FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
Phone: (202) 434-9933 Fax: (202) 434-9949

June 4, 2018

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2018-0165
Petitioner,	:	A.C. No. 46-01436-455014
	:	
v.	:	
	:	
THE OHIO COUNTY COAL COMPANY,	:	Mine: Ohio County Mine
Respondent.	:	

ORDER REGARDING MOTION TO CERTIFY FOR INTERLOCUTORY REVIEW

Before: Judge Moran

The Secretary of Labor has filed a motion ("Motion") to certify for interlocutory review this Court's Decision Denying Settlement in this docket. The Court's Decision denying settlement is included within this Order. The Secretary seeks the following question for certification for interlocutory review: "Whether the ALJ erred as a matter of law in rejecting as "facts in support" of the proposed settlement: (1) by the Secretary's stated enforcement priorities, and (2) the Secretary's identification of the facts disputed by the operator pertaining to the cited violations." Motion at 1-2.

The Commission procedural rule pertaining to interlocutory review provides that "Interlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission." 29 C.F.R. 2700.76(a). The Court certifies that its ruling denying settlement "involves a controlling question of law and that in [its] opinion immediate review will materially advance the final disposition of the proceeding." *Id.* at 29 C.F.R. 2700.76(a)(1)(i).

While the Court grants the Secretary's Motion, pursuant to 29 C.F.R. 2700.76(d), "Scope of review," it does adopt the characterization of the question, as framed by the Secretary. The Scope of Review provision provides "Unless otherwise specified in the Commission's order granting interlocutory review, review shall be confined to the issues raised in the Judge's certification or to the issues raised in the petition for interlocutory review." *Id.*

As noted, in its Motion the Secretary described the question as "Whether the ALJ erred as a matter of law in rejecting as "facts in support" of the proposed settlement: (1) by the Secretary's stated enforcement priorities, and (2) the Secretary's identification of the facts

disputed by the operator pertaining to the cited violations."

The first question is one the Commission presently has under reconsideration in *Secretary of Labor v. The American Coal Company*, LAKE 2011-13. The second question, in the Court's view, is an incomplete recounting of the issue. It is true that the justification for the 55% reduction provides, in its entirety, that the "Respondent argued that the operator was unaware of the cited *practice*, which was committed by an hourly employee. The inspector's notes confirm that the foreman was not present when the violation occurred. In consideration of the above, the Secretary agrees to a reduction in negligence and a corresponding reduction in the penalty to $2,438.00 pursuant to Part 100." Secretary's Motion for Decision and Order Approving Settlement, May 4, 2018 at 4 (emphasis added).

The Court, as reflected in its May 7, 2018 Decision Denying Settlement Motion, examining each of the citations involved in the settlement posed a question in that denial, regarding the nature of two citations, 9090883 and 9090884, which were issued on October 27, 2017, within minutes of one another. It noted that "[t]he problem is that the justification for the 55 % reduction for No. 9090883 does not square with the information contained in Citation No. 9090884, unless the Secretary is asserting that these citations do not relate to the same piece of equipment. This is so because, for Citation No. 9090883, the Secretary declares that the Respondent "argue[s] that the operator was unaware of the cited practice, which was committed by an hourly employee." Motion at 4 (emphasis added). Yet, Citation No. 9090884 does not indicate an incorrect practice. Rather it indicates a defect with the machine's ATRS, as it would not pivot to allow both pads to contact the roof, a function which the machine should have the ability to do." Decision at 2. On that basis, the Court concluded that the Motion was insufficiently supported.

It is the Court's view that its inquiry about the relationship, if any, between the two citations, Nos. 9090883 and 9090884, was a reasonable inquiry, consonant with its responsibilities under Section 110(k) of the Mine Act. Pursuant to 29 C.F.R. 2700.76(d), "Scope of review," the Court's granting of interlocutory is confined to this issue in its certification, namely the reasonableness of its inquiry to the parties regarding the settlement motion.

Accordingly, the Secretary's Motion to certify for interlocutory review is **GRANTED**.

SO ORDERED.

