FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. NEWMONT USA LIMITED, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEST 2015-819 A.C. No. 26-02512-386028 Mine: Leeville

DECISION DENYING MOTION FOR APPROVAL OF SETTLEMENT

Before: Judge Moran

This Court, tired of the Secretary's continuing and habitual practice of providing empty explanations for its settlements, has no option but to deny the present settlement motion and to publish for public consumption the basis for the denial. As explained on numerous occasions, the Court has an obligation, pursuant to Section 110(k) of the Mine Act, 30 U.S.C. § 820(k), to approve settlements. This is not a ministerial task, though the Secretary views it as such, because the statutory language does not support such a claim and the Court must presume that Congress does not include empty provisions in legislation of any sort, much less in matters impacting the safety and health of miners. On this issue, while the Commission has a legislative mandate to follow, the Secretary possesses only pretentiousness.

For each settlement, the Secretary offers *the same* empty chatter, advising:

> In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citations as indicated above.

See, as a representative sample, Motion for Settlement, at 2 (Apr. 1, 2016) ("Motion"). With that offering, the Secretary then offers the same rote justification that

> the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the Secretary's settlement under Section 110(k) of the Mine Act, 30 U.S.C. §820(k).

Id.

It is plain that were the Commission to accept the same mantra from the Secretary, the effect would be to endorse the Secretary's view that Congress' express language of the Commission's role in settlements per Section 110(k) was an empty gesture.

The Secretary then routinely moves on in its settlement motions to its secondary stance that, in view of litigation over the meaning and effect of Section 110(k), per *The American Coal Co.*, 36 FMSHRC 1489 (May 2014) (ALJ) (appeal to the Commission pending), to offer what it purports to constitute as "information in support of the penalties agreed to by the parties." *Id.* at 3.

In this case, one in which the Secretary seeks a fifty percent (50%) reduction from the proposed penalty under 30 C.F.R. Part 100, the supporting information consists of 101 words, of which 60 provide nothing useful at all, to wit:

> The representative for the Secretary has reviewed the factual circumstances surrounding Citation No. 8869188 and is persuaded that there were mitigating circumstances that warrant a reduction in the gravity of the violation. … The Secretary is willing to stipulate that the likelihood of injury is less than 'reasonably likely', and in the interest of settlement, a reduction in gravity is warranted.

Id. The remaining 41 words are completely insufficient. In its entirety, the following is offered up:

> The *respondent contends* the small amount of material was along the rib on a windrow.[1] *Respondent further contends* no material had fallen in the middle of the drift where persons would travel and the wire ground support was still in place.

Id. (emphasis added).

[1] A "windrow" is defined as a long low ridge of road-making material scraped to the side of a road; a bank, ridge or heap. MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/windrow (last visited June 24, 2016). In short, it is a fancy term for a pile of material.

The reader will take note that the Secretary says absolutely nothing about the accuracy of the Respondent's contentions. Rather, the contentions are merely laid out, in a vacuum, free of endorsement or comment from the Secretary. All that the Secretary adds is that he is "*willing* to stipulate that the likelihood of injury is less than 'reasonably likely', and in the interest of settlement, a reduction in gravity is warranted." *Id.* (emphasis added). But, neither the Commission, nor the public, nor any miner, is told why *the Secretary* is willing to so stipulate that the likelihood of injury is less than reasonably likely. The truth is that the Secretary's grudgingly offered alternative is every bit as empty as his default position that he is not obligated to provide any solid reasoning for his settlements. This is inconsistent both with Congressional intent and with the protection of miners. It also does a disservice to the dedicated MSHA mine inspectors in their efforts to provide such protection.[2]

The issuing inspector's section 104(a) citation presents a different picture, which is completely unaddressed by the Secretary. The inspector's written citation provides that the ground support was not being maintained, for a 12 foot length which had a 18 foot height, in that wire was missing, bolts damaged, and shotcrete missing. Speaking to the likelihood of the hazard occurring, the inspector stated that there was loose material, which was scaled down easily, and that it was 13 inches by 9 inches by 3 inches and smaller. The inspector assessed the hazard presented by the cited condition as reasonably expected to present a permanently disabling injury in the event of the loose material falling and striking a miner. The Respondent's contention that "the wire ground support was still in place," is factually at odds with the inspector's statement that the wire was "missing." Where the Secretary stands on that factual conflict is anybody's guess. Nor does the Secretary shed any light on the Respondent's claim that there was a small amount of material along the rib on a windrow, presumably from the scaling that was then performed, and that no material had fallen in the middle of the drift where persons would travel. But scaling is a somewhat controlled process and therefore may not be indicative of what would have occurred if the material had simply fallen in an unplanned event.

Accordingly, the Secretary is directed to either provide a legitimate factual basis to support the 50% reduction it seeks, or to prepare for a hearing.

So Ordered.

William B. Moran

William B. Moran
Administrative Law Judge

[2] When the Court denies insufficiently justified settlement reductions, it routinely asks the Secretary to advise whether, in the course of reaching a settlement, it has consulted with the issuing inspector. After all, the issuing inspector is the administration's eyewitness to the violative condition. The Secretary has never responded to this reasonable informational inquiry from the Court. Such a declaration, which does not require the particulars of the inquiry, is a way of ensuring that a settlement is factually reasonable from the Secretary's point of view and therefore does not rely only on unverified assertions from a respondent.

Distribution:

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