FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

January 27, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. KENTUCKY FUEL CORPORATION, Respondent.	CIVIL PENALTY PROCEEDING Docket No. KENT 2015-504 A.C. No. 15-19475-379792 Mine: Beech Creek Surface Mine

ORDER DENYING SETTLEMENT MOTION

Before: Judge Moran

This case is before the Court upon a petition for assessment of civil penalties under Section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a Motion to Approve Settlement. The Secretary originally proposed penalties totaling $69,400 for the two violations alleged and the motion seeks to settle them for penalties totaling $45,000, a 35% reduction. For the reasons which follow, the Secretary's Motion must be DENIED.

Citation No. 8300623

The Motion first addresses Citation Number 8300623, a section 104(a) citation, citing standard 30 C.F.R. § 77.404(a), and its provision that "[m]obile 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." The Secretary presents that the "Basis of compromise [is the] Fact of the Violation."[1] However, the fact of violation appears to be acknowledged in the motion. Instead, the Secretary offers the following[2] justification:

[1] Before presenting any information to justify the reductions, the Secretary habitually reasserts his view 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 parties' settlement under section 110(k) of the Mine Act, 30 U.S.C. § 820(k)." Motion at 2. The motion's reference to "the above summary" consists, in full, of the Secretary informing the Commission that he "*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*

> At hearing, Respondent would present evidence that the required pre-operational check under 30 C.F.R. § 77.1606(a) is conducted by an hourly miner, not a certified person. Respondent contends that the defects listed in this citation were not reported to mine management nor to the company maintenance staff. Many of the defects were cosmetic in nature, such as loose step, hood latch, and accumulations. None of the accumulations and the leaks was in proximity to a substantive ignition source. The operator admits that the remaining defects were

---

citations as indicated above." *Id.* (emphasis added). Along with that summary, the Secretary adds that, when considered with "the pleadings in this case," the Commission has "an adequate basis for exercising its authority to review and approve the parties' settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k)." *Id.* As the Secretary surely knows, "[t]he statements of fact in a party's pleadings are merely his contentions and are not evidence for himself unless admitted by his opponent." *Pullman Co. v. Bullard*, 44 F.2d 347, 348 (5th Cir. 1930). "The pleadings serve only as a rough guide to the nature of the case." *Minyard Enterprises, Inc. v. Southeastern Chemical & Solvent Co.*, 184 F.3d 373, 386 (4th Cir. 1999) (citing *Robinson v. Lorillard Corp.*, 444 F.2d 791, 803 (4th Cir. 1971)). Given that the pleadings are only contentions, under the Secretary's approach the Commission is left only with the Secretary's statement that *he* has evaluated the matter and that is that, there being no need to offer more than his conclusion that the settlement is appropriate. Therefore, while the Secretary acknowledges that the Commission has the "authority to review and approve the parties' settlement under Section 110(k) of the Mine Act," the Secretary's position is that such authority to review is to be made without facts, resting on the Secretary's mere assertion that the settlement is appropriate. *Id.* In other words, by the Secretary's interpretation of section 110(k), Congress intended by its words that "[n]o proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission," to mean that the Commission's approval role is purely perfunctory. The words of Section 110(k) instruct otherwise. For an excellent review of settlements under the Mine Act and the legislative history regarding that section, the reader is referred to Ellen Smith, "*History 101: Settlements Under the Mine Act.*" Mine Safety and Health News, May 14, 2014, http://www.minesafety.com/history-101-settlements-under-the-mine-act/.

[2] After protesting that he need not provide anything of substance to the Commission in settlement motions, the Secretary, ever reluctant to genuinely meet his obligation to provide sufficient information to justify penalty reductions, then proceeds to offer, in the alternative, his justification. An indication that his intention remains to provide as little information as possible, the Secretary's justification begins by noting that the Respondent refers to another standard than the one cited, 30 C.F.R. § 77.1606(a), which requires that "[m]obile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation [and that] [e]quipment defects affecting safety shall be recorded and reported to the mine operator." The Court notes that the standard cited for Citation No. 8300623 addresses *maintaining* equipment in safe operating condition, and that even the standard cited as a justification for a reduction requires inspection by a "competent person." The Respondent offers that the inspection was done by an "hourly miner, not a certified person." Motion at 3. This does not strike the Court as a mitigating factor. If anything, it suggests that § 77.1606(a) may have been violated as well.

