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June 28, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner, v. ARGUS ENERGY WV, LLC, Respondent.	)))))))))	CIVIL PENALTY PROCEEDING Docket No. WEVA 2017-0158 A.C. No. 46-07809-426807 Mine: Kiah Creek Preparation Judge Moran

ORDER DENYING SETTLEMENT MOTION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). Before the Court is the Secretary of Labor's Motion to approve settlement ("Motion"). If there was any doubt that the Secretary continues to seek an emasculated construction of section 110(k) of the Mine Act, neutering the Commission's role, this submission makes the intention clear. Despite the clear language of Section 110(k) that "[n]o proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission," the Secretary continues his effort to thwart the statutory language and Congress' expressed intent regarding the provision. Accordingly, the Motion must be **DENIED.** As the Secretary continues to balk at compliance with the statutory provision, this case is to be set for a prompt hearing.

A single citation is involved in this docket. The standard cited, 30 C.F.R. § 77.1606(a), titled, "Loading and haulage equipment; inspection and maintenance," provides at subsection (a), "Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator." 30 C.F.R. § 77.1606(a).

The issuing inspector's 104(a) citation stated, "[t]he spot mirror was busted out on the Komatsu HD 785 Haulage Truck, No. 137. Equipment defects affecting safety shall be recorded and reported to the mine operator. There was no pre-operational record completed and reported to the mine operator on this date for this piece of mobile equipment. This truck was being

operated to haul overburden on mine property." Citation No. 8128099. The inspector marked the citation as S&S, with the gravity of the injury as "reasonably likely," the injury reasonably expected to be fatal, affecting 1 (one) person, with moderate negligence.[1] *Id*. The citation was assessed at $666.00. Secretary's Petition, Exhibit A. Thus, while the broken mirror triggered the inspector's inquiry, it was the failure to conduct the pre-operational inspection and to record the defect which is the gravamen of the citation.

The Secretary's Motion.

Oddly, though the Motion presented by the Secretary is described as being submitted, "[*p*]*ursuant* to Section 110(k) of the Federal Mine Safety and Health Act of 1977 ("Mine Act") and Commission Procedural Rule 31" Motion at 1 (emphasis added), the Court finds that the submission is not *pursuant*[2] to that section, as it is not in accordance with its plain terms.

Instead, the Secretary informs that "[r]epresentatives for the Secretary and Respondent have discussed the alleged violation and MSHA's proposed penalty, and have agreed to settle the contested citation and penalty in the above-captioned docket as follows: Citation No. 8128099 shall be modified to delete the significant and substantial ("S&S") finding, change the gravity designation from reasonably likely to unlikely and reduce the penalty from $666.00 to $532.00." Motion at 1-2. The settlement represents a 20% reduction from the proposed penalty. The $666.00 figure was derived after applying a 10% reduction for good faith.[3]

The Secretary then announces that he

> 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. 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

[1] The violation was abated upon installation of a new spot mirror.

[2] "Pursuant" is defined as "in accordance with." Webster's New World College Dictionary 4th ed. 1166; "'pursuant' means in conformity to," *Brotherhood of Ry and S.S. Clerks, Freight Handlers, Exp.& Station Emp. v. Railway Express Agency, Inc.*, 238 F.2d 181, (6th Cir. 1956).

[3] 30 C.F.R. §100.3(f) affords a "10% reduction in the penalty amount of a regular assessment where the operator abates the violation within the time set by the inspector."

> outcome from the enforcement perspective than the settlement, in which the alleged violation is resolved and can be used as a basis for future enforcement actions.[4] A resolution of this matter in which the violation is resolved is of significant value to the Secretary and advances the purposes of the Act.

Motion at 2.

The Motion continues that "[t]o assist the Commission in evaluating the appropriateness of the settlement under Section 110(i), the Secretary presents the following information in support of the penalty agreed to by the parties." *Id.* As the following "information" from the Secretary reveals, all that is presented by the Secretary is his conclusion that the "S&S and gravity determinations in the citation at issue shall be modified *as discussed above*." *Id.* (emphasis added).

That "discussion above" from the Secretary is free of any facts pertaining to the violation itself. Instead, it rests upon the Secretary's odds-making, upon his evaluation of "the value of the compromise, the likelihood of obtaining a better settlement and the prospects of coming out better or worse after a trial." *Id*.

The Commission's function, so says the Secretary, is limited to "whether the agreed-upon penalty amount is consistent with the agreed-upon substantive modification." Motion at 2-3. Thus, the Secretary pronounces that *he* "*has determined* that the S&S and gravity determinations in the citation at issue *shall be modified* as discussed above. Substantive modifications to citations and orders, including the S&S designation, are within the prosecutorial discretion of the Secretary. *Mechanicsville Concrete Inc*., 18 FMSHRC 877 (1996)" The Commission's review of settlement proposals involving such substantive modifications is limited to whether the agreed-upon penalty amount is consistent with the agreed-upon substantive modification. Here, a $134.00 reduction in the penalty from $666.00 to $532.00 is appropriate and supported by the reduction in the gravity findings." Motion at 2-3 (emphasis added). In the Court's estimation, the Secretary improperly conflates his presently existing prosecutorial discretion to vacate

