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May 2, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2011-0013
Petitioner,	:	A.C. No. 11-02752-232235
v.	:	
	:	
THE AMERICAN COAL COMPANY,	:	Mine: New Era Mine
	:	

ORDER DENYING SETTLEMENT MOTION

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, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). The Secretary has filed a "new" motion to approve settlement, but it is new only in the sense of its filing date. The Secretary continues to resist complying with the Commission's requirements for settlements. Accordingly, for the reasons which follow, the Secretary's motion is **DENIED** and the parties are **ORDERED** to participate in a conference call with the Court on **Friday May 5, 2017 at 12:00 p.m. EDT** for the purpose of setting a hearing date for this docket, which shall be held promptly.[1]

This matter now has a very long history. Over four years ago the Secretary embarked on its goal of emasculating section 110(k) of the Mine Act. The Court in its Decision Denying Settlement Motion, issued February 11, 2013, noted that:

> [t]he Motion seeks an across-the-board reduction of 30 (thirty) percent for each of the 32 citations involved. That, in itself, is a red flag. The idea that every one of 32 citations could warrant a 30% reduction demonstrates, by that fact alone, that the reductions were more in the nature of yard sale, rather than any individualized review meriting, by some impossibly small odds, that each just happened to have earned such an implausibly uniform reduction.

The American Coal Co., 35 FMSHRC 515, 515 (Feb. 2013) (ALJ) (emphasis omitted).

[1] The call-in number will be provided in a separate email to the parties.

In denying the motion, the Court observed that:

> [t]he *entirety* of the justification provided: 'After further review of the evidence, the Secretary has determined that a reduced penalty is appropriate in light of the parties' interest in settling this matter amicably without further litigation. In recognition of the nature of the citations at issue, and the uncertainties of litigation, the parties wish to settle the matter with a 30% reduction in the total assessed penalty with no changes in gravity or negligence for any of the citations at issue.' If this were a satisfactory justification, then every case would warrant a 30% reduction to avoid the 'uncertainties of litigation.'

35 FMSHRC at 515-16.

So began the Secretary's effort to overlook the plain meaning of Section 110(k). As will be set forth below, the Secretary's latest motion, too clever by half, is nothing more than its latest gambit, displaying the same, tired, recalcitrant behavior, all with the obvious purpose of continuing to avoid complying with section 110(k) of the Mine Act.

Before examining the Secretary's latest ploy, it is worth revisiting that there is nothing particularly difficult, nor onerous, required for the Secretary to comply with the Commission's long-standing requirements for section 110(k) and the *Secretary has himself* repeatedly demonstrated that to be the case. In numerous other cases, examples of which were provided to the Secretary by the Court *from his own submissions* to the Commission, the Court reminded the Secretary how this is done in the appendix to its May 13, 2014 Order Denying Motion for Approval of Settlement Upon Secretary's Motion for Reconsideration. *The American Coal Co.*, 36 FMSHRC 1489, 1503-1522 (May 2014) (ALJ). Because the Secretary seems to have forgotten how this is done, two examples from the appendix to the Court's May 13, 2014 Order are repeated here. These examples are from the *Secretary's submission* for approval of a settlement in another case, *Sec. v. Brooks Run Mining*, Docket No. WEVA 2010-468:

> Citation No. 8089450 was issued to the Respondent on October 20, 2009 and alleged a violation of 30 C.F.R. § 75.517 and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that one person was affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $499.00. The Respondent contends that the likelihood of injury and level of negligence alleged are excessive, and states that at hearing it would present evidence that the individual leads of the allegedly damaged cable were insulated, that there was no damage to the inner power or ground conductors and that the condition had existed for only a short time and would have been discovered during the next examination. In light of the contested evidence, the Secretary has agreed to modify the likelihood from "reasonably likely" to unlikely," to modify the citation from "significant and substantial" to not significant and substantial," to modify the negligence from "moderate" to "low,"

and to reduce the penalty to $275.00.

> Citation No. 8089451 was issued to the Respondent on October 22, 2009 and alleged a violation of 30 C.F.R. § 75.220(a)(1) and 104(a) of the Act, 30 U.S.C. § 814(a). The Secretary determined that the violation was reasonably likely to cause an injury; that an injury from the cited condition could reasonably be expected to result in lost workdays or restricted duty; that the violation was significant and substantial; that two persons were affected; and that the operator's conduct in the violation demonstrated a moderate degree of negligence. The Secretary assessed a penalty of $540.00. The Respondent contends that the likelihood of injury alleged is excessive, and states that at hearing it would present evidence that the roof in the cited entry was too high for the automated temporary roof support system to effectively control the roof, the roof conditions were good and the top was solid, stable and secure and that any roof sloughage was addressed by the installation of "pizza pans" and 6-foot torque tension bolts. The parties agree that this citation will remain as issued with no modifications, but in light of the contested evidence, the Secretary has agreed to reduce the penalty to $475.00.