> reasonably likely to result in a lost workday/restricted duty injury. However, they were not readily apparent and would not have been noted without the input from the miner conducting pre-operational check. Further, Respondent argues about this citation being specially assessed. Nonetheless, in the interest of compromise, Respondent is willing to resolve this contest with a reduction to the penalty amount.
>
> Although the Secretary does not concede the issue, he recognizes a legitimate legal and factual dispute and believes settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act. The Secretary agrees to accept a reduced penalty.

Motion at 3-4. Based on those representations, the parties propose a 39% reduction from the proposed (special) assessment of $27,900 to $17,000.

The section 104(a) citation and the four continuation sheets which followed its issuance present a far different picture. Those documents, all part of Citation No. 8300623, issued December 1, 2014, assert:

> The red auto car grease truck, unit #7175, is not being maintained in safe operating condition. Several safety hazards, mechanical defects, and over worn components that directly affect the ability to safely operate this vehicle exist.
>
> A list of these issues follows:
>
> The operator's foot pedals, located inside the cab of this truck are worn, making them slick. This condition also adds to the difficulty and inability of the operator to bring this truck to a stop. Accumulations of the combustible material in the form of diesel fuel are present on the engine's diesel fuel injector pump, the diesel fuel transfer pump that is used to fill equipment, as well as a diesel fuel supply line coming from the left side diesel fuel tank supplying fuel to the motor of this truck. Additional leaks on of combustible materials, in the form of power steering fluid, are coming from the steering box's input shaft seal and the hose supplying oil to the power steering box.
>
> Extraneous material are present on the inside of the cab of this truck in the form of soda bottles, cans, oil and fuel filters, spare equipment light housings, hand cleaner, and a wooden plank.
>
> Safe means of access to the cab and rear service deck of this truck is not being provided. Both the mounting straps located on the fuel tank on the operator's side are broken. These are the mounting straps that the steps to board this truck are attached.
>
> The offside lower step is very loose and has one of the two present mounting bolts missing.

> Tripping hazards on the service deck are present from miscellaneous hydraulic hoses lying scattered out over the service deck. Gross amounts of oil and grease are present on the service deck of the truck and has been allowed to obviously accumulate in this area over and [sic] extended period of time. The accumulations of slick lubricants and extraneous material present in this area creates a tripping hazard situation for employees that access this area to obtain use of the filling nozzles and refill the oil tanks and grease drum.
>
> The front hood latches on both sides were broken and inoperative. The hood is the type that opens forward toward the front of the truck. Without the latches in place the hood could open forward and block the visibility of the operator.
>
> The pitman arm on the output shaft of the steering box is loose. Total loss of control of the direction the vehicle is traveling, would occur when this comes loose.
>
> The right side rear tandem outside tires has a 2 and ½ inch x 9 inch x ¼ inch deep section of rubber missing from the tire's sidewall area.
>
> The left side rear tandem outside tire has a groove worn the entire diameter of the tire 3/8 of an inch wide x 1/8 of an inch deep.
>
> A braking system air leak is present at the rear tandem splitter valve. The suspension's rear tandem left side front leaf spring is damaged and bent due to excessive stress. This condition is allowing the truck's frame to sit in a lower position than normal and the frame is coming in contact with the tires. This condition will cause the tires to explode and blow out due to the wear caused by friction of the tires rubbing the frame when moving. The two rear tandem axle wheels have lug nuts loose on three out of four wheels. Due to the excessive heavy loads this truck carries, this condition will cause the wheels to come off of the truck and the truck to overturn. Work practices of allowing equipment to operate with this many hazardous conditions constitutes extremely high negligence. This truck is used to service all equipment on this surface mine two times a day and seven days a week.

By December 22, 2014, the continuation report, (8300623-01), advised: "The affected truck remains out of service and at the mine site. A decision hasn't been made on the future of this truck due to the mine economy." On January 9, 2015, a subsequent continuation report, (8300623-02), advised: "The affected truck remains out of service and at the mine site. Additional time is needed for the truck to be moved and made inoperative." The January 19, 2015 continuation report (8300623-03) noted: "The affected truck has been towed off mine property. Additional time is needed to determine what's going to be done with truck."

