FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

August 3, 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. KENTUCKY FUEL CORPORATION, Respondent.	PENALTY PROCEEDING Docket No. KENT 2012-979 A.C. No. 15-19475-286532 Mine: Beech Creek Surface Mine

ORDER DENYING JOINT MOTION TO APPROVE SETTLEMENT

Before: Judge Moran

In this civil penalty proceeding involving an alleged violation of 30 C.F.R. 77.1000, Citation No. 8259158 states that "[t]he fly rock prevention plan (general safety precautions) which were incorporated into the acknowledged ground control plan on August 5, 2011, is not being complied with on this date." The cited standard, titled "Highwalls, pits and spoil banks; plans," provides:

> Each operator shall establish and follow a ground control plan for the safe control of all highwalls, pits and spoil banks to be developed after June 30, 1971, which shall be consistent with prudent engineering design and will insure safe working conditions. The mining methods employed by the operator shall be selected to insure highwall and spoil bank stability.

30 C.F.R. § 77.1000.

The Secretary has filed a joint motion to approve settlement in which he seeks a 97% reduction of the amount from that which was initially proposed, from $30,200.00 to $1,000.00. Despite a resubmission of the motion, the "basis of compromise" presented by the Secretary remains inadequate and prevents the Court from carrying out its responsibilities under section 110(k) of the Mine Act. Accordingly, for the reasons which follow, the Secretary's motion is DENIED.

The Joint Motion begins with the Secretary's standard, one-size-fits-all language:

> The Mine Safety and Health Administration ("MSHA") proposed civil penalty for the citation at issue [sic] [is] in accordance with the statutory penalty criteria in Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), and MSHA's civil penalty regulations at 30 C.F.R. Part 100.
>
> Representatives for the Secretary and Respondent have discussed the alleged violation and MSHA's proposed penalty, and seek to settle the contested citation in the above captioned docket as follows: . . . [m]odify the citation from "reasonably likely" to "unlikely", remove the S&S designation, and modify from "high" to "moderate" negligence, and from "fatal" to "lost workdays or restricted duty[.]"
>
> In reaching this settlement, the Secretary has evaluated the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after full trial, and the resources that would need to be expended in the attempt. The Secretary has determined that the public interest and the effective enforcement and deterrent purposes of the Mine Act are best served by settling the citation and order as indicated above.
>
> Consistent with the position the Secretary has taken before the Commission in *The American Coal Company*, LAKE 2011-13, the Secretary believes that the pleadings in this case and the above summary give the Commission an adequate basis for exercising its authority to review and approve the Secretary's settlement under Section 110(k) of the Mine Act, 30 U.S.C. § 820(k).

Second Jt. Mot. at 1-2 (paragraph designations omitted).

In the alternative to its fiat, the Secretary then reluctantly offered up what he considered to be a justification for the 97% reduction. Initially, in his first settlement motion submission, the justification stated, *in full*:

> Basis of compromise of penalty: The Respondent contends that the violation was not reasonably likely to lead to a reasonably serious injury because the boreholes were not loaded with explosives. Respondent asserts that it was not highly negligent because there were no boreholes drilled deeper than 10 feet and there were only 7 rows of boreholes. While the Secretary does not necessarily agree with Respondent's position, he has agreed to modify the citation from 'reasonably likely' to 'unlikely', to remove the S&S designation, and to modify from 'high' to 'moderate' negligence, and from 'fatal' to 'lost workdays or restricted duty', and to accept a reduced penalty. The Secretary believes settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act.

Initial Jt. Mot. at 3.

This case was, until recently, assigned to another judge.[1] That judge found the initial justification insufficient and required a resubmission. The resubmission, now before the undersigned, was identical to the quoted language above, but added the following:

> *The Respondent further asserts that it did not exceed the maximum number of 8 rows in length for the blasting pattern in no spoil areas. The Respondent contends it was not highly negligent because the shot did not exceed the maximum 32 holes, as there were only 20 holes drilled. The Respondent further contends it was not highly negligent because it did not exceed the maximum six and three-quarter inch drill bit. The Respondent asserts it was not highly negligent because it did not exceed the maximum twelve feet by twelve feet drill pattern.*

Second Jt. Mot. at 3 (emphasis added).

