

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

July 14, 2009

MARFORK COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 2007-564-R
	:	Citation No. 7259269; 06/20/2007
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2007-565-R
ADMINISTRATION (MSHA),	:	Order No. 7259270; 06/20/2007
Respondent	:	
	:	White Queen
	:	Mine ID 46-08297
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2007-716
Petitioner	:	A.C. No. 46-08297-122438
v.	:	
	:	Docket No. WEVA 2008-385
	:	A.C. No. 46-08297-133173
	:	
MARKFORK COAL COMPANY,	:	White Queen
Respondent	:	

CONSOLIDATION ORDER
AND
DECISION APPROVING SETTLEMENT

Appearances: Benjamin D. Chaykin, Esq., Office of the Regional Solicitor,
U.S. Department of Labor, Arlington, Virginia, for the Petitioner;
Matthew Nelson, Esq., Dinsmore & Shohl, LLP,
Morgantown, West Virginia, for the Respondent

Before: Judge Feldman

The captioned civil penalty in Docket Nos. WEVA 2007-716 and WEVA 2008-385 were the subject of a hearing that commenced on April 21, 2009, in St. Albans, West Virginia. The contest proceedings in Docket Nos. WEVA 2007-564-R and WEVA 2007-565-R, that concern 104(d)(1) Citation No. 7259269 and 104(d)(1) Order No. 7259270 contained in the

civil penalty proceeding in WEVA 2008-385, had been stayed. Subsequent to the hearing, on June 23, 2009, the stay of the contests was lifted by the Chief Administrative Law Judge, and, these contests were assigned to me. Consequently, **IT IS ORDERED** that the captioned contests **ARE CONSOLIDATED** for disposition with the captioned civil penalty matters.

The captioned matters concern Petitions for Assessment of Civil Penalty filed pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977 (the Mine Act), as amended, 30 U.S.C. § 820(a), by the Secretary of Labor (“the Secretary”), against the respondent, Marfork Coal Company (“Marfork”). The petitions seek to impose a total civil penalty of \$76,555.00 for four alleged violations in Docket No. WEVA 2007-716, and seven alleged violations in Docket No. WEVA 2008-385, of mandatory safety standards contained in Parts 75 and 77 of the Secretary’s regulations governing surface and underground portions of underground coal mines. 30 C.F.R. Parts 75 and 77.

Shortly after the scheduled hearing began, the parties reached a comprehensive settlement disposing of all matters in issue. The parties settlement terms were approved on the record. The settlement terms were formalized in a Motion to Approve Settlement filed by the Secretary on June 8, 2009. Specifically, the parties have agreed to reduce the initial \$76,555.00 total civil penalty proposed by the Secretary to \$57,813.00.

The parties agreed to a partial settlement prior to the hearing. Pursuant to their agreement, Marfork has agreed to pay the original assessed civil penalty of \$12,778.00 for the four 104(a) citations in issue in WEVA 2007-716. With respect to WEVA 2008-385, Marfork has agreed to pay a reduced civil penalty of \$45,035.00 in satisfaction of the subject five 104(a) citations, one 104(d)(1) citation, and one 104(d)(1) order. The settlement terms included deleting the significant and substantial designation in Citation Nos. 7260718 and 7260723.

The parties agreed to settle 104(d)(1) Citation No. 7259269 and 104(d)(1) Order No. 7259270 in WEVA 2008-385 shortly after the hearing began. 104(d)(1) Citation No. 7259269 concerns an alleged violation of section 75.202(a), 30 C.F.R. § 75.202(a), that provides: “[t]he roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts.” The citation was issued after the mine inspector observed numerous hazardous roof conditions including loose and broken rock brows and areas of wide roof bolt spacing. The cited violation was attributed to an unwarrantable failure. Although the unwarrantable failure characterization has remained, the parties agreed to reduce the proposed penalty assessment from \$40,180.00 to \$28,126.00 based on the vagaries of litigation and potential conflicts of proof.

104(d)(1) Order No. 7259270 involves an alleged inadequate pre-shift examination, attributed to Marfork's unwarrantable failure, in violation of the mandatory standard in section 75.360(b), 30 C.F.R. § 75.360(b). The order was issued because the hazardous roof conditions cited in 104(d)(1) Citation No. 7259269 were not noted during the course of several pre-shift examinations. Again, based on the uncertainties of litigation, the parties agreed to reduce the proposed civil penalty for Order No. 7259270 from \$15,971.00 to \$11,180.00.

Section 110(i) of the Mine Act 30 U.S.C. § 820(i), sets forth the statutory civil penalty criteria used to determine the appropriate civil penalty to be assessed. In this regard, section 110(i) provides, in pertinent part:

The Commission shall consider 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.

As noted, the parties settlement terms were approved on the record as their agreement is consistent with the above statutory penalty criteria. Accordingly, consistent with the parties' agreement, **IT IS ORDERED** that Marfork Coal Company shall pay, within 45 days of the date of this decision, a total civil penalty of \$57,813.00 in satisfaction of the eleven citations and orders in issue in these proceedings. Upon receipt of timely payment, the captioned contest and civil penalty matters **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

Distribution:

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