The recounting ends with the continuation report dated January 20, 2015, (8300623-04), which advised:

> The red auto car grease/lube unit #7175 was removed from the mine site and being towed to Blue Ridge Farm Center in Buchanan, Va. The violation is terminated due to removal from the mine site and transport off mining property. Prior to its removal the cited conditions had not been repaired by the operator. The mine operator was notified that prior to resuming mining activities at this or any other mine site, he is required to comply with the cited standard and notify MSHA.

The Court's problems with the settlement motion are severalfold. First, depending on how one subdivides the various safety hazards identified in the detailed three (3) page citation, by the Court's count, there were at least 9 (nine) separate hazards identified. The Court does not understand the basis for claiming that "[m]any of the defects were cosmetic." Motion at 3. In fact, reading the citation, none appear to be cosmetic. The Court also does not understand the claim that the hazards were "not readily apparent" as the text of the citation implies that they quite obvious. The narrative for the Special Assessment asserts the "numerous hazards had existed for an extended period of time."

Another issue is that the Secretary "does not concede" any of the Respondent's claims. Yet, without any elaboration, he offers only 8 (eight) words in support of it: "[The Secretary] recognizes a legitimate legal and factual dispute." Motion at 4. Such claimed justification does not meet the requirements of section 110(k). The Secretary will need to weigh in, with particularity, regarding the nine hazards identified in the citation and explain the factual disputes and which, if any of the named conditions, the Secretary believes may be argued as "cosmetic in nature." As noted, the standard cited speaks to maintaining equipment in safe operating condition and does not turn upon nor envision mitigation based on a claim that it was examined by an hourly employee. When equipment is not maintained in such condition, the standard requires that it be removed from service immediately. The importance of the cited standard, as the Narrative Findings for the Special Assessment informs, is also one of the Agency's "Rules to Live By."[3]

Citation No. 8296781

Similar deficiencies exist for the section 104(d)(1) Order, No. 8296781,[4] issued December 10, 2014, which alleges a violation of 30 C.F.R. § 77.1713(a). That standard provides:

[3] MSHA's "'Rules to Live By' is an initiative to prevent fatalities in mining [which was spawned by the fact that] [t]oo many miners still lose their lives in preventable accidents." MSHA, "Fatality Prevention – Rules to Live By," http://www.msha.gov/focuson/rulestoliveby.asp.

[4] In the Secretary's Motion, initially he correctly identifies this matter as No. 8296781, but then later mislabels it, in describing the offered basis for the reduction as pertaining to No. 8300623, which actually relates to the 104(a) citation discussed above. Motion at 4.

> Daily inspection of surface coal mine; certified person; reports of inspection. (a) At least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator.

For this alleged violation, the "Basis of Compromise" is listed as "Gravity." The motion asserts:

> At hearing, Respondent would present evidence that it was unlikely that a fatal injury would have occurred from the underlying cited condition. Respondent contends that the condition cited was the result of bad blasting practice engaged by the blasting contractor. The resulting materials had been identified by mine management. Respondent contends that all miners were alerted to the safety hazards in the areas, and appropriate steps were in process to remove these safety hazards. Respondent argues that even though the conditions had not yet been recorded in the book, the operator had notified MSHA of the problems and had submitted a proposed addendum to the ground control plan outlining the steps to be taken to correct the issue. The addendum was subsequently approved by MSHA shortly after this enforcement action was issued. Further, Respondent argues about this citation being specially assessed. Nonetheless, in the interest of compromise, Respondent is willing to resolve this contest with a reduction to the penalty amount.
>
> Although the Secretary does not concede the issue, he recognizes a legitimate legal and factual dispute and believes settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act. The Secretary agrees to accept a reduced penalty.
>
> Amount of the penalty proposed by the Office of Assessments: $41,500.
>
> Amount of the penalty proposed by the parties: $28,000.

Motion at 4.

Thus, the Secretary advances the same 8 (eight) words, and nothing more, in support of his motion for this alleged violation, that "he recognizes a legitimate legal and factual dispute." Motion at 4.

In contrast, the (d)(1) order asserts:

> Adequate on shift exams are not being conducted at this mine site in that they are not reflective of the actual conditions found. On this date, hazards were observed in the pits, on the dumps, on the drill benches, and on the safety catch bench areas

> and none of them were recorded in the exam book (see citation No. 8296765[5]). The foreman were [sic] aware of the conditions, as they were obvious and extensive, and failed to record them in the exam book or to take corrective actions. This is an unwarrantable failure to comply with a mandatory standard in that the foreman has engaged in aggravated conduct by failing to detect and correct the hazardous conditions exposing numerous miners to the hazards for several shifts. This is the third time this standard has been cited in 9 months at this mine.

