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July 3, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. MARSHALL COUNTY COAL, RESOURCES, INC., Respondent	CIVIL PENALTY PROCEEDING: Docket No. WEVA 2023-0214 A.C. No. 46-01437-571004 Mine: Marshall County Mine

DECISION APPROVING SETTLEMENT

Before: Judge Moran

This case is before the Court upon a Petition for Assessment of Civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Conference and Litigation Representative ("CLR"), who is not an attorney,[1] has filed a motion to approve settlement. A **fifty-six percent** reduction in the penalty from **$8,239.00** to **$3,660.00** is proposed. The settlement amounts and the one modification to a citation are as follows:

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
WEVA 2023-0214			
9581075	$2,561.00	$1,453.00	Reduce Monetary Penalty Only **43% reduction in penalty**
9581076	$1,858.00	$1,055.00	Reduce Monetary Penalty Only **Another 43% penalty reduction**
9581077	$3,820.00	$1,152.00	Modify Severity from "Fatal" to "Lost Workdays or Restricted Duty" **70 % reduction in penalty**
Total	**$8,239.00**	**$3,660.00**	**56% overall drop in penalty from the regularly assessed amount**

MSHA inspector Cody John Tominack, diligently performing his inspection responsibilities, found the three, now admitted, violations involved with this docket.

[1] None of the "CLRs" are attorneys. As such they are not licensed to practice law.

Analysis

As in this instance, the Secretary often touts in settlements that the modifications to some citations result "only" in a monetary reduction. Congress was not so cavalier about penalty reductions. Instead, it clearly expressed that penalties were to be of a sufficient order that non-compliance would be more expensive than compliance. As the Commission remarked in *Davis Coal*, 2 FMSHRC 619 (March 1980), "[i]n constructing the 1977 Act, **Congress paid significant attention to penalties, noting its dissatisfaction *with the low settlements* of penalties under the 1969 Coal Act. Section** 110(k)8 was therefore made a part of the 1977 Act, in order that penalties, mandatory under the 1977 Act, would not be compromised, mitigated or settled except with the approval of the Commission. As detailed in the Senate Report, the **Congress stated: 'In short, the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards.' To be successful in the objective of including (inducing) effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance.**" *Id.* at 625. (emphasis added).

With both citations 9581075 and 9581076 resulting in **43% reductions in the penalty** assessed, the Secretary simultaneously stands by the issuing inspector's evaluations, an incongruous result is produced. Such arrangements lay bare that the mine operator's focus is on the penalty amounts, not the evaluations of gravity or negligence. And this makes sense because penalties are not tax deductible. Treasury Regulation 26 C.F.R. § 1.162-21 (2021). A reduction in civil penalties is therefore a tax savings, as such penalties as are imposed constitute a non-tax-deductible financial burden. In short, lower penalties benefit mine operators because it reduces their tax obligations

Citation No. 9581075; Failure to maintain equipment in safe operating condition, as required by 30 C.F.R. § 75.1725(a).

This citation, issued on December 15, 2022, stated that

> [t]he number 14464 feeder located at the 4 West seal construction area was not maintained in a safe operating condition. When inspected **the shut off cable** that stretches over the feeders chain **could not activate the emergency stop button** when pulled from any angle. When tested **the rusted spring** would hold the metal flap a measured 1.5 inches from pressing the emergency stop button. This could result in crushing injuries if a miner would fall into the mouth of the feeder.

Petition for civil penalty at 5. (emphasis added)

The cited standard, 30 C.F.R. § 75.1725(a), requires that "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately." This standard was cited 10 times in two years at this mine (10 to the operator, 0 to a contractor)."

The motion seeks to have the negligence reduced to 'low,' meaning considerable mitigating circumstances must be present. The operator asserts it was unaware of the condition; that the coal feeder was not in service at the time of the citation's issuance, and that the last weekly electrical exam, conducted on December 12, 2022, indicated that the condition did not

exist at that time. That the operator was 'unaware,' does not constitute *considerable* mitigation. The claim that the feeder was not in service counts for nothing in any negligence evaluation, as it doesn't even amount to the rejected "alternative safety measures" roundly rejected by United States Courts of Appeals. Further, there is no claim that the equipment was tagged out. Last, the claim that the condition didn't exist three days earlier is not credible, as a rusted spring would not develop in three days' time. Inferentially, the Secretary agrees with these observations, as she stands by the inspector's evaluation in all respects, including negligence. Motion at 3.

Given the above, it is disconcerting that the Secretary would still agree to such an enormous penalty reduction of 43% for this violation, especially given that, per the inspector's unchallenged determination that fatal crushing injuries could result if a miner were to fall into the mouth of the feeder.