Unpublished Order dated Nov. 4, 2013; *see* 36 FMSHRC at 1519-20.

The reader should take note that the justification for the penalty reductions in those two citations provided a factual basis to support them.

More recent settlement motions before this Court demonstrate that, when the Secretary drops his mulish stance, he is quite able to provide the kind of facts the Commission needs in order to meet its statutory obligations under section 110(k).

For example, in *Sec. v. Triad Underground Mining LLC*, LAKE 2017-0007, ("*Triad*"), the Secretary filed his Motion to Approve Settlement before the Court on January 26, 2017. That case involved a single citation, No. 9036792, for which a penalty reduction of 24 percent, from $3,300 to $2,500, was sought.

In support of his Motion, despite some grammatical errors, the Secretary presented facts in dispute, stating:

> The Respondent has communicated plausible arguments as to why the gravity and/or negligence findings for this violation should be reduced. The Respondent would present evidence at hearing that, among other things, the examiner did not observe any hazards during his previous examination [sic] therefore no hazards were recorded in the Record Book. The accumulations referenced in the citation had occurred after the previous examination due to a coal spill. The hazard referenced in the inspection notes, accumulations of coal at the take up, had just occurred due to a spill and had not existed for two shifts [sic] therefore management could not have known. The Respondent contends that the negligence should be evaluated at "Moderate or Low" based on the mitigating circumstances provided. The Respondent contends that it is not reasonably likely that the

> accumulations of coal would [ ] result in a Lost Workdays injury. Also the Respondent provided evidence that this mine is in "Non-Producing Status", has no production crew and none of the belts are currently in operation, and when verified through reviewing the Uniform Mine File of record at MSHA, this mine was placed in "Non-Producing Status" on 09/06/2016. The Respondent further argues that management was not aware of the condition and would have promptly corrected the condition as soon as management was made aware of the condition. The Respondent asserts that there was not a "Confluence of Factors", no ignition source identified, along this belt that would cause and/or contribute to a belt fire. Also, the Respondent would argue that there was normally only one miner working and/or traveling within the cited area and would request the number of persons affected be modified from "2" to "1'. However, the respondent agrees to pay a reduced penalty and there will be no change to the violation as issued. The Secretary acknowledges that any or all of respondent's arguments regarding gravity or negligence may be persuasive at a hearing on the merits and has agreed, based on evidence presented, to reduce the proposed penalty *in consideration of the six statutory criteria in Section 110(i)* of the Federal Mine Safety and Health Act of 1977 as amended by the MINER Act of 2006 (the Act).

Motion at 4-5 (emphasis added).

The Court calls attention to four observations from the Secretary's Motion in *Triad*. First, the Motion demonstrates that the Secretary is not confused; he knows full well what needs to be provided to the Commission when inclined to respect the command of section 110(k). Second, the Secretary recognizes that *facts* which are in dispute need to be identified. Third, it is neither difficult nor burdensome to gather such facts to explain the basis for the reduced penalty. Fourth, the Secretary recognizes that such disputed facts must be tied to the six statutory criteria in Section 110(i), a requirement the Commission has made plain.[2] As the Commission stated less than a year ago:

> The requirements to provide *factual support in the settlement proposal* and for the Judge's decision approving settlement to be supported by the record have been largely unchanged since the inception of the Commission's procedural rules in 1979. … The Commission has recognized that standards for such factual support may be found in section 110(i).

The American Coal Company, 38 FMSHRC 1972, 1981 (Aug. 2016) ("*American Coal*") (emphasis added).

[2] While the Secretary asserted in *American Coal* that it is inappropriate for a judge to consider section 110(i) factors when considering whether to approve a proposed penalty settlement, the Commission directly stated, "We disagree." *The American Coal Company*, 38 FMSHRC 1972, 1981 (Aug. 2016). For instance, in *Black Beauty*, the Commission held that it was not error for the Judge to request factual support relating to the six criteria set forth in section 110(i) for her consideration of the penalties agreed to by the parties. *Black Beauty Coal Company*, 34 FMSHRC 1856, 1864 (Aug. 2012).

Now, with a zombie-like persistence, the Secretary refuses yet again to comply with the Commission's explicit direction, a direction the Secretary implicitly accepted by its recent decision to file, on March 16, 2017, his *Motion to Withdraw* its Petition with the Court of Appeals for the District of Columbia. Motion at 1 (emphasis added).

