FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 30, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 2008-1582-M A.C. No. 50-01850-159018LWI
v.	:	
ALASKA MECHANICAL, INCORPORATED, Repondent	:	
ALASKA MECHANICAL, INCORPORATED, Contestant	:	CONTEST PROCEEDINGS Docket No. WEST 2008-152-RM Citation No. 6398234; 10/04/2007
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Docket No. WEST 2008-153-RM Citation No. 6398235; 10/04/2007 Mine ID 50-01850 LWI Nome Operations

ORDER DENYING MOTION TO APPROVE SETTLEMENT

Before: Judge Lesnick

This case is before me upon a petition for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act" or "Mine Act"). The Secretary of Labor ("Secretary") and Alaska Mechanical, Incorporated ("AMI") filed a joint motion to approve settlement dated March 12, 2010. The case involves two violations issued by the Secretary under section 104 of the Act following an accident at AMI's Nome Operations that, on July 19, 2007, claimed the lives of two miners when a manlift they were operating tipped over.

The Secretary proposed that a total penalty $115,000 be assessed against AMI. After entering into settlement negotiations, the parties now move for approval of their settlement agreement in which AMI agrees to pay a total penalty of $80,000. For Citation No. 6398235 alleging a violation of 30 C.F.R. § 56.14205, AMI agrees to pay the full proposed penalty of $60,000. For Citation No. 6398234 alleging a violation of 30 C.F.R. § 48,27a, AMI agrees to pay a penalty of $20,000, which is $35,000 less than the Secretary's initial proposed penalty of $55,000, a decrease in amount of approximately 64 percent.

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.
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> . . . [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,[1] and is not otherwise improper, it will not be disturbed.

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[1] Under section 110(i), the Commission and its ALJs "shall consider" the following six penalty criteria in assessing any penalty, and by extension, any settlement agreement under which an operator agrees to pay a civil penalty: "the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and 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). In its *Knox County* decision, the Commission noted that its Procedural Rule 31 implementing section 110(k) "was revised in 1980 to delete the requirement . . . that the judge 'consider' and 'discuss' the six statutory penalty criteria in orders approving settlements" in order to enhance the "'flexibility of

> In reviewing such cases, abuses of discretion or plain errors are not immune from reversal.

Id. at 2479-80. The Commission went on to vacate the judge's rejection of the settlement motion in *Knox County* because it was not "fully supported" by the record and was inconsistent with the penalty criteria. *Id*. at 2481.

Here, the parties represent that the penalty amounts upon which they agreed "take into account those factors required to be considered by Section 110(i)," and that findings set forth by the Secretary in her petition for assessment of civil penalty as to gravity and negligence "are supportable." Mot. at 2. The Secretary's petition alleges that the violation cited in Citation No. 6398234 resulted from "moderate" negligence, and that the violation cited in Citation No. 6398235 resulted from "high" negligence. Pet. at [10]. The petition alleges the gravity of both violations was "serious," and "contributed to the cause of a fatal machinery accident." *Id*. The parties state that AMI's history of previous violations "is as set forth in . . . the Petition." Mot. at 2. Finally, the parties state that the company "exercised good faith in abating the cited conditions," and that the agreed to penalty would not affect AMI's ability to remain in business. *Id*. at 2-3. Neither of these representations is inconsistent with the Secretary's petition. Aside from several other general representations, the parties fail to identify and explain any particular facts that would support a reduction of the penalty for Citation No. 6398234 by well more than half.

In other words, the parties have said that although the Secretary's penalty petition is fully supportable, they have concluded that the significantly reduced penalty AMI has agreed to pay is "fair and reasonable and serve[s] the enforcement goals of the Act," and is "in the public interest and will further the intent and purpose of the Act," simply because they say so. Justice William O. Douglas once had occasion to cite Humpty Dumpty's pronouncement to Alice in *Through the Looking-Glass* that "When I use a word . . ., it means just what I choose it to mean – neither more nor less." *Zschernig v. Miller*, 389 U.S. 429, 435 n.6 (1968). Here, the Secretary has no such authority, and when she says that a penalty is "fair" and "reasonable" and "in the public interest," the Mine Act and Commission precedent requires her and other parties to a settlement to provide more than mere empty words to justify their agreement. Otherwise, section 110(k) would be meaningless, and the authority of Commission judges to review settlements would be reduced to providing the proverbial rubber stamp.

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the judges to approve the settlements,'" though also noting that the rule "does not sanction settlement decisions inconsistent with the statutory penalty criteria." 3 FMSHRC at 2480 n.3. Rule 31 further states that a settlement motion "shall include . . . [f]acts in support of the penalty agreed to by the parties." 29 C.F.R. § 2700.31.

I therefore conclude that the reduced penalty agreed to by the parties for Citation No. 6398234 lacks the factual basis necessary for me to determine whether the penalty would adequately effectuate the deterrent purpose underlying the Act's penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984). The motion to approve settlement is **DENIED**.

Robert J. Lesnick
Chief Administrative Law Judge

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