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September 20, 2018

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2017-0220
Petitioner,	:	A.C. No. 46-06618-427999
v.	:	
	:	
ROCKWELL MINING, LLC,	:	Mine: Gateway Eagle Mine
Respondent.	:	

DECISION UPON REMAND

Before: Judge Moran

In a Decision, issued August 2, 2018, the Commission, upon interlocutory review, concluded that this Court "applied an incorrect legal standard in denying the settlement motion and abused [its] discretion." *Sec'y of Labor, Mine Safety and Health Admin. (MSHA), v. Rockwell Mining, LLC*, 40 FMSHRC ___, slip op. at 1, 2018 WL 3830146 *1 (Aug. 2, 2018) (hereinafter *Rockwell*). It then vacated the Court's "order denying the settlement motion and remand[ed] for further proceedings." *Id.* Specifically, the Commission remanded the matter "for reconsideration consistent with [its] opinion *and* [its] decision in *AmCoal* issued on this date." *Id.* at 4, 2018 WL at *3 (emphasis added), citing *Sec'y of Labor, Mine Safety & Health Admin. (MSHA) v. The American Coal Company and United Mine Workers of America and United Steel, Paper and Forestry, Rubber Mfg., Energy, Allied Indus. and Service Workers International Union*, 40 FMSHRC ___, slip op., 2018 WL 3830145 (Aug. 2, 2018) (hereinafter *AmCoal*).

In its May 9, 2018 decision denying settlement, the Court recounted the information provided in the parties' motion:

Citation No. 9068232, which alleged a violation of 30 C.F.R. § 75.202(a), was proposed for a penalty reduction from $446.00 to $244.00. This citation alleged that,

> on the CO #2 section, 012/013 MMU, the rib area of the #3 entry, on the inby right rib corner across from the loading point, has not been supported or otherwise controlled to protect persons from hazards related to fall of the rib. When checked, the rib corner was found cracked and loose. When the rib was pulled, the corner fell in two pieces. When measured, one piece was approximately 18"x21"x10" and was rectangular in shape and the second piece was approximately 12"x21"x9" and was triangular in shape.

Citation No. 9068232 (formatting added).

The Secretary alleged that this violation was S&S, reasonably likely to result in lost workdays or restricted duties for one person, and the result of moderate negligence.

In support of the proposed penalty reduction for this citation, the motion stated,

> the Respondent argues that the evidence would establish that it was not negligent. The Respondent was taking steps to control the ribs by installing rib bolts throughout the section as needed. Furthermore, the cited conditions likely occurred since the most recent examination in the area. The Secretary notes that no rock dust was observed in the cracks in the ribs indicating that the cracks were fairly recent. Taking into account the Respondent's arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.

Mot. at 3.

Citation No. 9070540, which alleged a violation of 30 C.F.R. § 75.380(d)(4), was proposed for a penalty reduction from $2,598.00 to $2,000.00. The citation alleged that,

> The operator failed to maintain 6 foot of clearance on the branch line leading from secondary escapeway lifeline to the section refuge chamber, on 1 Section (010 and 011 MMU), in that upon arrival to the section a 6 man Diesel mantrip was observed parked under the branch line leading from the secondary escapeway lifeline to the section refuge chamber.

Citation No. 9070540.

The Secretary alleged that this violation was S&S, reasonably likely to result in permanently disabling injuries for 10 persons, and the result of moderate negligence.

In support of the proposed penalty reduction for this citation, the Motion stated,

> the Respondent argues that the evidence would establish that it was not negligent because there is no evidence as to how long the referenced mantrip was parked beneath the branch line or that management was aware of its presence. Taking into account the Respondent's arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.

Mot. at 3-4.

Citation No. 9070542, which alleged a violation of 30 C.F.R. § 75.604(b), was proposed for a penalty reduction from $666.00 to $443.00. The citation alleged that,

> The operator failed to effectively insulate and seal a permanent splice in the energized 995 volt trailing cable suppling [sic] power to the Co.# 251 continuous mining machine located on the right side of the 1 Section (010and 011MMU), in that an opening was observed in the permanent splice exposing the energized insulated inner conductors.

Citation No. 9070542.

The Secretary alleged that this violation was S&S, reasonably likely to result in permanently disabling injuries for one person, and the result of moderate negligence.

In support of the proposed penalty reduction for this citation, the Motion stated,

> the Respondent argues that the levels of gravity and negligence were overwritten. The Respondent would argue that the violation should not have been issued as S&S because there were no exposed inner leads in the splice. Respondent also argues that the cable is being moved on a continuous basis and the damage to the splice likely occurred sometime after the most recent weekly electrical examination. Taking into account the Respondent's arguments, as well as the uncertainties of litigation, the Secretary has agreed to a reduced penalty.