As with the Secretary's original, insufficient, justification in February 2013 for its 30% across-the-board reduction, its new offering, while dressed-up, is just as empty as its original formulation because it again provides *no facts* to support the reduction sought. In the Court's original rejection of the Secretary's Motion, issued in February 2013, it noted the "impossibly small odds," that each of the 32 citations warranted a 30% penalty reduction. 35 FMSHRC at 515. As set forth below, the Secretary now offers a host of non-factual excuses, untethered to any specific citation. Further, there is no information associating any of the citations to the statutorily identified penalty factors. While wordier, the Secretary sets forth its new justification and again, against all odds, miraculously arrives at the same conclusion it served up four years ago — a 30% across-the-board reduction. The translation of all this is, effectively, "*we were right all along*."

Here then, is the Secretary's latest offering:

> Counsel for the Secretary reviewed the entire case, including all 32 citations, the inspectors' notes, the views of officials in the district office, and American Coal's position statement, as well as privileged information that would be improper or imprudent to share with the court and opposing counsel concerning the evidence developed in this case. Counsel concluded that there is substantial risk that the court could reduce the degree of negligence or gravity with respect to 14 of the 32 citations. One additional citation runs the risk of vacatur because of a legal dispute between the operator and the Secretary regarding the applicability of the standard to the cited condition. The Secretary does not consider this case to be a well-chosen vehicle by which to litigate that legal dispute… If, after trial, the Secretary were to receive adverse decisions with respect to each of the citations that counsel believes to entail such risks- a worst-case outcome the Secretary does not believe would occur but is obligated to consider-the resulting penalty based on the Part 100 penalty tables would reflect an approximately 50% reduction from the penalties originally proposed by the Secretary. Accordingly, the Secretary has concluded that an across-the-board 30% reduction reflects an appropriate compromise. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. … The Secretary considers the fact that the proposed settlement preserves all of the citations as written to be a significant advantage of the compromise. This fact will assist the Secretary in future enforcement efforts against this operator by

> ensuring that the paper record reflects the Secretary's views regarding the gravity and negligence of the operator's conduct. As the Commission is aware, such determinations can affect the proposed or assessed penalty in future proceedings, can affect whether future citations are classified as unwarrantable failures within the meaning of Section 104(d) of the Act, and can bear on how the citations are counted for purposes of determining whether the operator has demonstrated a pattern of violations within the meaning of Section 104(e) of the Act. … Indeed, even if the Secretary were to substantially prevail at trial, and to obtain a monetary recovery similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all the citations are admitted and can constitute a basis for future enforcement actions. A resolution of this matter in which all violations are admitted is of significant value to the Secretary and advances the purposes of the Act. … Based on the course of negotiations and counsel's experience, the Secretary does not believe that the mine operator would have agreed not to contest all of the violations without a reduction in the monetary amount of the penalty. Based on the calculations above of litigation risk, a 30 percent reduction is reasonable from the Secretary's perspective in exchange for a guarantee that none of the violations will be set aside or modified. … Because the violations are all being admitted, an across-the-board reduction in penalties is reasonable. The value of an admitted violation from a future enforcement perspective does not depend on the size of the penalty so much as it does on the nature of the violation, including the alleged levels of negligence and gravity. There was no reason for the parties to negotiate different or variable reductions for each individual citation; doing so would have required sensitive discussions of the strengths and weaknesses of the Secretary's case, and given that American Coal has agreed to accept each citation as written, reallocation of the penalty amount on a citation-by-citation basis would undermine the Secretary's ability to effectively and efficiently enforce the Act.

Secretary's March 30, 2017 Motion at 2-4.

The Secretary confuses logorrhea with providing factual support. They are not the same. The long-winded statement is easily translatable — the Secretary's position has not changed; he continues to assert that settlements are within the Secretary's unreviewable discretion. The essential problem with the Secretary's latest motion is that it does not provide a penalty-factor related explanation to support the uniform 30%, reduction for each citation.

Importantly, in the larger picture, if this formulation were to be accepted by the Court, apart from the failure to meet 110(k)'s language, *every case* the Secretary submitted for settlement hereafter could adopt essentially the same language presented here. In that way, though it failed to prevail before this Court, and then failed *again* before the Commission and, effectively, failed for a *third time*, after he decided to *withdraw* his appeal before the United States Court of Appeals for the District of Columbia of those prior denials, this non-factually based language in his present motion,

if accepted, would enable the Secretary to achieve his original goal of unfettered, unreviewable settlement offerings before the Commission.

Nor can the non-factually based language be viewed as a one-off event. That the Secretary would now take this dressed-up formulation of non-compliance for future cases is not speculation. In other recent settlements the Secretary has been providing similar, uninformative, language, to wit:

> In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty total. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which all alleged violations are resolved and violations that are accepted can be used as a basis for future enforcement actions. A resolution of this matter in which all violations are resolved is of significant value to the Secretary and advances the purposes of the Act.

