FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 24, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-1421
Petitioner	:	A.C. No. 000184518
v.	:	
	:	
MARFORK COAL CO., INC.,	:	Mine: Brushy Eagle
Respondent	:	

ORDER DENYING MOTION FOR SETTLEMENT

The Secretary, through its Conference and Litigation Representative, ("CLR"), has filed a motion for approval of settlement in this matter . The motion relates that the single citation in issue, Citation Number 9968576, involves a violation of 30 C.F.R. § 70.101, pertaining to respirable dust. It notes that the average concentration of respirable dust, based on five valid samples collected by the operator, exceeded the maximum limit for such dust by nearly three times that level.[1] It also reports that the citation was determined to be significant and substantial, highly likely to result in lost workdays or restricted duty, of moderate negligence and affecting ten persons. Motion at 2.

The motion then continues with a recitation of the Respondent's contentions, in which it argues that: only four persons would actually have been exposed; that its negligence should be viewed as "low" and that it took reasonable steps to "prevent or limit exposure to excess dust or gases." The motion relates absolutely no basis for the support of the claim that the number exposed would be four, nor does it identify the "reasonable steps" Respondent took to prevent or limit exposure.

The motion then advises that the Respondent would argue that it *was* in compliance with the approved ventilation and dust control plan. This is an interesting contention, given that the Respondent is admitting that it was exceeding the respirable dust limit by nearly three times the upper limit of allowable exposure. The motion then contends that it is Respondent's position that "dust conditions are transitory in nature and not entirely preventable." That argument is intriguing as well, as it implies that the upper limit is not "entirely preventable," though one would think that the upper limit establishes a contrary presumption.

[1]The motion states that the applicable limit is 0.6 mg/m³ and that the results recorded the level as 1.723 mg/m³.

Continuing with its scattershot defense to the admitted violation, the Respondent, the Motion relates, would also contend that the "condition could have arisen due to geological conditions or because the continuous miner operator moved out of proper operating position unbeknownst to mine management, *among other* unpredictable reasons." *Id.* As with the other claims, there is nothing to support these assertions either.

The Motion then relates that the Respondent would also argue that case law supports a finding of low negligence here. To establish that, the Motion cites *Costain Coal, Inc.*, 19 FMSHRC 1653, 1997 WL 640692, (October 1997) ("*Costain*"), a decision issued by an administrative law judge *after* conducting a hearing. The Secretary relates that the "*Costain* Court explained: "[r]espirable dust concentrations vary from shift to shift and are affected by the level of coal production as well as varying factors such as temperature and humidity. Unlike most mine hazards caused by violated conditions, excessive respirable dust concentrations ordinarily cannot be observed." Motion at 2-3.

As pertinent here, the Motion then asserts that "[d]ue to the vagaries of litigation and in the interest of settlement, the parties have agreed that the Secretary will modify the number of persons affected from ten to four." Motion at 3.

The Court cannot approve this motion. The motion is merely a recitation of the defenses the Respondent may claim at a hearing. As noted, there are problems with these claims and the Secretary seemingly accepts them at face value. The motion sheds no light as to the Secretary's stance to these various claims, it merely recites them and then announces that the "the vagaries of litigation and [] the interest of settlement," justify the "half-off sale" presented. A motion must do more than present a one-sided expression of contentions that may be raised at a hearing; it must advise and react to those assertions.[2]

Additional comment is warranted. First, it must be stated what is otherwise well-known: another administrative law judge's opinion has no precedential effect and accordingly other administrative law judges are not obligated to afford such an opinion any deference except insofar as the rationale contained within it may be persuasive.

In *Costain*, the case cited with apparent acceptance by the Secretary, three respirable dust samples exceeded the there applicable 2.0 mg/m^3 upper limit by 2.2, 3.4 and 4.4 and it was undisputed that those exceedances were properly characterized as significant and substantial. Instead, the mine operator disputed the number of persons affected and the degree of negligence involved. The administrative law judge in *Costain* noted that in *Consolidation Coal*, 8

[2]For example, it would seem that the Secretary would have an obligation to consult with the inspector who issued the citation and obtain input as to the claim that four persons, not ten were affected. Any change in the number of persons affected should advise how such a new number impacts the penalty computation under the penalty policy.

FMSHRC 890, 895 (June 1986), the Commission observed that some departure from normal enforcement considerations was justified because exposure to respirable dust has fundamental differences with a "typical" safety hazard. However, this reference was not intended to ease enforcement at all. Rather, the Commission was speaking to the insidious nature of respirable dust exposure and that it was Congress' intent that the full "panoply of the Act's enforcement mechanisms" were to be used to effectuate the goal of preventing that disease, a conclusion with which the D.C. Circuit agreed. *See*, 824 F. 2d 1071 (D.C. Cir. 1987) , affirming the Commission's interpretation.

Further, the administrative law judge in *Costain* noted that "[i]n the final analysis, who, if not the [mine] operator, is responsible for ensuring that miners are not exposed to excessive respirable dust?" That judge then added: "Mine operators must ensure that the maximum levels of permissible respirable dust concentrations are not exceeded [and consequently] [a]n operator's failure to do so, *regardless of fault*, warrants the imposition of *meaningful* civil penalties." *Costain* at 5 (emphasis added).[3] Thus, this Court has a different take on the import of *Costain* in respirable dust cases. Further distinguishing that case from the present matter, the cited standard here is 30 C.F.R. § 70.101, which is the respirable dust standard where quartz is present. As MSHA has pointed out, "[q]uartz particles are 20 times more toxic to the lungs than coal dust alone." MSHA Health Hazard Information Sheet 47. The same Information Sheet advises that a "miner exposed to high levels of quartz can develop silicosis in as little as three years."

The Court is not stating that a reduction in a proposed penalty can never be approved. Rather, the point is that the motion must be more than a mere echo of the mine operator's contentions. Apart from the serious environment in which miners work on a daily basis, the risk of Black Lung disease has long been recognized by Congress as a matter of prime importance. Settlements must reflect the seriousness of this subject as well and penalty reductions must be fully supportable.

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[3]Other particular facts in *Costain* should be noted as well. One citation involved a relatively new mechanized mining unit with no history of previous violations; another had no history of previous violations for the unit in issue and a third had a history of similar violations but then five compliant bimonthly samples intervened before the latest violation. That judge took that information to justify his conclusion that the operator's history was not a factor warranting a "significant impact" on the civil penalty liability. Again, it must be noted such a conclusion is of no precedential impact for other administrative law judge's consideration.

Accordingly, the Secretary's Motion is DENIED. The motion should be re-submitted with appropriate supportive information, if it exists, or in the agency's discretion transferred to an attorney in the Solicitor's Office for further review.

William B. Moran
Administrative Law Judge

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