

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

August 10, 2015

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

v.

EMPIRE IRON MINING PARTNERSHIP,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2008-505-M
A.C. No. 20-01012-153165-01

Mine: Empire Mine

DECISION APPROVING SETTLEMENT
AND
ORDER VACATING CITATION

Before: Judge Feldman

The captioned civil penalty proceeding is before me based upon a petition for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended (“the Act”), 30 U.S.C. § 815(d). The captioned docket contains 19 citations, for which the Secretary proposes a total civil penalty of \$19,031.00.¹

On August 18, 2011, the captioned docket was stayed pending resolution of *Tilden Mining Co., LLC*, 33 FMHSRC 876 (Apr. 2011) (ALJ), which was, at that time, pending before the Commission. Section 56.12028 of the Secretary’s mandatory safety standards requires periodic resistance testing of all grounding systems. 30 C.F.R. § 56.12028. *Tilden Mining* addressed the question of whether extension cords on power cables constitute grounding systems as contemplated by section 56.12028. Citation No. 6199725, included in the captioned docket, for which the Secretary proposes a civil penalty of \$176.00, alleges a similar violation of section 56.12028 designated as non-significant and substantial (S&S) in nature. On August 20, 2014, on appeal, the Commission concluded that extension cords and power cables require continuity testing under section 56.12028. *Tilden Mining Co., LLC*, 36 FMHSRC 1965 (Aug. 2014). *Tilden Mining* was thereafter appealed to the U.S. Court of Appeals for the D.C. Circuit on September 8, 2014. As of the date of this Order, *Tilden Mining* is still pending before the D.C. Circuit.

¹ Docket No. LAKE 2008-505-M originally contained 20 citations, for which a total civil penalty of \$19,274.00 was proposed. On March 28, 2012, Citation No. 6199742 was severed from the captioned docket and placed in Docket No. LAKE 2008-505-M-A. Docket No. LAKE 2008-505-M-A was disposed of via settlement on October 16, 2012. As such, 19 citations remain at issue in the captioned docket.

Pending before me is a motion to approve settlement of 18 of the 19 citations at issue in the captioned docket, for which the parties have agreed on a total civil penalty of \$14,456.00. The parties have not agreed on a settlement of the proposed \$176.00 civil penalty for Citation No. 6199725 concerning continuity testing, asserting that the settlement of this citation is dependent upon the resolution of *Tilden Mining* before the D.C. Circuit. Citation No. 6199725 was issued on March 19, 2008. The citation was contemporaneously abated on March 19, 2008, after the subject power supply cord was tested for resistance. Citation No. 6199725 has been held in abeyance, out of necessity, pending the ultimate disposition of the identical issue in *Tilden Mining*.

The subject violation in Citation No. 6199725, which has been designated as non-S&S in nature, and for which the Secretary seeks a nominal penalty of \$176.00 was timely abated and has been pending for over seven years, during which time memories likely have faded and/or witnesses likely have become unavailable. I see no need to further delay final resolution of this docket and payment of the \$14,456.00 civil penalty agreed upon by the parties for the remaining 18 of 19 citations at issue in this proceeding. Frankly, to do so because of the outstanding \$176.00 civil penalty proposed by the Secretary for remaining Citation No. 6199725, that allegedly occurred over seven years ago and was timely abated, would elevate form over substance.

Accordingly, in the interest of administrative efficiency, Citation No. 6199725 shall be vacated without prejudice, with leave for the Secretary, if he so elects, to reissue a citation for the subject alleged continuity testing violation if the Secretary prevails before the D.C. Circuit in *Tilden Mining*.

With respect to the remaining 18 citations, the parties have agreed on a reduction of the proposed civil penalty from \$18,855.00 to \$14,456.00. The parties' agreed-upon settlement terms for Citation Nos. 6199720, 6199455, 6199729, and 6199746, include deleting the S&S designations and modifying the likelihood of injury findings from "reasonably likely" to "unlikely," with corresponding penalty reductions. Regarding Citation Nos. 6199953 and 6199955, the parties agree to modify the degree of negligence attributable to the cited violative conditions from "moderate" to "low," with corresponding penalty reductions.

Regarding Citation Nos. 6199714, 6199457, 6199745, 6199748, and 6199749, the parties agree to penalty reductions for each citation from \$1,412.00 to \$988.00 based on the vagaries of litigation. In particular, the Respondent represents that it would present evidence refuting the gravity of the cited violation. Specifically, the Respondent represents that the cited presence of "mud, slippery material, stones, and/or pellets" in workplaces and passageways did not cause slip and trip hazards and therefore not reasonably likely to cause reasonably serious injuries.

In addition, regarding Citation No. 6199719, the parties agree to a penalty reduction from \$3,689.00 to \$3,136.00 based on the vagaries of litigation. In particular, the Respondent represents that it would present evidence refuting the negligence of the cited violation. Specifically, the Respondent represents that the cited severely rusted grating was not easily recognizable due to dust and mud build-up. Regarding Citation Nos. 6199731 and 6199734, the parties agree to penalty reductions for each citation from \$162.00 to \$146.00 based on the

vagaries of litigation. In particular, the Respondent represents that it would present evidence refuting the negligence of the cited violation. Specifically, the Respondent represents that the cited missing lamp covers and lightbulbs were not easily recognizable.

Additionally, regarding Citation No. 6199738, the parties agree to a penalty reduction from \$162.00 to \$146.00 based on the vagaries of litigation. In particular, the Respondent represents that it would present evidence refuting the negligence of the cited violation. Specifically, the Respondent represents that the cited missing guarding on a rotating taper lock bushing shaft was not easily recognizable. Furthermore, regarding Citation No. 6199744, the parties agree to a penalty reduction from \$162.00 to \$130.00 based on the vagaries of litigation. In particular, the Respondent represents that it would present evidence refuting the negligence of the cited violation. Specifically, the Respondent represents that the cited missing knockout was at one time present and the condition was not easily recognizable. Regarding Citation No. 6199956, the parties agree to a penalty reduction from \$1,111.00 to \$889.00 based on the vagaries of litigation. In particular, the Respondent represents that it would present evidence refuting the negligence of the cited violation. Specifically, the Respondent represents that the cited missing hinges on a conveyor belt access door were not easily recognizable. Finally, the Respondent has agreed to pay the Secretary's proposed penalty in full in Citation No. 6199730.

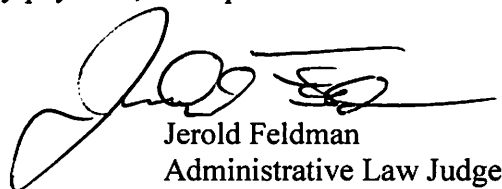
In sum, the total agreed-upon reduction in civil penalty for these citations is not of significant magnitude relative to the entire agreement to render it unreasonable in view of the uncertainties of litigation. While the Secretary does not necessarily agree with the exculpatory representations made by the Respondent, apparently there are sufficient vagaries of litigation to justify the parties' settlement proposal.

I have considered the representations and documentation submitted in this matter and I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act.

ORDER

In view of the above, it **IS ORDERED** that Citation No. 6199725 **IS VACATED** without prejudice.

It **IS FURTHER ORDERED** that the motion to approve settlement **IS GRANTED**, and pursuant to the parties' agreement, Empire Iron Mining Partnership, **IS ORDERED** to pay the \$14,456.00 civil penalty within 30 days of this Order in satisfaction of the 18 remaining citations at issue.² Upon receipt of timely payment, the captioned matter **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

² Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above caption on the check.

Distribution: (Regular and Certified Mail)

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