Mot. at 4, Decision Denying Settlement at 1-3.

The Court also summed up the motion, noting that, "[s]even citations are involved in this docket. The settlement motion proposed penalty reductions for three citations, and the Respondent agreed to pay the proposed penalties for three more, with no modifications." Decision Denying Settlement at 1.

The motion also informed the Court that the Secretary had decided to vacate Citation No. 9070543, which alleged a violation of 30 C.F.R. § 75.400-2. That citation, issued under section 104(a), initially alleged that "[t]he operator failed to follow the cleanup program on 1 Section (010 and 011 MMU), in that roadway coal spillage is present from the active pillar line to the section dump and from #1 entry to #8 entry. This creates slip, trip and fall hazards for mine personn[el] in the event of a rock fall trying to escape the rock fall." Citation No. 9070543, issued November 30, 2016. The cited standard, 30 C.F.R. § 75.400-2, titled, "Cleanup program," provides, in relevant part, that "[a] program for regular cleanup and removal of accumulations of coal and float coal dusts, loose coal, and other combustibles shall be established and maintained."

The condition or practice was then modified to state that the "[t]he operator's cleanup program on 1 Section (010 and 011 MMU) is deficient, in that rock, hydraulic oil cans, timber saw butts and metal are present across the section, presenting tripping hazards." Citation No. 9070543-01. Subsequently, because the operator had made "good efforts" to correct the cited

conditions, more time was granted on December 5, 2016, to perform more cleaning. Finally, on December 11, 2016, the citation was terminated as "[t]he section has been cleaned and all combustible material [was] removed." Citation No. 9070543-03. The gravity for the injury was marked as "Reasonably Likely," and "Permanently Disabling," and designated as "Significant and Substantial," with the negligence listed as "Moderate." The proposed penalty for that now vacated citation was $722.00, an amount, like each of the citations in this docket, that included a 10 (ten) percent reduction for "good faith."

Two of the reduced penalties, Citation Nos. 9070540 and 9070542, were in the same area 1 Section: 010 MMU and 011 MMU, as the vacated citation. The total proposed penalty amount was $6,977.00, with that amount representing the 10% across the board reduction for "good faith." The proposed settlement is for $5,232.00. This amounts to a 25% reduction from the total proposed penalty."[1] *Id.* at 1.

The Commission's Decisions in *Rockwell* and *AmCoal*

To comply with the remand order, the Court must first recount the Commission's holdings in those decisions.

In its August 2, 2018 decision in *Rockwell,* remanding this matter for further proceedings, the Commission instructed the Court to conduct "reconsideration consistent with this opinion and [its] decision in *AmCoal* issued on this date." *Rockwell,* slip op. at 4, 2018 WL at *3. Therefore, as stated, it is first necessary to discuss the Commission's decisions in those two matters. The Commission noted that in "evaluat[ing] settlement motions, [it] consider[s] 'whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *The American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016)." *Id.* at 3. It then acknowledged that to make that evaluation both the "Commission and its Judges 'must have information sufficient to carry out this responsibility.'" *Id., citation omitted.*

[1] As will be discussed more fully within, the Commission, concluding that the Court "applied an incorrect legal standard in denying the settlement motion and abused [its] discretion," rejected the Court's reliance in its denial that "that [while] the penalty reduction proposed here is relatively modest, ... Commission approval under section 110(k) is not simply about dollars [and the Court's conclusion that for] ... two of the three citations ... discussed above, the Secretary provided no substantive or case-specific information following the Respondent's contentions. The repeated allusion to uncertainties of litigation does nothing to help the Court discern whether there is a legitimate dispute of fact or law at issue here." Court's Denial at 3.

To accomplish this, the Commission, citing Commission Procedural Rule 31, 29 C.F.R. §2700.31, stated that "for each violation" a motion to approve penalty settlement must include three things:

(1) the penalty proposed by the Secretary;
(2) the amount of the penalty agreed to in settlement;
(3) "facts" in support of the penalty agreed to by the parties.

Id.