Citation No. 9581076; Failure to adhere to safeguard notice, per 30 C.F.R. § 75.1403, a statutory provision, which safeguards are designed to minimize hazards with respect to transportation of men and materials

This citation, also issued on December 15, 2022, invokes, as noted above, the safeguard standard, 30 C.F.R. § 75.1403. The condition stated:

> [t]he clearance space along the 5 north 1 and 2 track haulage was not kept clear of loose rock and debris. **A move was observed dragging and rubbing loose materials along the rails and in between the rails.** Debris consisting of crushed stone was above the rail from Grapevine bottom to 58 crosscut on the North main line. The track clearance space needs cleaned of all debris.

Petition for civil penalty at 7. (emphasis added).

As with the citation discussed above, here too the operator seeks to have the negligence cast as 'low.' The operator asserts that the preshift exam did not reflect the problem, suggesting that it did not then exist. Also, the operator contends it did not know of the problem. Further, the operator stated that a motor crew was delivering a roof bolting 4 machine on a dolly that is 13 inches lower than a normal supply car, therefore, intermittently contacting material along the outer edge of the track bed. Respondent also asserted that that the inspector observed the condition being created by the dolly and that normal haulage equipment would not contact the material, thus, the cited condition would not be present and would not be deemed a violation by the preshift examiner. Motion at 3-4.

In this instance, the reasons advanced by the operator to recast the negligence appear plausible, although the Secretary's concession is not to the negligence evaluation listed by the inspector. Instead, the Secretary stands by the issuing inspector's designation that the negligence was high. This is not a surprise as the inspector observed the violation in real time. Given that, it is disconcerting that the CLR agreed to a near half-off reduction in the penalty.

However, that is not the end of the story, as revealed in the third citation in this docket, Citation No. 9581077, discussed next.

Citation No. 9581077; Violation of 30 C.F.R. §75.360; Failure to conduct a preshift examination at within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground.

This citation, as with the two citations just analyzed, was also issued on December 15, 2022. The now-admitted violation was issued for an alleged violation of §75.360(a)(1). Titled "Preshift examination at fixed intervals," this standard provides that "a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground."

Significantly, the citation is inextricably tied to the other two admitted violations in this docket. Inspector Tominack spelled this out in his description of the "Condition or Practice" for this citation, stating:

> A preshift examination was not being conducted within 3 hours preceding the beginning of an 8 hour interval on the 4 West Seal construction area. The conditions cited in citations **No. 9581074** and **No. 9581075**, accumulations in entire area and emergency stop button not working on feeder. The construction area is only operated on day shift. The midnight pre shifter needs to examine the area. **The construction area had 4 date, time, and initial boards without any initials found for 12/15/22. Four miners were in the area working when the inspection started.**

Petition for civil penalty at 9. (emphasis added).

The Secretary had proposed a civil penalty of $3,820.00 for this violation, but now seeks a **70% reduction in the penalty, reducing the penalty from $3,820.00 to $1,152.00.** The Gravity was evaluated as: Unlikely, Fatal, with 4 Persons Affected. The violation was designated as Non-S&S. Negligence was evaluated as high.

The operator seeks to have the likely injury or illness dropped two steps down from the inspector's designation of 'fatal,' to 'lost workdays or restricted duty.' To support that claim, the operator asserts that, regarding the other two violations, as just described above, "the condition cited in Citation 9581075 and referenced in the body of Citation 9581077 does not apply to 75.360(a)(1) [**preshift exams**] [and] Respondent further assert[s] that related citation, [No.] **9581074**,[2] was evaluated as lost workdays or restricted duty." Motion at 4.

[2] The Court thought that perhaps the reference to 9581074 was a typographical error but the response from the CLR indicated there was no such error.

The Commission has spoken in unambiguous terms about the vital importance of preshift exams, stating:

