLR seems to recognize this, as he asserts that the cited provision of the standard was violated. In spite of that recognition, the CLR mistakenly believes that a "legitimate factual or legal issue" has been raised and from that agrees to redesignating the violation to Non-S&S.

Despite the several identified concerns, 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. 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** and the Citations in this docket are modified as reflected in the table above, with Citation No. 9872489 to be **MODIFIED** from moderate to low negligence and Citation No. 9872490 to be **MODIFIED** for the expected injury from reasonably likely to unlikely and from S&S to Non-S&S .

Per the settlement agreement as set forth in the Motion, the Respondent is **ORDERED** to pay the sum of **$183.00** within thirty days of this order.[1]

William B. Moran

William B. Moran
Administrative Law Judge

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[1] 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.

Distribution:

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