Order No. 8296781.

Of note, the Order applied to the entire mine and, adding detail that the party cited in the prior instances was the operator, not a contractor, it also advised that "Standard 77.1713 (a) was cited 2 times in two years at mine 1519475 (2 to the operator, 0 to a contractor) and the inspector deemed it be "an unwarrantable failure to comply with a mandatory standard."

The Order was terminated:

> on the basis that the foreman has received additional training on the requirements of the ground control plan, hazard recognition, and on conducting better on shifts exams. An exam was conducted by the 2nd shift foreman, of active work areas, and the location of the exam, hazards observed, and corrective actions were recorded in the on shift book.

Order 8296781-01, initialed on December 12, 2014.

The Secretary again has offered nothing in terms of identifying the "legitimate legal and factual" dispute that he "recognizes." Thus, although the basis for the reduced penalty is framed as if it is different from the Secretary's original stance that he not provide any information to the Commission because the pleadings and his summary are sufficient and because 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 fact is the Secretary has not provided more information to the Commission, presenting instead only the Respondent's version, coupled with the remark that none of that version is conceded by him.

Of concern and not addressed is the inspector's statement in the section 104(d)(1) order that the failure to conduct the on shift exams was mine-wide, with hazards observed in the pits, on the dumps, on drill benches, and on safety catch bench areas, and with none of the hazards recorded in the exam book. As also noted, the Order asserts that "the foreman [was] aware of the conditions [which were] obvious and extensive." The inspector deemed the foreman's failure to be aggravated conduct by his failing both to detect and correct the many hazards, which miners were exposed to "for several shifts." Order 8296781. The Order makes no mention that "the

[5] The inspector intended to reference Citation No. 8296780, not Citation No. 8296765. The Secretary filed a motion to amend the 104(d)(1) order, which the Court granted. *See* Order, October 16, 2015.

condition cited" was attributable to a blasting contractor, describes *multiple conditions*, not one, and that the foreman was aware of the obvious and extensive hazards, yet failed to record them in the exam book and also failed to take corrective actions. The settlement does not advise if there was a blasting contractor, nor if there was, whether that contractor was also cited. For his part, the Secretary addresses none of these matters in the Motion.

Another problem with the Secretary's offering is that the motion, as with all of the Secretary's settlement motions encountered by this Court, fails to inform whether the Secretary has consulted with the issuing inspector about the claims made by the mine operator. One would anticipate that the Secretary would want to reach out to the issuing inspector as part of the process of evaluating conflicting factual claims. A failure to engage in such practice seriously undercuts the diligent efforts of MSHA's dedicated inspectors and can only be expected to dampen those efforts if the problems identified are disposed of without such consultations and with as few as eight empty words.

If the parties cannot supply sufficient additional explanations/justifications for the motion, the Court will set the matter for hearing.

Conclusion

It seems more than unlikely that Congress would have taken the time to create a specific subsection within the topic of penalties for Mine Act violations to create only a paper, and purely ministerial, role for the Commission. That provision arrived in the context of a historical progression, as each iteration of Congressional legislation addressing mine safety and health recognized the prior legislation's shortcomings and from those lessons sought to strengthen the protection for miners.

Based on the foregoing reasons, the motion is DENIED. It is important that the parties understand that this decision does not suggest that a settlement motion can never be approved. Rather, it is a statement that the Secretary has failed to do his job and by that failure has prevented the Court from performing its job — carrying out Congress' will, per section 110(k).

Only when armed with sufficient information, can the Court, acting in the first instance for the Commission, make sure that compromises, mitigations, and settlements are substantially justified. Such adequate information may result in the approval of the settlement amount as originally presented or, as the facts may warrant when fully presented, a lesser or greater civil penalty.

So Ordered.

William B. Moran

William B. Moran
Administrative Law Judge

Distribution:

Dominique Gutierrez, Attorney, United States Department of Labor, Office of Solicitor, 211 7th Avenue North, Suite 420, Nashville, TN 37219

James F. Bowman, Representative, Kentucky Fuel Corporation P.O. Box 99, Midway, WV 25878