> The preshift inspection requirement is the linchpin of Mine Act safety protections. Without a timely preshift inspection, unwary miners may be sent into areas containing hazardous conditions. Congress explicitly acknowledged the **importance** of the **preshift** inspection by making it a longstanding statutory mandate, dating back to the Federal Coal Mine Safety Act of 1952, 30 U.S.C. § 471 et seq. (1955). These provisions were strengthened in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), and carried over in identical fashion to the Mine Act. The Senate Report on the 1969 Coal Act emphasized the importance of these inspections, stating that "[c]hanges occur so rapidly in the mines that it is imperative that the examinations be made as near as possible to the time the workmen enter the mine." S. Rep. 411, 91st Cong., 1st Sess. 57 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969,* at 183 (1975) ("*Coal Act Legis. Hist.*").
>
> Both the Senate Report and the Conference Report emphasized:
> No miner may enter the underground portion of a mine until the preshift examination is completed, the examiner's report is transmitted to the surface and actually recorded, and until hazardous conditions or standards violations are corrected. *Coal Act Legis. Hist.* and 183 and 1610.
>
> In its recent 1996 revision of safety standards for the ventilation of underground coal mines, **the Mine Safety and Health Administration acknowledged that: [t]he preshift examination is a critically important and fundamental safety practice in the industry.** It is a primary means of determining the effectiveness of the mine's ventilation system and of detecting developing hazards, such as methane accumulations, water accumulations, and bad roof. 61 Fed. Reg. 9790 (1996) … In *Emerald Mines Corp.,* 7 FMSHRC 437 (March 1985) (ALJ), Administrative Law Judge Broderick recognized the **importance** of the **preshift** examination in the arsenal of protections afforded to those working in the mines. In holding that the failure to conduct a preshift inspection was S&S, he stated that: [t]he whole rationale for requiring preshift examinations is the fact that underground coal mines are places of unexpected, unanticipated hazards: roof hazards, rib hazards, ventilation and methane hazards. I conclude that failure to make the required preshift examination of active workings in an underground coal mine contributes to "a measure of danger to safety" which is reasonably likely to result in a reasonably serious injury. 7 FMSHRC at 444. This Commission has recently had occasion to pronounce the **preshift** requirement "unambiguous" and of "fundamental **importance** in assuring a safe working environment underground." *Buck Creek Coal Co.,* 17 FMSHRC 8, 15 (January 1995).

Manalapan Mining, 18 FMSHRC 1375, 1391-1393 (emphasis added).

That was then, this is now.

Both contentions offered by the operator are troublesome. As to the first ground, that Citation No. 9581075, which was referenced by the Respondent in claiming that the condition cited in that citation does not apply to preshift exams, the Secretary, per usual, says nothing about the validity of that contention. Case law suggests that the Respondent's claim is dubious.

Section 75.360(b)(3) states that the preshift examination is to include "working sections," which are defined as "[a]ll areas of the coal mine from the loading point of the section to and including the working faces." 30 C.F.R. § 75.2. *Jim Walter Resources*, 28 FMSHRC 579, 599 (Aug. 2006)

The Commission has held that the scope of a preshift exam should be broadly construed to avoid anomalous results:

> Given that the statute and regulation require a preshift examination of 'the active workings of a coal mine' and that coal-carrying conveyor belt entries in which miners are normally required to work or travel clearly fall within the definition of 'active workings,' the statute and regulation appear to require coal mine operators to conduct a preshift examination of such entries. It would be anomalous if the mere addition of coal-carrying conveyor belts to an entry had the effect of removing the entry from the scope of the preshift examination requirement.

Jones and Laughlin Steel, 8 FMSHRC 1058, 1061.

The Court of Appeals for the D.C. Circuit reached a similarly broad conclusion in *Spartan Mining*, 415 F.3d 82, 85 (July 22, 2005).

A key element in evaluating the scope of preshift examinations is the "work or travel" aspect. Here, issuing inspector Tominack stated that in the seal construction area "four miners were in the area working when the inspection started." Petition for civil penalty at 9.

As set forth below, the Court's hands are tied in assessing the claim, as it is not permitted to make inquiry about the applicability of the preshift exam in the context of settlement motions.

As to the second ground, that a separate citation, No. 9581074, supports the argument that the preshift exam violation should also be listed as "lost workdays or restricted duty," the Court, in performing its due diligence in the spirit of the Mine Act's provision at 30 U.S.C. §820(k), 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." and in its Commission-designated role to provide "front-line oversight," per *AmCoal*, 40 FMSHRC 983, 987,[3] requested that the parties supply a copy of the citation

[3] The full text of the Commission's description of the judge's role informed: "As the Commission has repeatedly observed, a Judge's 'front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion.' *Id*. [citing *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014)]. Judges must have sufficient information to fulfill their duty of determining if a settlement of a penalty is fair, reasonable, appropriate under the facts, and protects the public interest. Moreover, such information permits a Judge to fulfill the duty of articulating reasons for the approval so that the process of compromising penalty amounts is transparent, as Congress intended. A Judge who properly determines that a settlement motion lacks sufficient information may permissibly

referenced as a basis for redesignating the preshift exam injury down from 'fatal,' to 'lost workdays, restricted duty.' In order to intelligently assess that claim, the Court asked the parties to supply a copy of that citation, No. 9581074.