The Commission determined that the Court erred in denying the settlement motion in two particulars. First, it noted as error that the Court "did not refer to or apply the [Rule 31] standard ... that [the Commission] use[s] for evaluating penalty reductions in settlement[s].[2] *Id.*

Second, the Commission determined that the Court "erred in concluding that a motion to approve settlement must include an acknowledgement by the Secretary that the Respondent's assertions present legitimate questions of fact which are in dispute and can only be resolved through the hearing process. ...[Instead,] facts alleged in a proposed settlement need not demonstrate a 'legitimate' disagreement that can only be resolved by a hearing." *Id.*, and citing its *AmCoal* decision issued the same day as *Rockwell.*

The Commission uses the term "facts" in a sense that the Court had not previously applied to that term. The Court was applying what it heretofore thought was meant by "facts," that is, "[a] thing that is known or proved to be true." Fact, *Oxford English Dictionary* (online ed.); something that has actual existence; a piece of information presented as having objective reality; the quality of being actual. Fact, *Merriam-Webster* (online ed.); "[a] fact is a statement that is consistent with reality or can be proven with evidence. The usual test for a statement of fact is verifiability." Fact, *Wikipedia*, Wikipedia (Sept. 17, 2018), https://en.wikipedia.org/wiki/Fact.

Of course, the Court understands that the parties may, in the context of a settlement motion, have a different view of what the facts are and that they need not necessarily agree on what they actually are. It was on the basis of that understanding that the Court sought a representation from the Secretary that the Respondent's assertions present *legitimate* questions of fact which are in dispute and can only be resolved through the hearing process. The Commission has stated this is not required in settlements. Instead, it has instructed that it is sufficient for the parties to submit facts that reflect a mutual position that the parties have agreed is acceptable to them in lieu of the hearing process. This means that such submitted "facts" are sufficient where they "reflect a mutual position that the parties have agreed is acceptable to them." *Rockwell*, slip op. at 3, 2018 WL at *3. Obviously, the Court plays no role in that mutual position of the parties. Now the Court realizes that, in the context of a settlement, facts may be different from the findings of facts resulting from a hearing. Still, it seems to be a misnomer, in the context of a citation, to call one side's, or the other's, statements to be facts. Rather, they are assertions about

[2] In this decision upon remand, the Court hereby expressly refers to Commission Rule 31.

the parties' view of the allegations and or conditions surrounding a citation or order, with the key determinant being whether they have reached a mutual position that is acceptable to them. Acceptability to the Court then, apparently under the Commission's view of the Court's role in carrying out section 110(k), is to apply the three elements, as described above.

For the Commission, in settlements, "facts" may "reflect a mutual position that the parties have agreed is acceptable to them in lieu of the hearing process." *Id* (citation omitted). This occurs where "the parties find and agree upon a mutually agreeable position that resolves the dispute and obviates the need for further proceedings." *Id.* (citation omitted). Expressed differently, the Commission has stated the Rule 31 facts "may include a description of an issue on which the parties have agreed to disagree." *Id.* Facts of this nature do "not require concessions from parties in settlement as long as the parties provide *mutually acceptable facts* that demonstrate the proposed penalty reduction is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* (emphasis added).

Accordingly, by virtue of the submission of a settlement motion, in all instances the parties have implicitly provided "mutually acceptable facts." And those "facts" may be composed entirely upon "a description of an issue on which the parties have agreed to disagree." *Id.* at 3, 2018 WL at *3.

As noted, the Commission's remand directed further proceedings for reconsideration consistent with its opinion in *Rockwell* and its decision in *AmCoal* issued on the same date. Therefore the Court now takes into account the Commission's decision in *AmCoal*. To begin, the Commission held that the criteria in section 110(i) of the Mine Act are not to be applied "in an overly rigid manner." *AmCoal*, slip op. at 6, 2018 WL at *5. Further, the Commission held that it is not true "that the facts supporting the settlement 'must be tied to the six statutory criteria in [s]ection 110(i).'" *Id.* In this regard, the Commission stated that although it "has previously explained that standards for factual support for a penalty reduction in settlement may be found in section 110(i)," it has also expressed "that 'parties may submit facts supporting a settlement that fall outside of the section 110(i) factors but that support settlement.'" *Id.* at 7, 2018 WL at *5.

Rather, the Commission has stated "there may be considerations beyond the six statutory criteria of section 110(i) that are relevant to whether a settlement proposal is fair, reasonable, appropriate under the facts, and protects the public interest." *Id.* citations omitted.

In its *AmCoal* decision, the Commission identified that such other considerations include "that the operator had agreed to accept all of the citations as written," endorsing the Secretary's statement that "the fact that the proposed settlement preserves all of the citations as written could assist the Secretary in future enforcement efforts against this operator by ensuring that the paper record reflects the Secretary's views regarding gravity and negligence stated in the citations." *Id.* Thus, *AmCoal* instructs that it is proper to consider the "value of accepting the citations as written on future enforcement actions." *Id.*

Further, the Commission instructed that a judge is "to accord due consideration to the entirety of the proposed settlement package, including both its monetary and nonmonetary aspects." *Id.*, citation omitted.