The Secretary's portion of the resubmission added *nothing*, only repeating, *exactly*, what it stated with the first submission:

> While the Secretary does not necessarily agree with Respondent's position, he has agreed to modify the citation from 'reasonably likely' to 'unlikely', to remove the S&S designation, and to modify from 'high' to 'moderate' negligence, and from 'fatal' to 'lost workdays or restricted duty', and to accept a reduced penalty. The Secretary believes settlement of the civil money penalty is consistent with his enforcement responsibility under the Mine Act.

Id.

There are several deficiencies with the submissions.[2] The starting point to appreciate the deficiencies in the motions begins with the text of the citation itself, which contends:

> The fly rock prevention plan (general safety precautions) which were incorporated into the acknowledged ground control plan on August 5, 2011, is not being complied with on this date. Item seven (7) was not being complied with in that a total of seven rows of holes were drilled where it is required to be a minimum of two and a maximum of four rows on the no spoil side. The pattern had been drilled out and was awaiting the loading process. Failure of mine management to follow their ground control plan stipulations would lead to serious injuries to miners and/or residents living directly below the blast site.

Citation No. 8259158.

The "Subsequent Action" then states: "The Operator is now following the safety precautions incorporated into their ground control plan. The cited area was shot on 10-21-11 according to their plan." Citation No. 8259158-01.

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[1] On July 21, 2015, this docket was reassigned to the undersigned.

[2] A motion to approve settlement was e-filed on February 4, 2015. A revised motion to approve settlement was e-filed on March 25, 2015.

The issuing inspector marked the section 104(a) citation as significant and substantial, the negligence as high, the likelihood of an injury as highly likely, and the type of injury as fatal. The follow-up, as noted, reflected that the operator "*is now following the safety precautions incorporated into their ground control plan*." *Id.* (emphasis added). The cited area was then shot, one day after the citation was issued.

MSHA considered the matter serious enough to specially assess the alleged violation, with that process bringing about the proposed penalty of $30,200.00. The special assessment provision, found at 30 C.F.R. § 100.5, provides that "MSHA may elect to waive the regular assessment under § 100.3 if it determines that conditions warrant a special assessment . . . [and that] [w]hen MSHA determines that a special assessment is appropriate, the proposed penalty will be based on the six criteria set forth in § 100.3(a)." 30 C.F.R. § 100.5(a)-(b).

As even the second motion reveals, of the 214 words offered to justify the settlement, only 145 of those deal with the basis for the reduction, all offered by Respondent. Of course, evaluating a settlement is not a matter of counting words, but in general, as the Court has explained on many occasions, larger reductions require a more complete explication than modest reductions. In this instance, the words offered by Respondent consist of assertions only, free of any context or explanation, stating:

> the boreholes were not loaded with explosives . . . no boreholes drilled deeper than 10 feet and there were only 7 rows of boreholes, . . . it did not exceed the maximum number of 8 rows in length for the blasting pattern in no spoil areas, . . . the shot did not exceed the maximum 32 holes, as there were only 20 holes drilled . . . it did not exceed the maximum six and three-quarter inch drill bit . . . [and] it did not exceed the maximum twelve feet by twelve feet drill pattern.

Second Jt. Mot. at 3.

The Court acknowledges that it is possible that these assertions do bear on the issue of negligence, but the motion provides no information explaining such relationship, even though this was the second submitted motion. To accept such unexplained reasons would make a mockery of the settlement review process. Parties must explain *how* the assertions justify the reduction, and not simply present assertions which are not obviously self-explanatory.

The Secretary provided a proposed order for the Court to grant the motion. For the Secretary's part of the rationale, in the 55 words he provides ratifying the settlement, absolutely no information explaining the relationship of the assertion to the negligence is set forth, nor does the Secretary even maintain that he agrees with the assertions at all. Instead, the Secretary merely offers that he

> does not necessarily agree with the Respondent's position, but he recognizes legitimate factual and legal disputes and believes that the proffered settlement is consistent with his enforcement responsibility under the Mine Act. Therefore, the Secretary agrees to modify the order as indicated above. The Secretary has also agreed to accept a reduced penalty.

Second Proposed Order at 1.

The Court is therefore left to guess as to both the import of Respondent's assertions and what "legitimate" factual and legal disputes are brought to bear by those assertions. Further, the Secretary does not concede that he agrees with either the assertions or the legal disputes that are involved, whatever those may be.

