FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 11, 2023

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEVA 2023-0141 A.C. No. 46-09569-568207
v.	
CONSOL MINING COMPANY LLC, Respondent	Mine: Itmann No. 5

ORDER DENYING MOTION TO APPROVE SETTLEMENT AND STRIKING MATERIAL FROM MOTION

On April 25, 2023, a Commission ALJ issued an order noting with disapproval the Secretary's ongoing citation to *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 880, 882 (June 1996), as authority for her removal of the significant and substantial designations from citations during the settlement process. *See* Decision Approving Settlement with Significant Reservations, Docket no. PENN 2022-0129, at 4–6 (Apr. 25, 2023) (ALJ) ("Reservations"). Commission judges have routinely observed that *Mechanicsville*, and the also oft-cited *American Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576 (Aug. 2020), cannot support the premise for which they have been cited.[1]

In this instance, though, the Judge correctly pointed out that parties have a duty not to misstate case law and that such misconduct has been affirmed as sanctionable under Rule 11 of the Federal Rules of Civil Procedure. *See* Reservations at 6 (citing *Teamsters Local No. 579 v. B & M Transit, Inc.*, 882 F.2d 274, 280 (7th Cir. 1989)).

Following this, I issued an order on May 3 denying a motion to approve settlement, in which I said that the continued citation to these cases as authority for the removal of S&S designations falls below the minimum standards of practice before the Commission. *See* Order Accepting Appearance and Denying Motion to Approve Settlement, Docket No. WEVA 2023-0071, at 7 (May 3, 2023) (ALJ). I said that a conference and litigation representative who submitted a motion with such citations would be barred from practice before me. *Id.*

[1] *See* Decision Approving Settlement, Docket No. SE 2023-0046, at 2 (Apr. 24, 2023); Order Denying Settlement, Docket No. WEST 2022-0249, at 5 (Nov. 2, 2022) (ALJ); Order Denying Settlement, Docket No. WEST 2022-0267 & WEST 2022-0268, at 11 (Oct. 18, 2022) (ALJ).

I also said that there might be other consequences. I noted that an attorney should know better, and that such misstatements of the law by an attorney would be even more egregious. *Id.* at 7 n.5. The supervising attorney for the Labor Department's CLR's was included in the distribution for the order.

On May 9, the Secretary filed with the Commission a Motion to Approve Partial Settlement, which again included the offending citations to *Mechanicsville* and *American Aggregates*. *See* S. Mot. to Approve Partial Settlement, Docket No. WEVA 2023-0141, at 3 (May 9, 2023). Not only is the recitation of these cases obviously inappropriate; it is impertinent. To my knowledge, no Commission judge has agreed with this mischaracterization of the law, and I have approved dozens of S&S removals without ever considering either case as authority for the removal. Rather than adhering to the clearly-expressed expectations of the Commission's judges, the Secretary has continued to recite this non-sequitur any time an S&S designation is proposed for removal in a settlement.

An attorney for a government agency who misstates the law arrogates the properly conferred constitutional authority of others to determine what the law *is.* Like bridge scour, this subtle corrosion wears on the foundation of the rule of law and threatens the integrity of a structure upon which the public depends.

While the full array of sanctions under Rule 11 may not be available as a corrective, I have made clear that misleading use of precedent fails to meet the minimum standards of practice before the Commission. Its redress begins with a refusal to accept the unacceptable. By this order, I therefore **STRIKE** the reference to the cited cases and the assertions they purportedly support.[2]

Striking material, and even professional sanctions, are appropriate responses to bad faith employment of case law. *See Collar v. Abalux, Inc.*, 806 Fed. Appx. 860, 864 (11th Cir. 2020) (affirming sanctions where an attorney continually misstated the import of case law); *Kamdem-Ouaffo v. Huczko*, 810 Fed. Appx. 82, 83 (3d Cir. 2020) (citing Fed. R. Civ. P. 12(f)) (noting that impertinent analysis of law is "plainly vulnerable to [] remedial strike"). Striking the impertinent matter from the motion is the least severe sanction I could impose in these circumstances. As with the Mine Act, those who persist in the discredited and misleading use of precedent should reasonably anticipate that their conduct will be deemed knowing or intentional and will be addressed with progressive severity until the practice is discontinued.

The motion to approve settlement is **DENIED** without reaching the merits. This denial will be reconsidered if the parties refile the motion without the noted language, *see supra* note 2. The parties should anticipate that the matters addressed by the motion will be resolved at hearing

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[2] The language to be stricken from the motion reads: "Taking into account the uncertainty of the outcome of these issues at trial, the Secretary has decided to exercise her discretion to modify the gravity to unlikely and not S&S as recognized in *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996))." Mot. at 3.

unless and until a motion that meets the standards of practice before the Commission has been filed.

Michael G. Young
Administrative Law Judge

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