FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 7, 2010

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-327
Petitioner,	:	A.C. No. 12-02010-143641
	:	
	:	Docket No. LAKE 2008-590
v.	:	A.C. No. 12-02010-157123-01
	:	
	:	Docket No. LAKE 2009-224
	:	A.C. No. 12-02010-171751-02
	:	
BLACK BEAUTY COAL COMPANY,	:	Mine: Air Quality #1
Respondent	:	

ORDER GRANTING THE SECRETARY'S UNOPPOSED MOTION FOR CERTIFICATION FOR INTERLOCUTORY REVIEW,
ORDER GRANTING THE SECRETARY'S UNOPPOSED MOTION FOR CONTINUANCE OF HEARING,
AND ORDER STAYING PROCEEDINGS

These cases are before me on petitions for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., (the "Act"). On February 1, 2010, the Secretary filed Motions to Approve Settlement and Dismiss Proceedings in Docket Nos. LAKE 2008-327 and LAKE 2008-590. On March 16, 2010, I issued two orders denying the Secretary's request to settle the respective dockets based upon the lack of adequate information necessary to address the six penalty criteria and because the drastically reduced penalties proposed by the Secretary would not adequately effectuate the deterrent purpose underlying the act. Subsequently, the Secretary filed a Motion for Reconsideration, as well as an Amended Motion for Reconsideration, for each of the two dockets. On May 7, 2010, I issued an order denying the Motion for Reconsideration and Amended Motion for Reconsideration in both dockets and restated that the proposed settlement motions contained insufficient evidence to determine what penalty should be appropriately assessed. In addition, on April 19, 2010, the Secretary filed a Motion to Approve Settlement and Dismiss Proceedings in Docket No. LAKE 2009-224. I subsequently denied the Secretary's settlement motion on the basis that there was not enough evidence to justify the penalties as proposed for settlement; in this case a reduction in penalty by more than 80% of the original

proposal. On May 26, 2010, the Secretary filed an Unopposed Motion for Certification for Interlocutory Review and for Continuance of Hearing ("Sec'y First Mot.") for all three dockets. The three captioned dockets are currently set for hearing on June 16, 2010 on the issue of the appropriate penalty to be assessed in each case. For reasons set forth below, I **GRANT** the Secretary's Motion for Certification for Interlocutory Review. Further I **GRANT** the Secretary's Motion for Continuance of Hearing and **STAY** these matters until further notice.

The Commission's Procedural Rules state that "[i]nterlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission." 29 C.F.R. § 2700.76(a). Interlocutory review "cannot be granted unless . . . [t]he Judge has certified, upon . . . the motion of a party, that [her] interlocutory ruling involves a controlling question of law and that in [her] opinion immediate review will materially advance the final disposition of the proceeding." *Id*. at § 2700.76(a)(1)(i).

The Secretary, with little elaboration, alleges that the denial of the settlement motions involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. I agree that there is little, if any, legal authority regarding the denial of a settlement agreement, and particularly authority that relates to the requirements an administrative law judge may impose on parties in reviewing a proposed settlement, and therefore a controlling question of law is raised. I further find that an immediate review will materially advance the final disposition of the proceeding.

The Secretary makes the same argument for certification in all three dockets and asserts the following three controlling questions of law:

> (i) [W]hether, in a settlement context just as in an enforcement context, the Secretary has unreviewable prosecutorial discretion to modify: (a) a citation from "significant and substantial" ("S&S") to non-S&S, and (b) a Section 104(d) citation or order to a Section 104(a) citation or order;
> (ii) whether, in considering a proposed settlement agreement under Section 110(k), an ALJ may require the Secretary to submit factual findings and documentation addressing the six factors listed in Section 110(i) for assessing a penalty, even though Section 110(i) expressly states that the Secretary "shall not be required to make findings of fact" concerning those six factors; and
> (iii) whether the ALJ impermissibly relied on her finding that the proposed settlement would encourage operators to contest future citations, orders, and penalty assessments.

Sec'y First Mot. 2; Sec'y Second Mot. 2. Further, the Secretary asserts that Commission review of the three controlling questions of law will materially advance the disposition of these proceedings by rendering the scheduled hearing unnecessary if the Commission were to reverse my denial of the settlement motions in the respective dockets. *Id*.

I agree that there is a controlling question of law, but I do not agree to the questions as posed by the Secretary. Instead, the issue before me is whether or not the Secretary must provide sufficient facts and information to justify the proposed penalty in the context of a settlement and in terms of the six statutory criteria found at section 110(i) of the Act. Since the Mine Act requires the Commission to assess all penalties and in doing so, consider the six criteria, it follows that the Commission must have the information needed to make the assessment. The Secretary argues that she is not required to submit such information to the Commission and therefore appeals the order issued requiring the submission of facts that relate to the penalty criteria. Whether the Secretary must provide information is a controlling question of law in resolving the many cases that are proposed for settlement and is an important matter to resolve before going forward in the three cases at issue here.

Next, I disagree with the Secretary's assertion that, in two of the settlement denials, I impermissibly relied upon a finding that the proposed settlements would encourage operators to contest future violations and the associated proposed penalties. The argument goes beyond the notion of future contests and instead relates to the deterrent purposes of the Act. Pursuant to *Sellersburg Stone Co*., 5 FMSHRC 287, 294 (Mar. 1983), discretion in assessing penalties is bounded by not only the factors set forth in section 110(i), but also by the "deterrent purposes underlying the Act's penalty assessment scheme." The question of whether an administrative law judge may extend the six penalty criteria to a discussion of deterrence is a controlling issue in these settlement proposals.

The Secretary is charged with enforcement of the Mine Act. For that reason, I understand the importance to her in resolving these controlling questions of law. Based upon my review of Commission precedent, these cases present issues of first impression. I find that these are controlling questions of law which, if granted review, will materially advance the final disposition of these cases. Should the Commission grant review and reverse my denial of the settlement motions, the June 16, 2010 hearing would likely become unnecessary and the cases could be easily disposed of without the expenditure of further resources from either party. If, on the other hand, the Commission does not reverse the denial, the hearings on the issue of the evidence required to support a penalty assessment in a settlement will be guided by the Commission's ruling on the matter.

At the heart of this certification order is the authority of Commission Administrative Law Judges to address proposed settlements. Given that the just over two weeks remain before the scheduled June 16th hearing, I find it is appropriate to continue the hearing and stay these matters pending the resolution of this issue before the Commission. The operator has not taken a position on the settlement agreements and has expressed no opposition to this motion.

ORDER

For the foregoing reasons, the Secretary's Unopposed Motions for Certification for Interlocutory Review are **GRANTED** for the three above captioned matters. Accordingly, it is **ORDERED** that the question of what requirements if any, an administrative law judge may

impose upon the Secretary to demonstrate the six penalty criteria as they relate to a modified penalty in a settlement context is **CERTIFIED** for review. Related to that question, is whether an administrative law judge may consider the "deterrent purposes" that underlay the penalty scheme in reviewing a settlement proposal. Further, the Secretary's Motions for Continuance of Hearing are **GRANTED** and these matters are **STAYED** pending further notice.

Margaret A. Miller
Administrative Law Judge

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