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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. JOHN S. LANE & SON INC, Respondent	CIVIL PENALTY PROCEEDING Docket No. YORK 2023-0051 A.C. No. 19-00014-571201 Mine: Westfield Quarry Plant 78

DECISION APPROVING SETTLEMENT

Before: Judge William 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"), has filed a motion to approve settlement. The originally assessed amount was $747.00 and the proposed settlement is for $429.00. The amounts and modifications are reflected in the following table.

Citation/ Order	MSHA's Proposed Penalty	Settlement Amount	Other modifications to citation/order
9714863	$318.00	$143.00	Modify to low negligence **55% reduction in regularly assessed penalty**
9714864	$143.00	$0.00	Vacate
9714865	$143.00	$143.00	Modify to unlikely, not significant and substantial
9714866	$143.00	$143.00	No changes[1]
Total	$747.00	$429.00	**43% overall reduction in penalty**

[1] Citation No. 9714866, a paperwork recording violation, remained unchanged, and the Respondent agreed to accept it as issued and pay the assessed penalty. Motion at 4.

The Court is aware that the penalties in this docket, even as proposed, are of low dollar amounts. However, in the spirit of protecting the safety and health of our Nation's miners, the dollar amount is not the sole concern when reviewing settlements. Rather, the substance of the alleged violations matters too.

Citation No. 9714863

This Section 104(a) citation involves a now-admitted violation of 30 C.F.R 56.11001. That section, titled "Safe Access," provides: "Safe means of access shall be provided and maintained to all working places."

The citation, issued by MSHA Inspector Brandt L. Berryann, provided a detailed and excellent recounting of the hazard. That hazard was great, with the inspector stating that a permanently disabling injury was reasonably likely. To his great credit, Inspector Berryann, took photos of the hazardous condition. However, the Court is not permitted to see the photos, informative as they would likely be. The reason for this prohibition is unclear. The only reason the Court can discern is the "see no evil" approach[2] or that the *The American Coal Co*. and *Rockwell Mining, LLC*, decisions, cited below, preclude the need for photos.

The inspector recounted:

> Safe access was not provided to the transfer chute between conveyors CS and CS located at the Primary Plant. A miner **had accessed the chute for cleaning and maintenance by climbing a step ladder, egressing the ladder laterally by stepping onto the conveyor CS frame measuring 36-inches from the ladder by 39-inches high which was covered in hardened earthen material, climbing vertically to the top of the CS conveyor skirt boards measuring 64-inches high, onto the CS conveyor belt, climbing through an approximate 2.5- by 2.5-foot diameter access door at the discharge end of the chute, then climbed vertically up the interior of the chute, exiting through a removed access panel approximately 4-feet above the conveyor and directly below the CS conveyor catwalk**, where the miner then affixed the provided fall protection to the CS catwalk mid-railing while standing on a stone step within the chute, with the upper torso of the miner extending through the exterior of the chute, and the miner operating a pneumatic chipping hammer inside the chute to free hardened material within the chute falling to the CS conveyor below increasing the likelihood of an accident/ injury to occur. This condition exposed the miner to a slip/ trip/ fall hazard. In the event a miner were to slip// trip/ fall hazard. **In the event a miner were to slip/trip/ fall *while accessing the chute* a permanently disabling injury would be expected**. **Photo taken**.
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> Petition for Civil Penalty at 6. (emphasis added).

[2] Dating back to the Muromachi period of Japan, 1338-1573, this expression is now often used to mean to ignore bad behavior by pretending not to hear or see it. https://www.britannica.com/event/Muromachi-period, https://www.macmillandictionary.com/us/dictionary/american/hear-no-evil-see-no-evil-speak-evil

To terminate the citation, the inspector recorded the following:

The miner was removed from the chute with a boomlift, the mine operator developed and implemented a standard operating procedure for safe access to working at heights, conducted a toolbox talk with all miners, and conducted task training on these procedures with the affected miner terminating this citation. **Photo taken**. *Id.* at 7.

Analysis: A model of brevity, the Secretary offered the following in support of its view that the negligence should be considered 'low,' stating: "Respondent will argue that management had no direct knowledge of the observed practice, and a man-lift was on site and available for elevated tasks, indicating the negligence was somewhat lower than originally evaluated by the inspector." Motion at 3.

In the Court's view, the Secretary has presented paltry support for this egregious violation. In no way does it provide considerable mitigating information. It cannot be passed off as *low* negligence simply on the basis of the claim that the operator had no '*direct* knowledge' of the hazardous action. Even if the knowledge was indirect, it was obvious and there are people known as foremen to oversee work. Further, the operator only then developed a standard operating procedure for safe access to working at heights, a serious failure, contradicting any justification to award 'low' negligence. It should not be overlooked that the inspector had already, generously in the Court's estimation, called the negligence 'moderate,' meaning there was some mitigation awarded.

Although, respecting the Commission case law cited below, the settlement must be approved, the Court does not believe that the small penalty of $143.00, an amount tantamount to the minimum penalty under Part 100, is consonant with Congress' concern that penalties are to be of an amount sufficient to make non-compliance more expensive than compliance.

Citation No. 9714864

This citation, invoking 30 C.F.R. § 56.12068, is plain and direct. Titled "providing: Locking transformer enclosures, it provides in clear language: "Transformer enclosures shall be **kept locked** against unauthorized entry." (emphasis added)

Issuing Inspector Berryann, recorded in his citation:

> An energized stepdown enclosed transformer was not kept locked against unauthorized entry providing 480-VAC to the Powerhouse North Pump Building. The transformer access door handle was provided with a means to lock and secure the transformer, but was not utilized. This condition exposed the miner to a shock/ burn hazard. In the event a miner were to enter the transformer a fatal shock would be expected. Photo taken.
>
> **Petition for Civil Penalty at 8**

Even though the Court is not permitted to view the photograph, it still compliments the inspector for his diligent effort to record his observation.

