

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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April 8, 2015

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

v.

JACOBS FIELD SERVICES,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2014-96-M  
A.C. No. 02-00024-333771 1PL

Mine: Freeport-McMoRan Morenci Mine

**ORDER**

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Secretary has filed a motion to approve settlement.<sup>1</sup> The Court reviewed the motion and upon such review had some question relating to one of the citations. The motion stated:

Citation No. 8755380: Respondent was cited for a violation of 30 C.F.R. § 56.20003(a). Specifically, the Secretary alleges that the Respondent failed to keep the walkways free of protruding nails. There were four boards with nails protruding out of them located at the 4500 lay down yard. Respondent takes the position, and would have alleged at hearing, that the area was clean and the boards were not in a walkway and further that the nails were very small and would not cause a serious injury if stepped on. Without conceding any merit to Respondent's arguments, the Secretary acknowledges that there may be legitimate factual and legal disputes regarding gravity and negligence at hearing and therefore has agreed for settlement purposes to reduce the likelihood to unlikely, to remove the S&S designation and to reduce the proposed penalty from \$1,795.00 to \$800.00.

Thereafter, on March 25, 2015, the Court sent an email to the parties' representatives, requesting additional information in light of the 55% reduction from the proposed penalty, stating:

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<sup>1</sup> The originally assessed amount was \$28,543.00, and the proposed settlement is for \$20,022.00. The Respondent agreed to pay the penalties for 11 out of the 19 violations as originally assessed by the Secretary.

[T]he Court directs the Secretary to provide the inspector's notes and any photographs taken for this citation. Second, the Court needs more information in support of the Respondent's contention that the boards were not in a walkway. It is not enough to simply state they were not in a walkway, nor does asserting that the 'area was clean' address the cited issue—protruding nails in 6 boards. The basis for that counter contention needs to be explained. In this regard, the Court notes its related concern that the cited standard is not limited to walkways but includes working places and passageways and that the definition of the former is quite expansive. Further, what is the support for the claim that the nails were 'very small?' The citation states they protruded 2 to 3 inches out. If one examines a ruler, it is plain that a 2 inch protruding nail could easily penetrate even a thick work boot sole and that a 3 inch nail would present a greater hazard. For these identified reasons, the Court needs the additional information described above.

The Court then received responses from both counsel. The Secretary's Counsel stated:

The Secretary requests that the Court issue a formal written order directing him to produce the requested information so that we may respond formally. I believe the Respondent is willing to provide further information and arguments to the Court, but in the event that is not enough, my superiors have directed me to request that the Court issue a formal order.

The Respondent's counsel, in response to the Secretary's request for an Order, provided the following information to the Court:

The Secretary informed Respondent that it would require the court to issue a formal order to produce the MSHA inspector notes and photographs pertinent to the court's request. Respondent also understands the court has requested additional information/documentation in support of its settlement position. While Respondent is working to pull together additional information, the key support to Respondent's settlement position are the MSHA inspector's notes and photographs the court requested from Petitioner. Respondent has the MSHA inspector notes and photographs supplied to it during discovery and is willing to provide them if Petitioner is not. Please advise on how to proceed.

The entirety of the Secretary's Motion in support of the reduction for this citation provided:

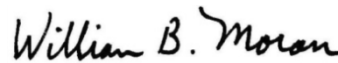
Specifically, the Secretary alleges that the Respondent failed to keep the walkways free of protruding nails. There were four boards with nails protruding out of them located at the 4500 lay down yard. Respondent takes the position, and would have alleged at hearing, that the area was clean and the boards were not in a walkway and further that the nails were very small and would not cause a serious injury if stepped on. Without conceding any merit to Respondent's arguments, the Secretary acknowledges that there may be legitimate factual and

legal disputes regarding gravity and negligence at hearing and therefore has agreed for settlement purposes to reduce the likelihood to unlikely, to remove the S&S designation and to reduce the proposed penalty from \$1,795.00 to \$800.00.

It should be noted that the Secretary merely recited its position and that of Respondent's but made no concession at all as to the accuracy of the Respondent's contention that "that the area was clean and the boards were not in a walkway and further that the nails were very small and would not cause a serious injury if stepped on." Instead, it remarked without any elaboration or identification "that there may be legitimate factual and legal disputes regarding gravity and negligence at hearing and therefore has agreed for settlement purposes to reduce the likelihood to unlikely, to remove the S&S designation and to reduce the proposed penalty from \$1,795.00 to \$800.00."

Given the large proposed reduction, the mere recitation of the parties' respective takes on the issue and the absence of any supportive information, the Court requested additional information so that it could carry out its responsibilities under Section 110(k) of the Mine Act. Oddly, and contrary to what one might anticipate, the posture of this case is such that the Respondent is quite willing to provide the requested information, but the Secretary is not. Now, given the Secretary's refusal to provide the requested information without an order from the Court, the Court hereby ORDERS the Secretary to provide the information, identified above, from its earlier email. In these settlement motions, which the Secretary continues to balk at providing sufficient information to enable the Commission to conduct an appropriate and informed review, the Secretary has repeatedly invoked its support for "transparency." It is in that spirit of transparency that the Court initially requested, and now Orders, the information in this instance.

SO ORDERED.



William B. Moran  
Administrative Law Judge

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