

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N.W., SUITE 9500
WASHINGTON, D.C. 20001
(202) 577-6809
Facsimile 303 844 5268

July 12, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2009-803
Petitioner	:	A.C. No. 36-07416-195550
	:	
v.	:	
	:	
CONSOL PENNSYLVANIA COAL CO.,	:	Enlow Fork Mine
Respondent	:	

**ORDER REGARDING MOTION FOR PARTIAL SETTLEMENT AND STAY OF
REMAINING CITATION**

Before the Court is the Secretary’s Motion for partial settlement and a stay regarding one (Citation No. 7064741) of the eight (8) citations within this docket. The Motion states that the parties negotiated settlements for seven of the citations and it seeks the Court’s approval for them. The motion sets forth reasons to justify the reduction from the originally proposed penalties, which totaled \$23,491.00¹ to the proposed settlement amount, which totals \$4,184.00, a reduction of 82% .

As set forth in the Motion, the Secretary offers the following in support of the reductions it now advocates and for which the Respondent concurs:

For Citation No. 7084566, alleging improper storage of gas cylinders, the issuing inspector failed to determine if the cylinders contained fuel. This created an evidentiary shortcoming and that failure supports the reduction in the penalty sought to \$128.00.²

¹The proposed penalty includes a 10% reduction from the amount which would be derived from the total points under the penalty policy, representing an across-the-board reduction for “good faith.”

²While accepted in this instance, the Court notes that the citation states there had been 13 citations for this regulation at this mine in the past two years, a significant number of occurrences for the same problem. In the future, the Secretary will need to explain how this was considered.

For Citation No. 8008112, which alleged improperly setting temporary roof support, the Motion's attached Exhibit "A," explains that in fact no violation existed. The Court is bound to accept the Secretary's action, but not the request that the matter be dismissed "without prejudice." At least as to this event, the Secretary cannot have it both ways by agreeing on the one hand that no violation in fact existed and simultaneously asserting that it may still re-file the proceeding for the same event. Therefore, the proceeding is dismissed as to this Citation, but "with prejudice."

For Citation No. 8008113, an energized battery was not ventilated with intake air that was properly coursed in that it traveled to the primary escapeway. The Citation noted this condition had been cited 12 times in the last two years at this mine. The Motion states that it was later determined that only a small amount of air was traveling over the charger to the intake and that the batteries were being vented into the return. The reevaluation of the circumstances concluded that a fire was not reasonably likely to occur. While there is some conflict about the air's travel path, the Court will accept the Motion's reassessment of the gravity and the attendant reduction in the proposed penalty to \$499.00. However, as noted *supra*, future motions will need to address how the Secretary has factored the assertion that this standard has been violated so often in the past.

For Citation No. 7084571, the Citation asserts the presence of damp loose coal and coal fines along a nine foot distance of a conveyor belt. The issuing inspector noted there have been 180 citations of this regulation over the past two years at this mine. The Motion asserts that "there was no confluence of factors to support that fire was reasonably likely to occur" and that the air travels in an outby direction and would affect only one person, the beltman, either by burns or smoke inhalation. Originally assessed at \$11,306.00, the Motion seeks to reduce the penalty to a mere \$207.00, a reduction of 98%. Given the unrefuted factors listed in the citation, and the significant history of this class of problem at the mine, the drastic reduction proposed, without more explanation or justification, cannot be accepted. **Therefore the proposed settlement for this Citation is DENIED.**

For Citation No. 8008115, the facts asserted in the Citation are essentially the same as those presented in Citation No. 8008113. While the Court continues to have the same misgivings expressed for Citation No. 8008113, it accepts the proposed settlement but with the same admonition that future settlement motions will need to explain how a significant history of the same regulatory violation was considered.

For Citation No. 7064745, the settlement provides for the full amount originally proposed and accordingly, the settlement is accepted.

For Citation No. 8008120, the settlement provides for the full amount originally proposed and accordingly, the settlement is accepted.

As noted above, the Motion seeks a stay with regard to Citation No. 7064741. The requested stay anticipates that a decision involving the same regulation, presently on appeal before the Commission, is likely to impact the resolution of this matter. On that basis, the Motion seeks a stay until a decision is issued in that matter, PENN 2008-189. This is a reasonable request and accordingly the request for a stay is GRANTED as to that citation.

Accordingly, *except for* Citation No. 7084571, which proposed settlement is **DENIED**, and Citation No. 7064741, which is **STAYED**, the Settlement Motion is GRANTED as to the remaining Citations, as identified above.

William B. Moran
Administrative Law Judge

Distribution:

Thomas Whitehair II, U.S. Department of Labor, MSHA, Paladin Professional Center, 631 Excel Dr., Suite 100, Mt. Pleasant, PA 15666

Suzanne M. Burt, CONSOL Energy Inc., CNX Center, 1000 CONSOL Energy Dr., Canonsburg, PA 15317-6506

wm