The Secretary announces that this violation is vacated in an exercise of his prosecutorial discretion.

Analysis:

Although the Court recognizes that the Secretary presently has the authority to vacate citations without presenting any reason for such a decision, it is hard to understand this decision to vacate. What is not hard to understand is that a non-utilized handle to lock the transformer enclosure was found and that an unlocked transformer enclosure is not a locked transformer. Confirming that there was in fact a violation, Inspector Berryman informed in terminating the violation, "a keyed lock was installed on the transformer door handle terminating the citation." Again, to his continued credit, Inspector Berryann took a photo of action reflecting the installation of the keyed lock. Given the very low proposed penalty, at $143.00, and at that barely more than the minimum penalty, the decision to vacate is a mystery.

Citation No. 9714865

For this citation, Inspector Berryann cited a violation of 30 C.F.R.§56.14025. It applies to machinery, equipment, and tools and, like the other standards mentioned above, it too is understandable to persons of ordinary intelligence, with its clear requirement that "Machinery, equipment, and tools shall not be used beyond the design capacity intended by the manufacturer where such use may create a hazard to persons."

In this instance, the inspector's description of the condition and practice recounted:

> A Spedecut 3-inch cut-off wheel was used beyond the design capacity intended by the manufacturer where such use created a hazard to persons located on a pneumatic die grinder in the black Craftsman toolbox in the Maintenance Shop. The cut-off wheel was attached to the die grinder with no installed flange guard as required. The cut-off wheel was used/ returned in this condition, and held by hand when used increasing the likelihood of an accident/ injury to occur. This condition exposed the miner to contact with or being struck with a fragmenting cut-off wheel hazard. In the event a miner were to come into contact or were struck with a fragmenting wheel a permanently disabling injury would be expected. **Photo taken**

Petition for civil penalty at 9

The inspector believed that an accident was reasonably likely to occur and that if it did, it would be permanently disabling. Accordingly, he listed it as significant and substantial. The negligence was marked as 'low' by the inspector.

To terminate the citation, the Inspector noted:

The cut-off wheel was removed from the die grinder and the miner was given a safety talk terminating this citation. Photo taken. Further, the mine operator was put-on-notice that should the die grinder be observed with an attachment installed requiring a guard, with no guard installed, that this would be considered aggravated conduct constituting more than ordinary negligence.

Analysis:

It appears, clearly, that the inspector had it quite right. Miners should appreciate his perceptive observation of the hazard the cited condition presented. Norton Abrasives[3], in an article titled "Cut-Off Wheels and Die Grinders – A Dangerous Combination," explains that "the difference between a cut-off tool and a die grinder [is] [s]imple – cut-off tools come equipped with a guard and proper mounting flanges designed for cut-off wheels, and the speed is compatible with the cut-off wheel. … While die grinders may look similar to cut-off tools, they are not. They are unguarded tools without flanges and should NEVER be used with cut-off wheels. **It is simple to remember: if the tool does not have a guard, do not use a cut-off wheel.** https://www.nortonabrasives.com/en-us/resources/expertise/cut-wheels-and-die-grinders-dangerous-combination (emphasis in original, bold print added).

In what the Court views as an unintentional lack of understanding on the part of the CLR, Mr. Jakubauskas, in his motion states: "The unguarded cut-off tool **was not observed in use**, so an accurate determination of the hazards present could not be qualified to support reasonably likely. The miner owned tool was in storage at the time of inspection, and no visible physical damage to the cutoff wheel was observed, further lessening the likelihood of an injury." Motion at 3.

The remarks cited above from the manufacturer demonstrate that the CLR was incorrect. That ill-founded assertion was compounded by two more inaccurate remarks. The establishment of a violation does not require that the condition be observed in use. Such a prerequisite would be ludicrous. The second inaccuracy is the CLR citing *Am. Aggregates of Michigan, Inc*., 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc*., 18 FMSHRC 877, 879-80 (June 1996) as authority permitting the Secretary with *discretion* to modify an *extant* significant and substantial designation. Those cases do not stand for that claim. The Court recognizes that CLRs, not being attorneys, just echo what they are told to say on that score, but just following orders, repeating what someone else (the Solicitor) directs one to assert doesn't make it true.

Accordingly, the CLR improperly asserted his discretion to turn the violation into a non-significant and substantial violation, an assertion contrary to the hazard presented and contrary to current Commission decisional law.

Conclusion

In spite of all the identified inadequacies, the motion must be approved. This is because the Court is obligated, and does, honor Commission case law regarding a judge's review of settlement motions. On that account, 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.

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[3] Norton Abrasives has been in the abrasives business for more than 130 years. https://www.nortonabrasives.com/en-us

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that **Citation No. 9714863** be **MODIFIED** to low negligence and **Citation No. 9714865** be **MODIFIED** to unlikely, and by that redesignation as unlikely, modified to not significant and substantial. The reduced penalties are reflected in the table above.

The Respondent is **ORDERED** to pay the sum of **$429.00** within thirty days of the final order.[4] Upon receipt of payment, this case is **DISMISSED**.

William B. Moran

William B. Moran
Administrative Law Judge

Distribution:

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[4] 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.