Given that this matter was specially assessed and that technical issues are involved, the Secretary has a duty to advise whether it consulted with the issuing inspector about Respondent's claims and how those claims may impact the degree of negligence, if at all. Failure to so consult ignores the MSHA official with firsthand knowledge, the inspector who issued the citation, and sends a message to all inspectors that their safety and health enforcement efforts are inconsequential.[3] Further, the Secretary will need to explain how the several assertions made by Respondent bear upon the claim that Respondent was not highly negligent. So too, the claim that the violation was not S&S because the boreholes were not then loaded with explosives makes no sense because, in the course of continuing normal mining[4] one would expect that such boreholes would be so loaded, consistent with the sole purpose of drilling boreholes.

Finally, although all mine safety standards are important, the subject of blasting, an inherently dangerous activity, and the hazards of flyrock are particularly noteworthy and have been the subject of several cases and safety studies. Several litigated cases underscore the gravity associated with that activity and the importance that proper procedures be employed.

For example, in *Revelation Energy*, 36 FMSHRC 1581, 1587, 1600 (June 2014) (Judge Andrews), a violation of § 77.1000 was found to be significant and substantial where flyrock fell in an inhabited area approximately 1000 feet from a blast site. It was determined that the *respondent failed to strictly follow their Ground Control Plan*, as required. *Id.* at 1603. Similarly, in *Central Appalachia Mining, LLC*, 29 FMSHRC 430, 430-31 (June 2007) (Judge Barbour), flyrock from a highwall blast flew into the pit where miners were working. Vehicles were hit, and a miner suffered a compound fracture when his leg was hit. *Id.* at 433. The judge found that the violation of 30 C.F.R. § 77.1000 was S&S. *Id.* at 444. In *Lakeview Rock Products*, 34 FMSHRC 244, 246 (Jan. 2011) (Judge Moran), flyrock penetrated the roof of a home located above the highwall and 600-700 yards away from the detonation site.

Beyond case examples, MSHA has issued blasting alerts addressing these issues. *See, e.g.*, Blasting Safety Alert: 6 Fatalities from blasting accidents 2010-2013, http://www.msha.gov/Alerts/SAbulletins/BlastingAlert12014.pdf. Studies also warn of these hazards. *See* T. S. Bajpayee et al., *Blasting Injuries in Surface Mining with Emphasis on Flyrock and Blast Area Security*, 35 J. Safety Res. 47 (2004). These resources note that serious injuries and fatalities result from improper *practice* during rock blasting. Fatalities have resulted where the hole diameter and blast pattern used in the blast were also different from the approved plan. The studies note the importance of following a good blasting plan. Proper blast design has been identified as the single most important tool to prevent blasting problems.

[3] To consult does not mean that the Secretary must accede to an inspector's viewpoint. Rather, it is a matter of acquiring information from the issuing inspector in the face of a respondent's assertions.

[4] Per the *Mathies* four-part test for determining S&S, the violation in issue is to be evaluated assuming continued normal mining operations.

Yet another example of the dangers from flyrock is reflected in an MSHA investigation of a surface coal mine fatal surface blasting accident when flyrock from a blast struck a miner with 20 years of mining experience. *The accident occurred because safe procedures for conducting blasting operations were not followed. See* Mine Safety and Health Admin., CAI-2007-09, *Report of Investigation: Surface Coal Mine: Fatal Surface Blasting Accident*, http://www.msha.gov/FATALS/2007/ftl07c09.pdf (involving CAM Mining, LLC, July 16, 2007).

These cases and MSHA's alerts and studies demonstrate that the dangers of flyrock are real, not theoretical. Therefore, Kentucky Fuel Corporation's adherence to its flyrock prevention plan is essential. Accordingly, the proffered settlement is rejected. The parties are directed to either submit a new settlement or to be prepared to present their evidence relating to this matter at the hearing now scheduled to hear other Kentucky Fuel dockets before the Court, commencing on August 18, 2015. Should a new settlement motion be submitted, the parties are advised to be prepared to try this case at the upcoming hearing, if the new submission is also wanting.

So Ordered.

William B. Moran

William B. Moran
Administrative Law Judge

Emily O. Roberts, Attorney, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219

Jennifer Thomas, Attorney, Office of the Solicitor, 618 Church Street, Suite 230, Nashville, TN 37219

James F. Bowman, P.O. Box 99, Midway, WV 25878