FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 18, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2017-0370 A.C. No. 46-09029-435040
v.	
MINGO LOGAN COAL, LLC, Respondent	Mine: Mountaineer II

ORDER REJECTING SETTLEMENT MOTION AND NOTICE OF HEARING

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On November 8, 2017, the Secretary filed a motion pursuant to Section 110(k) of the Mine Act, 30 U.S.C. § 820(k), seeking approval of the proposed settlement ("Secretary's motion").[1] The Secretary's motion proposes a reduction in penalty from $20,280.00 to $14,242.00. The Solicitor specifically requests a reduction in penalty for Citation No. 9068069 from $12,075.00 to $6,037.00. Citation No. 9068069 alleges the following:

> The lifeline in the alternate escapeway is not located in such a manner for miners to use effectively to escape starting at the track switch for Cedar Grove Mains Section and extending for a distance of six crosscuts inby towards the #18 Head gate section. Directly under this lifeline [are] extraneous materials in the form of loose rock measuring from 2 inches up to 12 inches thick, and a track rail, and a wooden cable spoon.
>
> Standard 75.380(d)(7)(iv)[2] was cited 5 times in two years at [the subject] mine.

Citation No. 9068069. The violation was designated as a significant and substantial contribution to a mine safety hazard ("S&S").

[1] Section 110(k) of the Mine Act states that: "No 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." 30 U.S.C. § 820(k).

[2] 75.380 (d)(7)(iv) requires that "[e]ach escapeway shall be . . . [p]rovided with a continuous, durable directional lifeline or equivalent device that shall be . . . [l]ocated in such a manner for miners to use effectively to escape." 30 C.F.R. § 75.380(d)(7)(iv).

The motion submitted by the Secretary provided the following information in support of the penalty reduction:

> The Respondent has argued that the conditions cited in Citation Nos. 9068069 were not reasonably likely to result in an injury and therefore should not have been designated as S&S. The Secretary does not agree that such a showing is necessary for an S&S finding. However, as demonstrated in the recent Commission decision in *Consolidation Coal Company*, [39 FMSHRC 1737 (Sept. 2017)], the Secretary acknowledges the uncertainty of the outcome of that issue and has agreed to the reduced penalty amount in order to resolve this proceeding.

Secretary's Motion at 3.

On November 13, 2017, the solicitor was sent an email asking him to clarify the factual basis for the penalty reduction, which was entirely lacking from the original settlement motion, and to explain how the Commission's recent *Consolidation Coal* decision reflected uncertainty over the outcome of the S&S issue in this proceeding, given the Commission's well-settled case law that the existence of an emergency must be assumed when evaluating the reasonable likelihood of an injury resulting from a violation of an emergency standard.

The solicitor provided the following additional information in response:

> The justification for the agreed-upon reduction is the uncertainty of the outcome of the gravity and S&S issues being challenged by the Respondent. In the C*onsolidation Coal Company* decision, as well as in *Newtown Energy*, 38 FMSHRC 2033 ([Nov.] 2016), two of the current Commissioner's [sic] stated that the second element of the *Mathies* test requires a showing by the Secretary that the hazard contributed to was reasonably likely to occur. The Secretary does not agree with this reading of the *Mathies* test. Nevertheless, the Secretary recognizes that given the current split of opinion at the Commission, the outcome of this issue is uncertain. Even if an underlying emergency were assumed to have occurred, the Respondent argues that cited condition was not reasonably likely to result in fatal injuries to 20 miners as alleged in the citation. This was an alternate escapeway, miners would use the primary escapeway and the cited lifeline was in place and accessible. Should this matter go to hearing, the Secretary would argue that the gravity findings are supported. Nevertheless, the Secretary recognizes that the outcome of that issue is uncertain and the judge could rule in the Respondent's favor. The Secretary values a settlement where the citation is affirmed as issued. The Secretary has also considered that as part of the settlement, the Respondent has agreed to accept the other 6 citations in the docket as issued and as assessed.

Solicitor's November 13, 2017 email to the Court.

The solicitor was subsequently informed that this justification was insufficient and that the settlement could not be approved in its current form. The solicitor was also informed of the

following problems with the settlement motion that the parties could seek to avoid in an amended settlement motion.

