FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 12, 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. WEVA 2015-987 A.C. No. 46-08637-388319
v.	
GATEWAY EAGLE COAL CO., LLC, Respondent.	Mine: Campbells Creek No. 10

DECISION DENYING MOTION FOR APPROVAL OF SETTLEMENT

Before: Judge Moran

Over at least the past 33 years, Commission judges, citing section 110(k) of the Mine Act, 30 U.S.C. § 820(k), have required that settlements must be adequately justified. The Secretary of Labor has filed a motion to approve settlement in this matter. For the reasons that follow, as the present motion fails to meet this requirement, the Court has no choice but to deny the motion.

The settlement motion at issue involves two citations. Citation No. 9055796 pertains to a section 104(a) action, marked as significant and substantial (S&S), with a fatality as the injury reasonably expected, and the negligence listed as moderate. The standard invoked, 30 C.F.R. § 75.517, provides: "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected." Specifically, Citation No. 9055796 alleges:

> The 480 volt cable, supplying power to the Fletcher Roof Bolter (co.#406), is not insulated adequately and fully protected. A splice in the cable is found to be damaged with exposed conductors. This condition exposes the miners who handle and/or work or travel near this energized cable to hazards of electrical shock, which is likely to result in electrocution. Standard 75.517 was cited 11 times in two years at mine 4608637 (11 to the operator, 0 to a contractor).

The parties' settlement agreement proposes reducing the civil penalty for Citation No. 9055796 from $1,657.00 to $829.00.

The Secretary's settlement motion presents only the following in support of the 50% reduction of the proposed penalty: "Respondent presented evidence that miners are required to check cables prior to each use, a requirement that is more stringent than demanded by regulations, potentially reducing its negligence. Based on this information and the risks of litigation, the parties agreed to the stated penalty." *Mot. for Dec. and Order Approving Settlement*, at 4 (Apr. 20, 2016).

The "information" provided by the Secretary, through the Respondent, does not add up, as section 75.517 does not speak to checking cables prior to each use. Instead, it requires cables to be "insulated adequately and fully protected," and such cable conditions were apparently not present. The Secretary bases his agreement for a 50% penalty reduction "on [that] information," which rests only upon a potential reduction in the mine's negligence, but leaves unanswered how it is that the mine's "more stringent" practice did not detect that the splice in the cable was "damaged with exposed conductors." *Id.* Thus, the "more stringent" requirement was ineffective and the standard itself is not qualified by employing such alleged practices. Instead, it plainly requires that cables be insulated adequately and fully protected. As noted, the inspector marked the violation as S&S and the expected injury to be a fatality. Correction of the violation required that a damaged splice be replaced.

For Citation No. 9055799, another section 104(a) action, marked as S&S, fatal, and with moderate negligence, invoked 30 C.F.R. § 75.400. That standard, titled "Accumulation of combustible materials," provides that "[c]oal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein." Specifically, Citation No. 9055799 alleges:

> Combustible materials have been permitted to accumulate at the #9a Belt Take-up. *Dry coal fines have accumulated under the take-up and are found to be compressed against the moving belt.* The coal fines measure 6' long X 17" deep. This condition exposes miners to hazards associated with mine fires which are likely to result in fatal injuries due to smoke inhalation. Standard 75.400 was cited 29 times in two years at mine 4608637 (29 to the operator, 0 to a contractor).

(Emphasis added). The parties' settlement agreement proposes reducing the civil penalty for Citation No. 9055799 from $3,143.00 to $1,571.00.

The settlement motion states that the Respondent presented evidence that the coal belt accumulations "could have occurred since the last examination, potentially reducing its negligence." *Mot. for Dec. and Order Approving Settlement*, at 4. The motion also stated that the Respondent presented evidence that, "in the event of a fire, the expected injuries may be less severe than originally assessed." *Id.* As with the first citation discussed above, the motion seeks a 50% reduction in the penalty. The problem with the asserted basis for the reduction is that the motion does not provide the information relied upon to support the claim that the accumulations could have occurred since the last examination, nor does the Secretary weigh in on that claim. Similarly, there is no basis to support the claim that "the expected injuries may be less severe than originally assessed."

As the Commission has noted, accumulation violations are serious business.[1] In fact, the provision essentially repeats the statutory language of section 304(a) of the Mine Act. *See* 30 U.S.C. § 864(a). With respect to the issue of such violations, the Commission has previously held that

> section 75.400 'is violated when an accumulation of combustible materials exists.' *Old Ben I*, 1 FMSHRC at 1956. The Commission has further held that a violative 'accumulation' exists 'where the quantity of combustible materials is such that, in the judgment of the authorized representative of the Secretary, it likely could cause a fire or explosion if an ignition source were present.' *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (October 1980)('*Old Ben II*') . . . The Commission [has] emphasized that the legislative history relevant to the statutory standard that section 75.400 repeats 'demonstrates Congress' intention to prevent, not merely to minimize, accumulations. The standard was directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated.' *Old Ben I*, 1 FMSHRC at 1957.

