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

September 5, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2015-0136
Petitioner,	:	A.C. No. 37-00093-386771
v.	:	
	:	
HOLLISTON SAND COMPANY INC.,	:	Mine: Slatersville Plant
Respondent.	:	

DISMISSAL ORDER

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977.[1] On March 21, 2016, the Secretary, through a Conference and Litigation Representative, filed a Motion to Approve Settlement. The Citation in issue, citing 30 C.F.R. §46.7(a),[2] alleged the occurrence of a serious event. The text of that Citation asserted:

> An accident occurred on April 27, 2015 at 2:30 PM, an apprentice mechanic was cleaning tools for another mechanic using Cyclo brake and parts cleaner [aerosol can] spraying over a 40 gallon rubber maid trash can and then wiping the tools down. The last tool he cleaned was a striker used to ignite acetylene/oxygen torches. He sprayed the striker down and as he was wiping the striker a spark occurred that ignited the rag. He dropped the rag into the trash can. The cleaner residue on the bottom of the trash can ignited and flashed up into his face. The employee received burns to his face, lips and nose. He was wearing safety glasses

[1] It is **DETERMINED** that the Conference and Litigation Representative (CLR) is accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994). At some point, Attorney for the Secretary James Polianites became involved to some degree with this matter.

[2] 30 C.F.R. § 46.7 titled, "New task training," provides at subsection (a): "You must provide any miner who is reassigned to a new task in which he or she has no previous work experience with training in the health and safety aspects of the task to be assigned, including the safe work procedures of such task, information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program. This training must be provided before the miner performs the new task."

> and latex gloves at the time of the accident. A parts cleaner cabinet was located five feet from where the accident occurred. The employee received Haz-com training. The employee did not specifically receive task training using the Cyclo brake and parts cleaner aerosol can, this is a flammable product. Photos taken.

Citation No. 8803673.

The citation was abated after the injured employee received task training. *Id.*

As noted, on March 21, 2016, the CLR filed his Motion for Decision and Order Approving Settlement. That Motion, reciting the Secretary's boilerplate language to the effect that, notwithstanding section 110(k) of the Mine Act, the requirements for settlement approvals are exclusively within the Secretary's domain, asserted:

> In reaching this settlement, *the Secretary has evaluated* the value of the compromise, the likelihood of obtaining a still better settlement, the prospects of coming out better, or worse, after a 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 citations as indicated above.

Motion at 2 (emphasis added).

The Motion then gave a nod to the Commission's decisions in *The American Coal Company* and *Black Beauty Coal Co.*,[3] offering the following alternative information in support of the penalties agreed to by the parties:

> The CLR requests that Citation No. 8803673 be modified to Unlikely and Not Significant and Substantial. The respondent would argue the accident victim had received training during employment at non-mining locations and additional training while employed by the mine operator. The training provided based on the affidavit of the employee did not specifically cover cleaning spark making tool with an extremely flammable solvent.

Motion at 3.

[3] The Court notes that the Commission had issued its decision in *The American Coal Company*, reaffirming that Congress authorized the Commission to review in detail settlements of contested civil penalties before approving them. *The American Coal Co.,* 38 FMSHRC 1972 (Aug. 2016) (citing *Black Beauty Coal Co*., 34 FMSHRC 1856, 1862 (Aug. 2012)). Even with that acknowledgement, the Secretary still insisted that he "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)." Motion at 2.

On October 20, 2016, the Court requested additional information in support of the Motion, reciting the text of the alternative information, as set forth above. The Court advised that the alternative information did not offer any basis to approve the modification to non-S&S and unlikely — especially since an injury did occur.[4] As is evident from the above, the Secretary did not weigh in on the Respondent's contention, and the assertion that, "the training provided based on the affidavit of the employee did not specifically cover cleaning spark making tool with an extremely flammable solvent," seemed to detract from the claimed settlement basis, not support it. Accordingly, the Court asked for an explanation of the grounds for the proposed modifications for the citation, including how the Haz-com training that the miner in question received supports the proposed change to the gravity of the citation.

No explanation was ever forthcoming and it was not until June 20, 2017, that CLR Ridley sent an e-mail to the Court and the Respondent's counsel informing of the Secretary's decision to vacate the citation at issue in this matter. Thereafter, on June 30, 2017, the Secretary filed the instant motion to dismiss.

Although the Secretary's discretion to vacate a citation or order is not subject to review, *RBK Contr. Inc.*, 15 FMSHRC 2099 (Oct. 1993), it is disconcerting that the response to the reasonable request for genuine supporting information to support the original settlement motion was met with the decision to vacate. Here the decision to vacate arose under circumstances *where a miner was injured, receiving burns to his face, lips and nose*. It also occurred under circumstances where the original settlement motion maintained the penalty as proposed but, as explained, above offered nothing to support modifying the event to unlikely and not significant and substantial. Thus it is noted that under these peculiar circumstances, this decision to vacate comes from the same Secretary of Labor who, despite Congress' command in section 110(k) of the Mine Act, wishes to expand his authority to settle matters before the Commission without providing facts in support of compromise, mitigation or settlement to the Commission.

Despite the curious circumstances, for now, the Secretary continues to have the authority to vacate citations and the Court has no alternative but to dismiss this matter.

WHEREFORE, this case is **DISMISSED.**

William B. Moran
Administrative Law Judge

[4] In the Court's view, the significant and substantial test is, at its heart, a tool of prognostication. As the accident occurred here, no forecast of reasonable likelihood is needed. To engage in such a theoretical exercise would much like predicting the weather for Wednesday on the following day, as the previous day's weather is known and established. Thus, in both instances, actual experience overtakes theory.

Distribution:

Norman Ridley, Conference and Litigation Representative, U.S. Department of Labor, MSHA, 178 Thorn Hill Road, Suite 100, Warrendale, PA 15086, ridley.norman@dol.gov

Ms. Tina Marie Stanczewski, Law Office of Adele L. Abrams, P.C., 4740 Corridor Place, Suite D, Beltsville, MD 20705

/JM