Most significantly, even though the settlement does not delete the S&S designation, the substantial 50% penalty reduction proposed appears largely predicated on S&S arguments that are contrary to law. The Commission has repeatedly held, including after *Newtown*, that the existence of an emergency must be assumed when considering the reasonable likelihood of a hazard or injury for a violation of an emergency standard. *See ICG Illinois*, 38 FMSHRC 2473, 2476 (Oct. 2016). Additionally, the presence of a primary escapeway is immaterial to the analysis of whether a violation in the secondary escapeway was reasonably likely to lead to injury. In fact, the Commission and its ALJ's have previously rejected the exact same argument now offered by the parties in this matter for the exact same mandatory safety standard at issue here. *See Black Beauty Coal Co.*, 36 FMSHRC 1121, 1125 n.5 (May 2014) ("In challenging the S&S determination, Black Beauty raises the presence of other safety measures, such as a viable primary escapeway, . . . as mitigating the S&S determination. The Commission and courts have soundly rejected this line of argument.") *aff'g* 33 FMSHRC 1174, 1178-79 (May 2011) (ALJ) (rejecting this argument after finding that a primary escapeway "is equally vulnerable to the effects of a fire," which can "mak[e] it difficult, if not impossible, to see," and can cause "panic and disorientation" among even trained miners.) Neither *Newtown* nor the separate opinions in *Consolidation Coal* sought to overturn these holdings regarding the S&S analysis for escapeway or emergency standards. Therefore, the parties were informed that I could not accept such a substantial reduction in penalty based on arguments that run entirely counter to black letter law. Instead, the condition cited in and around the escapeway needed to be addressed standing on its own, and assuming an emergency event, in determining whether the operator's S&S arguments justified a reduction in penalty.

The solicitor was also asked to provide additional information clarifying the basis for the operator's argument that the cited lifeline was in fact accessible, since the citation seemed to suggest that the presence of extraneous material in the form of loose rock, a track rail, and a wooden cable spoon rendered the lifeline ineffective for use for a distance of six crosscuts. The solicitor was next informed that any arguments regarding fatal injuries to 20 miners, while not relevant to the S&S justification originally provided in the motion, may go to the gravity of the violation in an amended motion, but that I did not believe that this argument, alone, could justify a 50% penalty reduction. Finally, the parties were reminded of the information contained in the citation, noting that this was the fifth time in two years that the operator had been cited under this standard, and that this fact tended to argue against mitigation.

The parties were asked to promptly submit an amended settlement motion that addressed these issues, or else the matter would be set for hearing. No revision has been received.

Therefore, the Motion to Approve Settlement is **REJECTED** and the parties are **ORDERED** to appear for a hearing on the merits of the case.

NOTICE OF HEARING

In accordance with Section 105(d) of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. §§ 801, et seq., **this case is set for hearing in South Charleston, West Virginia, on February 16, 2018, commencing at 8:30 AM**. A subsequent notice will identify the courthouse location.

The hearing will be conducted in accordance with the Mine Act and the Commission's Procedural Rules addressing the subject, as set forth at 29 C.F.R. Part 2700, Subpart G. The issues to be resolved are whether the Respondent violated the Mine Act and the cited regulatory standards, and if so, the level of gravity and degree of negligence of those violations which are proved, as well as the appropriate civil penalty to be imposed.

The parties are reminded to comply with the terms of any prehearing orders previously issued. It is further ordered that any party intending to offer exhibits at the hearing shall submit, twenty (20) days prior to the commencement of the hearing, a marked copy of all exhibits to the opposing party and the judge. The Secretary's exhibits shall be designated "S-#" and Respondent's exhibits shall be designated "R-#." Exhibits shall be clearly marked and numbered seriatim. If opposing counsel has an objection to the admission of any exhibit, he or she shall state the grounds for the objection in writing and submit it to the judge and opposing counsel at least five (5) days prior to the commencement of the hearing.

A list of witnesses (including experts) and a statement as to their expected testimony (and copy of any report prepared by an expert) shall also be exchanged by the parties with a copy submitted to the judge twenty (20) days prior to the commencement of the hearing.

Any stipulations agreed upon by the parties shall be submitted to the judge five (5) days prior to the commencement of the hearing.

Any person planning on attending the hearing who requires special accessibility features and/or any auxiliary aids (such as sign language interpreters) must request those sufficiently in advance of the hearing to allow accommodation, subject to the limitations set forth in 29 C.F.R. §2706.150(a) and § 2706.160(d).

If a settlement is reached after the date set forth on this Notice, the parties are directed to contact my law clerk, Roshan Dhillon, at 202-233-4010 or at rdhillon@fmshrc.gov immediately. Unless a written Order is issued upon my direction removing the matter from the docket, the parties are directed to appear at the time and place designated for hearing.

If you have any questions or concerns, please contact Mr. Dhillon.

Priscilla M. Rae
Administrative Law Judge

Distribution (Certified Mail):

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