William B. Moran

_____

William B. Moran
Administrative Law Judge

Distribution:

Robert S. Wilson, Esq., U.S. Department of Labor, 201 12th Street South, Suite 401, Arlington, VA 22202-5450

Wm. Allen McGilton, Murray Energy Corporation, 46226 National Road, St. Clairsville, OH 43950

APPENDIX

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710
Phone: (202) 434-9933 | Fax: (202) 434-9949

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2018-0165
Petitioner,	:	A.C. No. 46-01436-455014
	:	
v.	:	
	:	
THE OHIO COUNTY COAL COMPANY,	:	Mine: Ohio County Mine
Respondent.	:	

DECISION DENYING SETTLEMENT MOTION

Before: Judge Moran

The Secretary has filed, through a Conference and Litigation Representative ("CLR"),[1] a

[1] The CLR has not complied with 29 C.F.R. § 2700.3, addressing who may practice per subsection (b)(4), "Other persons," which provides that "[a] person who is not authorized to practice before the Commission as an attorney under paragraph (a) of this section may practice before the Commission as a representative of a party if he is: … (4) Any other person with the permission of the presiding judge or the Commission." The CLR has not sought permission from the presiding judge to practice for this docket. The routine statement from the non-lawyer CLR asserts that they are "authorized to represent the Secretary of Labor in this proceeding, in accordance with the enclosed Notice of Appearance." This does not recognize that the authorization to practice before the Commission comes from the presiding judge, not the

Motion for Decision and Order Approving Settlement ("Motion"). For the reasons which follow, the Motion must be denied.

This docket involves 5 (five) citations, for which a 55% reduction, and modification of the negligence from moderate to low, is being sought for one[2] of the citations: Citation No. 9090883. That citation, asserting a violation of 30 C.F.R. § 75.202(b), states:

> During the investigation of an accident that occurred on October 3, 2017, it was determined through interviews and by a recreation of the accident scene that both ATRS pads were not in contact with the roof while roof bolting was being performed in the #2 entry of the 4-West B Setup Entry section. During the bolting process, the right side ATRS pad was in contact with the roof, but the left side pad could not touch due to potting out of the roof. Due to the left side pad not contacting the roof, the miner placing the drill steels into and out of the drill pod (from the right side of the machine) would've been reaching past roof support into the unsupported area. Both pads need to be touching the roof to create a supported area where the drill pod is located.

Citation No. 9090883.

The citation listed the gravity as highly likely, fatal, and significant and substantial, with one person affected. The negligence, as noted, was marked as "moderate."

The official file does not reveal anything about the nature of the accident alluded to in the Citation. In the name of "transparency," a term for which the Secretary invokes support, this information should have been provided. Despite this shortcoming, more is learned about the matter through Citation No. 9090884, which is also part of this docket. That Citation states:

> The operator failed to maintain the Company #15 Fletcher single head roof bolter (serial # 2012043) on the 4-West B Setup Entry section. During the investigation of an accident that occurred on October 3, 2017, the ATRS on the machine would not pivot to allow both pads to contact the roof when uneven roof is present. According to the manufacturer's approval, the ATRS should have the ability to tilt 15 degrees in either direction so that the pads can contact the roof in varying conditions. The ATRS is also approved at its rated capacity when both pads are touching the roof. The machine was removed from service per K-order # 9124865-03 to correct the condition. Standard 75.1725(a) was cited 13 times in two years at mine 4601436 (13 to the operator, 0 to a contractor).

Citation No. 9090884.

Secretary.

[2] The Motion provides for the other four citations to be settled for the originally proposed amounts. That does not negate the need for a proposed penalty reduction to be supported.

The two citations, 9090883 and 9090884 were issued on October 27, 2017, within minutes of one another. The problem is that the justification for the 55 % reduction for No. 9090883 does not square with the information contained in Citation No. 9090884, unless the Secretary is asserting that these citations *do not* relate to the same piece of equipment. This is so because, for Citation No. 9090883, the Secretary declares that the Respondent "argue[s] that the operator was unaware of *the cited practice*, which was committed by an hourly employee." Motion at 4 (emphasis added). Yet, Citation No. 9090884 does not indicate an incorrect practice. Rather it indicates *a defect* with the machine's ATRS, as it would not pivot to allow both pads to contact the roof, a function which the machine should have the ability to do.

Therefore the Motion is insufficiently supported.[3] Within seven days, the parties are directed to advise the Court whether a sufficiently supported amended settlement will be provided. If such an amended settlement will not be forthcoming, this matter will be set for a prompt hearing.

SO ORDERED

William B. Moran

William B. Moran
Administrative Law Judge

[3] Per usual, the Secretary presents his usual mantra that he "has evaluated the value of the compromise . . . . etc.," with the end game being that he does not have to provide facts in support of penalty reductions to the Commission. One does wonder, however, in light of section 110(k) of the Mine Act, a provision which was new with that Act, exactly what the Secretary believes that provision does require and how the boiler-plate language employed in all of his settlements provides useful information beyond that presented under prior federal mine safety statutes.