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

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September 25, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2016-0584
Petitioner,	:	A.C. No. 46-05252-416626
v.	:	
	:	
ICG BECKLEY., LLC,	:	Mine: Beckley Pocahontas Mine
Respondent.	:	

ORDER GRANTING MOTION TO WITHDRAW CONTEST, FOLLOWING COURT'S REJECTION OF SETTLEMENT MOTION
ORDER TO PAY

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. Involved is a section 104(a) citation, alleging a violation of 30 C.F.R. §75.1725(a). The standard is titled, "Machinery and equipment; operation and maintenance," with subsection (a) providing "[m]obile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately. The issuing inspector's citation asserted:

> The operator has failed to maintain the #3 Roof Bolter in operation on the left side of the #2 Section in safe operating condition. When parked on a slight grade it was observed that the park brake was not holding the machine in place and allowing it to creep very slowly downhill. The operator removed the machine from service until repairs were made. Standard 75.1725(a) was cited 6 times in two years at [the Beckley Pocahontas Mine].

Citation No. 9054430, issued May 16, 2016.

On February 16, 2017, the Secretary, acting through a Conference and Litigation Representative ("CLR") filed the Secretary's Motion for Decision and Order Approving Settlement ("Motion"). The Motion contained the Secretary's routine boilerplate language to justify the penalty reduction. That language is in contravention to Congress' command in section 110(k) of the Mine Act that no 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*. Nevertheless, the Motion proceeded to announce that "*the Secretary has evaluated* the value of 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 [and] [*t*]*he 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).

On April 14, 2017, the Court advised the CLR that it had:

> reviewed the settlement motion in this matter, and would like some additional information. Specifically, the Court is concerned that the settlement motion contained no information on the Secretary's perspective. As you know, the rationale presented for the proposed reduction in penalty amount reads: 'Citation No. 9054430 remains as issued with a penalty reduction. Respondent argues that Citation No. 9054430 should be modified to non-S&S because a fatal injury was not reasonably likely to occur. Although the cited brake did need some attention because it allowed the bolter to inch forward a little at a time on a steep grade, it did hold under normal circumstances. Furthermore, the roof bolter almost always had two persons attending it when it was being operated which means there would be a person there immediately for assistance in any event caused by this brake and was thus unlikely to result in a fatal injury. The Secretary, nevertheless, while not admitting the relevancy or significance of Respondent's arguments, agrees to reduce the penalty from $1,607.00 to $1,292.00 for settlement purposes. No modifications to the citation are made.'
>
> With only a statement that the Secretary does 'not [admit] the relevancy or significance of Respondent's arguments,' the Court is left without important information. Does the Secretary agree that the assertions advanced by the Respondent raise legitimate questions of fact which can only be resolved at hearing, and therefore support the proposed settlement? We are asking for this input because the motion tells us nothing at all about the Secretary's stance in reaction to the Respondent's claims. Please feel free to provide this additional information via e-mail — there is no need for a formal amended motion.

Court's April 14, 2017 E-mail to the Parties.

The CLR responded on May 2, 2017, stating:

> As to the substance of your inquiry, please note paragraph 3 of the motion where we indicate that 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 …" Given the company's arguments set forth in paragraph 5.A., we recognize that the outcome of a trial could result in the deletion of the S&S designation. Although we would disagree with such an outcome, we recognize that such an outcome is a possibility. The Secretary has determined that the agreed-upon reduction in penalty of $315 is appropriate given the dispute concerning the gravity of the violation and to ensure the affirmance of the citation as issued.

On July 21, 2017, the Court responded, advising that it:

> routinely rejects the boilerplate the Secretary inserts that he 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 …" because the Commission and this Court view that language as insufficient under section 110(k) of the Mine Act.
>
> That aside, it is unclear to the Court whether the other language in the motion that "[a]lthough the cited brake did need some attention because it allowed the bolter to inch forward a little at a time on a steep grade, it did hold under normal circumstances [and that] the roof bolter almost always had two persons attending it when it was being operated which means there would be a person there immediately for assistance in any event caused by this brake and was thus unlikely to result in a fatal injury," is meant to convey solely the mine operator's position or whether that language reflects, in the Secretary's view, plausible contentions which may be established at a hearing.
>
> It is therefore unclear whether the motion has merely regurgitated the Respondent's position or whether it recognizes that there is a plausible basis for the claim that the bolter would only "inch forward a little at a time on a steep grade," and similarly that there is a plausible basis for the claim that "it did hold under normal circumstances." This is not an unusual request on the Court's part. Instead the Court is trying to ferret out whether the words in the motion represent solely a one-sided representation – that of the mine operator.
>
> The Secretary himself has routinely recognized how to deal with this issue in many other settlement motions. Typically, the Secretary has stated words to the effect that there is some uncertainty about the facts and that such uncertainties can only be resolved by proceeding to a hearing. In light of those uncertainties, the Secretary has agreed to settle this matter by …. etc. Thus, without admitting to the Respondent's contentions, the Secretary at least needs to convey the element of uncertainty as to the disputed facts. Merely stating, as this motion does here that the Secretary does not "[admit] the relevancy or significance of Respondent's arguments," but "agrees to reduce the penalty … for settlement purposes" is therefore an insufficient basis for approving a settlement.
>
> The Court hopes this has been helpful and instructive as to the information needed for this and like settlements.
>
> Please reply to indicate whether the parties plan to file an amended motion, or if they prefer to have the Court issue a decision on the instant motion.

Court's July 21, 2017 E-mail to the parties

Thereafter, on August 1, 2017, the Respondent filed a "Withdrawal of Contest." The Withdrawal states that the Respondent "wishes to withdraw its opposition to the outstanding citation and related civil penalty… [and that the] Secretary of Labor does not object to this Withdrawal of Contest."

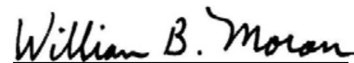
Discussion

Under Commission Rule 11 "[a] party may withdraw a pleading at any stage of a proceeding with the approval of the Judge or the Commission." 29 C.F.R. § 2700.11, *Sec. v. Performance Coal* 34 FMSHRC 587, *592, Mar. 2012. (Chief Judge Robert Lesnick and Judge Margaret Miller). As Administrative Law Judge David F. Barbour noted in *Sec. v. Consolidation Coal,* 1993 WL 396898, (Feb. 1993), "[h]aving withdrawn its contest, there remains no challenge to the Secretary's civil penalty petition, and it too is GRANTED." *Id.* Administrative Law Judge Thomas P. McCarthy observed, a Respondent's withdrawal of contest makes a current civil penalty proceeding moot and the "matter reverts back to the status quo ante prior to said contest," with the effect that the penalty as originally proposed by the Secretary is imposed. 35 FMSHRC 698, (Mar. 2013).

The Court views the events, as recounted above, as yet another example of the importance of the Commission's role in the review of settlements, per the direction of Congress under section 110(k) of the Mine Act.

Accordingly, the proposed penalty as originally assessed is hereby imposed as follows: **Citation No.** 9054430 **Assessment** $1,607.00.

It is **ORDERED** that Respondent pay a penalty of $1.607.00 within 30 days of this order.[1] Upon receipt of payment, this case is **DISMISSED**.



William B. Moran
Administrative Law Judge

[1] Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390

Distribution:

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/JM