In discussing what constitute "facts" for a settlement, 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." *Id.* at 8 (emphasis added), 2018 WL at *6. 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."[3] *Id.*

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. *Id.*

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. The Commission's Procedural Rules and standing precedent do not contain such a requirement." *Id.* at 9, 2018 WL at *6. Instead, the Commission will allow that the "parties may submit facts that reflect a mutual position that the parties have agreed is acceptable to them...." *Id.*

As the Commission did not expressly set forth how one discerns that the submitted facts "reflect a mutual position that the parties have agreed is acceptable," the Court infers that the act of submitting the settlement reflects such a mutually acceptable position from the parties, else the submission could not be denominated a "settlement." That this is the case is reflected by the Commission's statement that it is "'[*i*]*nherent in the concept of settlement* [ ] that the parties find and agree upon a mutually acceptable position that resolves the dispute and obviates the need for further proceedings.'" *Id.*, citation omitted.

To meet Rule 31, it is enough, the Commission has stated, to "include a description of an issue on which the parties have agreed to disagree. The Commission does not require concessions from parties in settlement as long as the parties provide mutually acceptable facts "that demonstrate the proposed penalty reduction is *fair, reasonable, appropriate under the facts, and protects the public interest.*" *Id.* (emphasis added). That phrase, repeated seven (7) times in *AmCoal*, is unadorned. Rather, in terms of any tangible guideposts as to its meaning, a court is directed to ascertain whether:

(1) there has been a penalty proposed by the Secretary;
(2) the settlement motion reflects the amount of the penalty agreed to in the settlement; and
(3) whether there are "facts" which reflect a mutual position that the parties have agreed is acceptable to them.

Thus, the Commission has held, per its decisions in *Rockwell* and *AmCoal*, that the presence of these three elements are consonant with Congress' inclusion of Section 110(k) of the Mine Act, addressing the subject of "Compromise, mitigation, and settlement of penalty," which provides in relevant part that "[n]o proposed penalty which has been contested before the

[3] It would difficult to imagine a "settlement" motion where one party does not consent to the granting of the motion.

Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission."

30 U.S.C. § 820(k).

In evaluating the propriety of settlements, the Commission also eschewed the idea that the Secretary is required "to provide an explanation for the specific numerical percentage reduction of each penalty." *Id.* In this regard the Commission stated that there may be non-monetary considerations that also support settlement that are not amenable to "explanation about why a particular numerical reduction is appropriate for a violation." *Id.* at 10, 2018 WL at *7.

The Commission has "recognized that, in reviewing information supporting a reduced penalty in settlement, a Judge 'need not make factual findings with respect to each of the section 110(i) factors as a Judge would in the assessment of a penalty after hearing.'" *Id.* at 9, citation omitted. Last, the Commission also held that it was error for the Court to require that the Secretary need "provide an explanation for the specific numerical percentage reduction of each penalty." *Id.*

Application of the Commission's decisions in *Rockwell Mining* and *AmCoal*

Pursuant to the *entirety* of the Commission's decisions in *Rockwell Mining* and *AmCoal*, the settlement motion and in obeisance to those decisions, the Court finds that the motion contains:

(1) the penalty proposed by the Secretary;
(2) the amount of the penalty agreed to in settlement;
(3) "facts," as the Commission has employed that term, in support of the penalty agreed to by the parties.

The Court finds that the settlement motion meets the Commission's expressed requirements for settlement approval as expressed in *Rockwell Mining* and *AmCoal* and, on that basis, it is approved.

In sum the settlement amounts for the citations in issue are as follows:

Citation	Assessment	Settlement
4201556	$1,484	$1,484
9068232	$446	$244
9070540	$2598	$2,000
9070542	$666	$443
9070543	$722	$0 (Vacated by Secretary)
9065102	$446	$446
9065104	$615	$615
TOTAL:	**$6,977**	**$5,232**

Within 30 days of this Order approving this settlement, the Respondent shall send to MSHA a check in the amount of $5,232.00, made payable to "U.S. Department of Labor/MSHA", and mailed to the following address: P.O. Box 790390, St. Louis, MO 63179-0390.

WHEREFORE, the motion to approve settlement is **GRANTED.**

It is **ORDERED** that the respondent pay a civil penalty of $5,232.00. Upon receipt of timely payment, the captioned case is **DISMISSED**.

SO ORDERED.

William B. Moran

William B. Moran
Administrative Law Judge

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