FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 18, 2011

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	: : : :	CIVIL PENALTY PROCEEDING Docket No. LAKE 2010-315 A.C. No. 11-02752-206211-01
v.	:	
AMERICAN COAL COMPANY, Respondent	: :	Mine: Galatia Mine

ORDER DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge McCarthy

This case is before me upon a petition for assessment of a civil penalty filed under section 105(d) of the Federal Mine Safety and Health Act of 1977. It involves a single, section 104(a) citation designated as significant and substantial (S&S). The citation was issued on August 20, 2009 after an accident occurred at the Respondent's underground bituminous coal mine, the Galatia Mine, in Galatia, Illinois.

Citation No. 6683272 alleges the following condition or practice:

> The D9 dozer operator at the New Future raw coal stockpile was positioned in a hazardous location over the bridge/void condition created by coal reclaiming operations beneath the storage pile. The operator trammed the dozer across the stockpile above the #2 feeder. An unseen void was present above the feeder due to the #2 feeder being started by the mine control attendant without informing the dozer operator. The lights that indicate which feeders are operating could not been (sic) seen from all areas on the stockpile due to excessive height of the coal stockpile. The coal above the void collapsed as the dozer was being trammed across it and the right side of the dozer dropped into the void. An ignition, possibly caused when methane was released from the void, occurred shortly after the dozer dropped into the void. The heat from the ignition caused severe burns to the operator.

The inspector evaluated gravity as an injury occurred, which could reasonably be expected to be permanently disabling and was S&S. Negligence was characterized as moderate.

On August 24, 2009, additional time was granted to terminate the citation after an electrical contractor installed additional lights to indicate which feeders were running. The citation was

eventually terminated on September 8, 2009 when additional lights were installed in an effort to inform dozer operators which feeders were running so they would refrain from positioning the dozer in hazardous locations above the operating feeders.

The Solicitor has filed a motion to approve settlement. A reduction in the penalty from $7,578.00 to $3,405.00 is proposed. The Solicitor also requests that the Citation be modified to reduce the level of negligence from "moderate" to "low." For the reasons set forth below, the motion to approve settlement is denied.

In the Motion to Approve Settlement and Dismiss Proceedings, the Secretary relies on the fact that "[t]he dozer operator exited the vehicle and he sustained severe burns from the heat of the ignition." The Secretary then accepts Respondent's argument "that it could not have foreseen that the dozer operator would exit the dozer onto the raw coal pile and, therefore, the negligence should be less than was cited" and the civil penalty reduced.

The authority of Commission judges to review settlement agreements filed by the Secretary and mine operators is found at section 110(k) of the Act, which provides in relevant part: "No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission." 30 U.S.C. § 820(k). The Commission has held that section 110(k) "directs the Commission and its judges to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act's objectives." *Knox County Stone Co.*, 3 FMSHRC 2478, 2479 (Nov. 1981).

In *Knox County*, the Commission further explained the role of its judges in reviewing settlements:

> The judges' front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion. While the scope of this discretion may elude detailed description, it is not unlimited and at least some of its outer boundaries are clear. . . . [We] reject the notion . . . that Commission judges are bound to endorse all proposed settlements of contested penalties. However, settlements are not in disfavor under the Mine Act, and a judge is not free to reject them arbitrarily…. Rejections, as well as approvals, should be based on principled reasons. Therefore, we [have] held that if a judge's settlement approval or rejection is "fully supported" by the record before him, is consistent with the statutory penalty criteria, and is not otherwise improper, it will not be disturbed. In reviewing such cases, abuses of discretion or plain errors are not immune from reversal.

Id. at 2479-80.

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). The Commission stated:

> The principles governing the authority of Commission Administrative Law Judges to assess civil penalties *de novo* for violations of the Mine Act are well established.

> (italics added). Section 110(i) of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:
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> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

Accordingly, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). Once such findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration of the statutory criteria and the deterrent purposes of the Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000). In exercising this discretion, the Commission has emphasized that a judge is not bound by the amount of the penalty recommended by the Secretary. *Spartan Mining Co.*, 30 FMSHRC 699, 723 (Aug. 2008). The Commission has also emphasized, however, that when a penalty determination "substantially diverge[s] from those originally proposed, it behooves the . . . judge[] to provide a sufficient explanation of the bases underlying the penalties assessed. *Id.* Without an explanation for such a divergence, the "credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Sellersburg, supra,* 5 FMSHRC1 at 293.

Applying these legal principles to the facts before me, I find no rational explanation justifying the modification of the citation from moderate to low negligence and the concomitant reduction in penalty by 55%. MSHA regulations define the terms "moderate negligence" and "low negligence" for assessment of penalty purposes. *See* 30 C.F.R. § 100.3(d). Moderate negligence is defined as where, "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." Low negligence is defined as where, "[t]he operator knew or should have known of the violative condition or practice, but there are *considerable* mitigating circumstances." 30 C.F.R. § 100.3(d)(emphasis added). Therefore, in order to justify the reduction of negligence from moderate to low, the Secretary must set forth facts to show not only that there were mitigating circumstances, but that those mitigating circumstances were "considerable."

The Secretary accepts Respondent's argument that it could not have foreseen that the operator would attempt to exit the dozer, which had dropped into the void and ignited a potentially flammable and explosive coal pile. Such reasoning is fallacious. One need not engage in any

extended philosophical or rhetorical debate about whether the captain of a sinking ship must go down with it. Unlike the captain of a sinking ship, there were no considerations of overall responsibility for crew, passengers, or cargo here. Suffice it to say that the operator's action would appear to be exactly the sort of action that any reasonably prudent person would take when trapped in the same or similar life-threatening circumstances. Absent a deliberate attempt at suicide, it would be hard to imagine that one would not attempt to exit the sunk dozer in the burning coal pile. Contrary to the proffered settlement, that event is quite foreseeable. Furthermore, the Secretary does not set forth any "considerable" mitigating circumstances that would justify the modification to low negligence or the 55% reduction in penalty, and instead relies entirely on the erroneous claim that the act of self-preservation was unforeseeable.

The injury here was serious. The severe burns could have turned fatal. Penalties must be strong enough to adequately effectuate the deterrent purpose underlying the Mine Act's penalty assessment scheme. *Sellersburg, supra,* 5 FMSHRC at 294. I have considered the representations and documentation submitted and I conclude that the proposed settlement is unreasonable and inappropriate under the criteria set forth in section 110(i) of the Act and would not effectuate the deterrent purpose underlying the Act's penalty assessment scheme. The motion to approve settlement is **DENIED**.

Thomas P. McCarthy
Administrative Law Judge

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