Utah Power & Light Co., 12 FMSHRC 965, 968 (May 1990).[2]

The Court is aware that the Secretary does not care for the Court's requirements for additional information to support settlements. However, pursuant to section 110(k) of the Mine Act, it is the Court's responsibility to require additional information in motions where reductions are insufficiently explained. It should be pointed out that the requirement for adequate supporting information in motions for settlement is not new. Former Chief Judge Paul Merlin invoked this requirement 33 years ago in a denial of a proposed settlement order, noting that "[t]he Solicitor has given me no basis whatsoever to approve the proposed settlement. None of the violations are explained or analyzed." *Yakima Cement*, 5 FMSHRC 1278, 1279 (July 1983) (ALJ). The Chief Judge went on to note:

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[1] At least one of the Upper Big Branch citations involved an accumulation of loose coal at a tailpiece, where the material was some two to eight inches in depth along the number 2 belt. *See* Citation No. 8094527, issued 07/21/2009.

[2] As noted in *ICG Knott County,* 35 FMSHRC 1027, 1039 (Apr. 2013) (ALJ Moran):

> To place these standards in context, the legislative history of the Mine Act details Congress' concern with the hazards associated with such belts, noting that 'many fires occur along belt conveyors as a result of defective electric wiring, overheated bearings, and friction; and therefore, and examination of belt conveyors is necessary.' S. Rep. No. 91-411, at 57 (1967), reprinted in Senate Subcomm. On Labor, Comm. On Labor and Public Welfare, Part I Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 183 (1975).

> The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. *Sellersburg Stone Company*, 5 FMSHRC 287 (March 1983). *Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.*

Id. at 1279 (emphasis added); *see also Columbia Portland Cement*, 10 FMSHRC 1375 (Sept. 1988) (ALJ Merlin) (settlement motion denied by Chief Judge Merlin based on insufficient information). Noting the Secretary's practice, which continues to be frequently carried out today, the Chief Judge noted: "Using the same language each time, the Solicitor gives no facts or rationale to support any of [its] conclusions . . . [and therefore the court has] no basis to accept [the Secretary's] representations." *Columbia Portland Cement*, 10 FMSHRC at 1375, 1377, 1378, 1379.

Among many examples, in the same vein, a quarter century ago, Judge William Fauver found two instances of deficient settlement presentations:

> The settlement motion does not state or show a factual basis for concluding that the alleged violation did not present a substantial possibility of resulting in injury within the context of continued normal mining operations. Determination of that issue will depend on a fuller presentation and evaluation of the facts. The settlement will therefore be rejected," and later in the same decision stated, "[t]he settlement motion does not state or show a factual basis for concluding that the alleged violation did not present a substantial possibility of resulting in injury within the context of continued normal mining operations. For the reasons discussed above, I find the motion to be insufficient as to this citation.

Consolidation Coal, 13 FMSHRC 748, 751 (Apr. 1991) (ALJ).

In light of section 110(k) and the Commission's long-established construction of its role under that provision, in reviewing proposed penalties contested before it, it is difficult to discern any legitimate basis for the Secretary's recalcitrance. As it is the Secretary of Labor, not the Secretary of Commerce, that is objecting to demonstrating the legitimacy of compromises associated with violations of the Mine Act, one would anticipate that the Secretary would be anxious to demonstrate that his proposed settlements are patently supportable. Frequently, in dragging his feet to establish such legitimacy, the Secretary will invoke "transparency" in its submissions. As this Court noted in *Bristol Coal*, 36 FMSHRC 2198, 2198 (Aug. 2014) (ALJ Moran):

> [I]n *Sec. of Labor v. The American Coal Company*, LAKE 2011-13 ("American Coal") and in its underlying submission to this Court in that case, the Secretary repeatedly invoked the claim that its approach for settlement submissions promotes transparency and satisfies the need for public scrutiny, objectives to which it professedly subscribes. *See, for e.g.* Sec's Brief in *American Coal* at 43.
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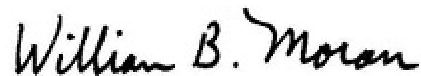
> The Secretary, in this Court's view, has not caught on to the trend that began in the late twentieth century that more, not less, public information from government is the preferred practice. As the dictionary explains, to be 'transparent' means to be 'easily detected … characterized by visibility or accessibility of information especially concerning business practices.' Merriam-Webster.com. Instead, in its Motion before this Court in American Coal, the Secretary merely proclaimed, in a decidedly non-transparent manner that '[a]fter 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 assessed penalty with no changes to gravity or negligence for any of the citations at issue." *See, American Coal* Motion at 2-3. In the Court's view, such an approach is at odds with the normal sense of the meaning of transparency and, importantly, makes public scrutiny impossible. Further, the Secretary exaggerates, and some might fairly state outright misrepresents, what is required for a settlement to pass muster, by asserting that the Commission's approach requires 'the Secretary to supply extensive information to justify proposed settlements.'1 *See, Sec's Br.* at 5, presently before the Commission under interlocutory review in *American Coal*.

Id.

The Court hopes that the Secretary will see the short-sightedness of his lack of transparency and, rather than fighting his duty to disclose the legitimacy behind his proposed settlements, instead demonstrate the basis for his compromises.

On the basis of the foregoing, the Secretary's Motion is DENIED. The parties are directed to provide a sufficient basis to support the proposed settlement reductions or to prepare for trial. If a trial occurs, regarding any violations that may be established, the Court may impose a greater, lesser, or the same penalty as that proposed in the motion, but such penalties as may be imposed will be based upon those facts found through the testimony and documentary evidence produced in the proceeding.

SO ORDERED.



William B. Moran
Administrative Law Judge

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