FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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February 28, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
UNITED STATES DEPARTMENT	:	
OF LABOR (MSHA),	:	Docket No. PENN 2009-564
	:	A.C. No. 36-05466-186704
Petitioner	:	
v.	:	
	:	Mine: Emerald Mine No. 1
EMERALD COAL CO.,	:	
Respondent	:	

DECISION DENYING MOTION TO APPROVE SETTLEMENT

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. The Secretary has filed a motion to approve settlement. The originally assessed amount was $208,685.00 and the proposed settlement is for $30,773.00. The Secretary also requests that each of the Orders be modified. For the reasons which follow, the Motion is DENIED.

The Motion seeks to have the six orders involved in this docket reduced by 78% for two of them, 76% for two others, 92% for one and 97% for another. This results in an overall reduction of more than 85% from the original assessments. To support this dramatic reduction the Secretary's Motion provides a breathtaking economy of words. As one example, for a section 104 (d)(2) Order, number 8006616, asserting an inadequate preshift examination, the rationale employs a mere 33 words[1] for its supporting rationale to bring a proposed penalty of $35,543.00 down by 78% to $7,774.00.

Of course, it is not simply a matter of tallying words. The few words offered to support the

[1]Removing necessary but unenlightening articles, conjunctions and a recitation about the nature of the violation, the number of words explaining the proposed reduction drops to 20.

motion are quite uninformative.[2] The rationale, *in its entirety*, provides: "Modify to reasonably likely, change number of persons affected from 6 to 1. This is an inadequate preshift violation, and the underlying conditions were not as likely as originally assessed because only the examiner would be affected." Motion at 2.

There is much to comment about the justification presented for this 78% reduction over the initial proposal. First, it is a non sequitur to state that the underlying *conditions* were not the same because only the examiner would be affected. Second, the Order relates that hazards described in another order and in two other citations[3] were not recorded in the preshift exam and that such omissions exposed miners entering the section to unknown hazards. The issuing inspector deemed it to be an unwarrantable failure. Nowhere does the motion address the impact of those other hazards. Nor does the Secretary's motion deal at all with the inspector's notation that the standard, that is, the inadequate preshift, has been cited 4 times at the mine in the past 2 years. Then too, much of the pithy rationale, offers in fact no rationale but instead consists of unsupported assertions, such as "[m]odify to reasonably likely," and "change number of persons affected from 6 to 1." Those assertions do not illuminate any underlying basis for support of those changes and therefore the Court is uninformed as to the reasoning, as opposed to conclusions, to support them.

As mentioned, the Order described above, number 8006616, referenced two other citations which are not included in this docket and the motion provides no information about them to the Court. But one order is included in this docket and it is appropriate to examine that included order, number 8006611, and the Secretary's offering in this motion to support the 92 % reduction it seeks for it. That order pertained to coal accumulations running some 702 feet. The order also recorded accumulation depths running from 1 to 7 inches and some 2 to 4 feet in width. The inspector marked it as an unwarrantable failure, significant and substantial, the injury likely to be fatal if it occurred, and the likelihood as "highly likely." The issuing inspector considered it important enough to note that the mine had been cited 79 times for violation of this standard in the past two years. The Court considers this to be of importance as well, and at least deserving of comment in any motion. Yet, the Secretary's motion is very uninformative, stating only "Modify to unlikely

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[2] Uninformative, and despite being as short as it is, wrong too. For example, in its Motion and in its draft order the Secretary lists the last of the six violations as Number 6607448. The problem with that is that there is no such number among the citation/order numbers for this docket. Instead the correct number is 8007448. This is important because, aside from being inaccurate, the violation was originally issued as a section 104(a) citation and then modified to a 104(d)(2).

[3] The two citations, identified by number, are not part of this docket. The Secretary does not indicate what those citations involved, whether it checked on their nature, nor whether it consulted with the issuing inspector about the Respondent's contentions regarding this Order or, for that matter, any of the six citations/orders involved in this docket. It turns out that, at least the allegations for the one order which is part of this docket and which was referenced in this alleged violation, involves the very serious matter of considerable accumulations of coal and coal dust for some 702 feet in an entry that serves as an alternate escapeway. That latter order was also deemed by the issuing inspector as unwarrantable.

(still a 104(d)(2)), change number of persons affected from 6 to 1. Upon further review, an ignition of this material was unlikely under the circumstances." Yet, the order states that the accumulations were dry to touch, black in color, and of the depths previously described above. The inspector also noted that battery scoops travel the entry every shift.

Other aspects of the motion are equally troubling, beyond the lack of supporting rationale for the Court to be able to independently assess the proposed, great, reductions. For example, both Orders 8006616 and 8006617, deal with very different topics, the former with an inadequate preshift, while the latter deals with an unsafe conveyor belt in a different longwall section. The unsafe conveyor in 8006617, it was alleged, had abraised the belt structure and was hot with *visible smoke* emanating from the belt, which belt was in operation. Yet, somehow, the motion seeks the exact proposed reduced penalty for both orders, at $7,774.00.

The Court will not go into further detail to describe every aspect of the inadequacies of the motion. Suffice it to say that each putative "rationale" suffers from the same type of deficiencies noted above and deprives the Court of adequate information to independently evaluate the merit of the proposed reductions, as opposed to simply accepting conclusions upon faith. Without such information, the Court is unable to perform its job.

Also, there is no averment that the Secretary consulted with the issuing inspector upon receiving the contentions made by the Respondent mine. If the Secretary fails to consult with the inspectors who are diligently performing their safety and health inspection responsibilities in the Nation's mines, it is obvious this will have a demoralizing effect upon those front-line enforcement personnel. Accordingly, the Court considers it a fundamental averment for the Secretary to at least include a statement that there has been such consultation, so that the Court can be assured that the Secretary's averments are grounded in fact. Finally, the Court has expressed before that settlements should reflect proportionality. That is, as the amount of a given reduction grows from the initial assessment, generally the amount of information to justify the reduction should be proportionally greater as well. Restated, a proposed reduction of 50% will generally require more information to support it than a reduction proposing a 10% reduction.

Accordingly, for the reasons stated, the Motion is DENIED. The Secretary is directed to either resubmit an adequately supported motion, and to indicate whether it has consulted with the issuing inspector as to assertions made by the Respondent which run contrary to the inspector's citation or order. Alternatively, the Secretary, upon reevaluation of its position, may elect to proceed to hearing on such matters for which a settlement justification, as currently proposed, is no longer deemed fitting.

William B. Moran
Administrative Law Judge

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