See, e.g., the settlement motions filed by the Secretary in *Omega Highwall*, VA 2016-0008 (April 26, 2017), *Edgar Minerals*, SE 2017-0029 (April 27, 2017), and *Greenbrier*, WEVA 2017-0091 (April 26, 2017), each of which contain this verbiage.

Meeting the requirement of Section 110(k) requires that civil penalties are to be assessed upon the Commission considering:

> the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.[3]

30 U.S.C. 820(i); *American Coal* at 1977.

[3] Included here for the sake of completeness, the remainder of section 110(i) then speaks to the distinct subject of the Secretary's *proposing* civil penalties by providing: "In proposing civil penalties under this chapter, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors."

The Commission, in its August 25, 2016 decision in this case, left no room for the apparent confusion or obstinate stance that the Secretary has renewed here.

As the Commission stated:

> [t]he legislative history of section 110(k) describes the Congressional rationale behind the provision in great detail. The Senate Report states that the 'compromising of the amounts of penalties actually paid' had reduced 'the effectiveness of the civil penalty as an enforcement tool.' S. Rep. No. 95-181, at 44 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of* 1977, at 632 (1978) ("Legis. Hist."). The Committee explained that in investigating the penalty collection system under the Federal Coal Mine Safety and Health Act of 1969, it learned 'that to a great extent the compromising of assessed penalties [did] not come under public scrutiny,' and that '[n]egotiations between operators and Conference Officers of MESA [MSHA's predecessor] are not on the record.' *Id.* It noted that even after a petition for civil penalty had been filed, 'settlement efforts between the operator and Solicitor [were] not on the record, and a settlement need not be approved by the Administrative Law Judge.' *Id.*
>
> In fashioning a solution to this problem, Congress emphasized the need for transparency in the penalty process, stating that 'the purpose of civil penalties, [that is,] convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public,' where miners, Congress, and other interested parties 'can fully observe the process.' *Id.* at 633. 'To remedy this situation,' section 110(k) 'provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission' and that a 'penalty assessment which has become the final order of the Commission may not be compromised except with the approval of the Court.' *Id.*
>
> Congress explained that '[b]y imposing [the] requirements" of section 110(k), it "intend[ed] to assure that the *abuses involved in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided*." *Id.* (emphasis added). Congress expressed its 'inten[t] that the Commission and the Courts will assure the public interest is adequately protected before any reduction in penalties.' *Id.*

American Coal at 1975-76.

Anticipating the type of empty settlement the Secretary has presented yet again in this case, the Commission set forth its standard for reviewing proposed settlements of contested penalties. The Commission's standard, based upon the language of section 110(k) and the legislative history for that section, is designed "'in order to ensure that penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest.' . . . The Commission's consideration of proffered settlements has worked well for more than 35 years.

Id. at 1976 (quoting *Black Beauty*, 34 FMSHRC at 1862).

Thus, the Commission summarized that it:

> must have information sufficient to carry out this responsibility. Consequently, through its procedural rules, the Commission has required parties to submit *facts* supporting a penalty amount agreed to in settlement. In particular, Commission Procedural Rule 31 requires that a motion to approve penalty settlement must include for each violation the penalty proposed by the Secretary, the amount of the penalty agreed to in settlement, and *facts* in support of the penalty agreed to by the parties. 29 C.F.R. § 2700.31(b)(1). Rule 31 also requires that "[a]ny order by the Judge approving settlement shall set forth the reasons for approval and shall be supported by the record." 29 C.F.R. § 2700.31(g). The requirements to provide *factual support* in the settlement proposal and for the Judge's decision approving settlement to be supported by the record have been largely unchanged since the inception of the Commission's procedural rules in 1979. See 44 Fed. Reg. 38,226, 38,230 (June 29, 1979).

Id. at 1981 (emphasis added).

Conclusion

Now, more than four years later, the Secretary continues to refuse to provide any facts to support the proposed settlement of 32 reduced penalties. The game is over. Given that Counsel for the Secretary has represented in its current motion that it has, "reviewed the *entire* case, including *all* 32 citations, the inspectors' notes, the views of officials in the district office, and American Coal's position statement, as well as privileged information that would be improper or imprudent to share with the court and opposing counsel concerning the evidence developed in this case,"[4] there can be no need for the delay resulting from depositions, nor is there any other impediment to proceeding immediately to hearing in this matter.

William B. Moran
Administrative Law Judge

[4] *See*, Sec's Motion at 2 (emphasis added).

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