[4] Even this non-informative basis is incorrect. The Secretary spins the tale that, even if he were to win at a hearing and even if the civil penalty was similar to the settlement, or the penalty was even greater, "it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which *the alleged violation is resolved and can be used as a basis for future enforcement actions*." Motion at 2 (emphasis added). However, the Motion itself seems to refute the notion that this settlement *can be used as a basis for future enforcement actions,* as the settlement terms provide, "[e]xcept for proceedings under the Act, Respondent contends that nothing contained herein is intended to be deemed an admission of a violation of the Act or regulations." Settlement Motion at 3.

citations without any explanation with the claim that the information supplied in settlements is also entirely within his discretion." ("*Mechanicsville*").[5]

Discussion

While it should be obvious that the Secretary elected to supplant CLR Trent as his representative with a Regional Counsel because the relatively small penalty involved makes it a superficially attractive vehicle to assert its broad claim of settlement authority, the subject of section 110(k) is not solely about money. Congress' overarching concern was about the safety and health of miners. The Commission took note of this as well in its *American Coal* decision, wherein it observed, "a settlement agreement involving violations of mandatory safety standards affects all miners working in the cited mine. Thus, the miners may be likened to a class affected by a settlement." *American Coal* at 1984. Here, the Secretary's Motion says *not a word* about the health or safety of the mining industry's "most precious resource – the miner." 30 U.S.C. § 801(a).

Further, even on the subject of the civil penalty amount itself, on numerous occasions, this Court has expressed that the amount of information it requires in support of a reduced penalty is proportional to the percentage reduction of that penalty. Significant reductions require more supporting facts than modest reductions. But, in either scenario, the facts are to be tied to the considerations identified in the gravity and negligence sections of the citation or one of the other statutory penalty factors that the Commission has the authority to assess, as identified in section 110(i) of the Act.

The Commission, both in its *Black Beauty* and *American Coal* decisions has made this quite clear. As it noted in *American Coal*, which also referenced its decision in *Black Beauty*, [6]

[5] The Secretary employs an expansive reading to the *Mechanicsville* decision and this Court does not believe it is on point. First, that case went to hearing; it was not a settlement. As the issuing inspector *never* marked the violation as S&S, the issue was whether the judge could find an S&S violation *sua sponte.* The Commission's decision was limited to that issue, holding, "we conclude that the judge lacked authority to find, *sua sponte*, that Mechanicsville's violation was S&S and we reverse the judge's conclusion that the violation was S&S." *Mechanicsville* at 882. However, the Commission affirmed "the judge's assessment of a $200 civil penalty." *Id.* It also noted that "[i]n contested civil penalty cases, the Mine Act requires that the Commission make an independent penalty assessment based on the statutory criteria of section 110(i) of the Act, 30 U.S.C. § 820(i)." *Sellersburg Stone Co*., 5 FMSHRC 287, 291 (March 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). The Commission has explained that "[t]he determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact. This discretion is bounded by proper consideration of the statutory criteria and the deterrent purpose underlying the Act's penalty assessment scheme." *Id.* at 881 (internal citation omitted).

[6] *Black Beauty Coal Co*., 34 FMSHRC 1856, 1862 (Aug. 2012).

> the legislative history of section 110(k) reveals that Congress authorized the Commission to approve the settlement of contested civil penalties in order to ensure that penalties serve as an effective enforcement tool, prevent abuse, and preserve the public interest.[7] 34 FMSHRC at 1862. The Commission and its Judges 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.

The American Coal Company, 38 FMSHRC 1972, 1981 (Aug. 2016)

The Secretary's self-aggrandizement of power regarding settlements, despite Congress' clear statement that no proposed penalty which has been contested before the Commission shall be compromised, mitigated, or settled *except with the approval of the Commission*, should not come as a surprise.[8]

The essential problems with the Secretary's claim, if accepted, are twofold. First, it would render the statutory provision and the legislative history for section 110(k) nugatory. Second, in each instance, the Secretary could present such boilerplate language, untethered to any facts in support of a reduced likelihood of injury or illness, the nature of the expected injury, the number of persons affected or the degree of negligence.

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[7] The Commission, in *American Coal*, noted that "[t]he Secretary downplays the significance of the legislative history. . . . However, Congress chose to explain the purpose of section 110(k) and the Commission's role in approving settlements in unusually specific terms. That legislative history cannot be ignored simply because of the passage of time or because it may be convenient for the Secretary to do so." 38 FMSHRC at 1986, n 5.

[8] The Secretary, it will be recalled, previously attempted an overreach in another matter, taking the position that he need not announce the basis for a claimed pattern of violations until *after* the conclusion of a hearing on such a charge. *Sec. v. Brody Mining LLC*, 37 FMSHRC 1914, 1928-29 (Sept. 2015).

Accordingly, for the foregoing reasons, and though the Secretary may believe he knows best in terms of the information needed for settlement approvals, Congress has determined otherwise by virtue of section 110(k). The Secretary may either submit an appropriately based settlement or prepare for a hearing.

SO ORDERED.

William B. Moran

William B. Moran
Administrative Law Judge

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