The non-attorney representative for the Secretary, CLR Hayhurst, declined to provide the Court with the Citation identified in the motion informing, "[t]he Secretary stands by the information provided in the Motion to Approve Settlement and declines to provide additional evidence not in the record in this matter." Email from CLR Hayhurst to the Court, June 28, 2023.

With respect for the Commission's present case law on the issue of settlement motions, the Secretary's refusal to even provide the Court with a copy of the citation cited by the mine operator as support for its claim that the expected injury should be classified as "lost workdays or restricted duty," demonstrates that the Court's review role of settlements is only ministerial. It is worth it to stop and think about this. The parties submit that another citation, not in the docket before the Court, is instructive for their position that lost workdays is the more appropriate designation, but the Court may not see the referenced citation. Beyond ministerial, the Court's review role is perfunctory, if refusing to provide a copy of a cited document is an acceptable posture. To be blunt, in the Court's opinion, if it may not see a citation relied upon in support of the operator's position for reducing the gravity of the reasonably expected injury, then its review role is to act only as a rubber stamp.

As this Court has often remarked, reasonable inquiry is not allowed, as long as the *AmCoal* elements are present.

Reasonable Inquiry is not Permitted

Despite the Court's analysis and concerns, it is not permitted to make reasonable inquiry about the contentions advanced in settlement motions. This is because, under the Commission's interpretation of section 110(k) of the Mine Act, Congress only intended that the three elements as laid out in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018) need be considered under the Commission's standard for review of settlement submissions. The settlement motion does not require more information from the Secretary. Accordingly, 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.

Rather, the Court's review of settlement motions is confined to comparing the parties' motion with the three criteria set forth by the Commission in its decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) ("*AmCoal*") and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018).

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request further facts from the parties." *AmCoal* at 987-988.

Per the Commission's decisions in *AmCoal* and *Rockwell Mining*, to approve a settlement motion there are three requirements. Meeting the first two requirements is automatic and perfunctory.

(1) **The motion must state the penalty proposed by the Secretary**.

This requirement is met in every civil penalty petition, as the petition contains the proposed penalty. The amount is rarely, if ever, an issue, and if in issue, it is resolved before the penalty petition is filed.

(2) **The amount of the penalty agreed to in settlement**.

This requirement is also automatic; there could not be a settlement motion without the parties stating the penalty amount to which they have agreed.

(3) **"Facts," as the Commission has employed that term, in support of the penalty agreed to by the parties**.

In the context of settlement motions, "facts" have an atypical meaning.[4] In discussing what constitute "facts" for settlements, the Commission stated "there is no requirement that facts supporting a proposed settlement must necessarily be submitted by the Secretary. Facts supporting a penalty reduction in a settlement motion may be provided by any party individually or by parties collectively." *AmCoal* at 990. The only associated requirement with such *"facts"* is that *"there is a certification by the filing party that any non-filing party has consented to the granting of the settlement motion.*" *Id.* (emphasis added).

Accordingly, the Commission rejected the view that a respondent's assertions of fact need to "present legitimate questions of fact," and further that the Secretary need not comment yea or nay to the facts asserted by a respondent. Instead, the Commission announced that "[f]acts alleged in a proposed settlement need not demonstrate a 'legitimate' disagreement that can only be resolved by a hearing." Instead, the Commission allows that parties may submit facts that reflect a mutual position that the parties have agreed is acceptable to them . . . " *Id.*

It should not come as a surprise that, under the Commission's *AmCoal* test for review of settlements, all such motions are approved. In the rare instances where a judge has denied a settlement motion, post-*AmCoal*, those decisions have met with reversals by the Commission. *Hopedale Mining*, 42 FMSHRC 589 (Aug. 2020), *American Aggregates*, 42 FMSHRC 570 (Aug. 2020) (Chairman Traynor and Commissioner Jordan, dissenting).

[4] In settlements, "facts" do not mean things that are known or proved to be true, nor does the term mean something that has actual existence or a piece of information presented as having objective reality. *Fact*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/fact (accessed Nov. 18, 2021). Accordingly, in settlements, a fact does not mean something that is true, nor is there a requirement that a statement of fact be verifiable.

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.

WHEREFORE, the motion for approval of settlement is **GRANTED**. Citation No. 9581077 is modified to list the gravity of the injury or illness from 'fatal' to 'lost workdays or restricted duty.' The penalties for the three citations in this docket are all reduced as reflected in the table above. The Respondent is **ORDERED TO PAY** a penalty of $3,660.00 within 30 days of this order. Upon receipt of payment, this case is **DISMISSED**. [5]

William B. Moran

William B. Moran
Administrative Law Judge

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[5] 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.
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