FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 02 2018

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2018-0165
v.	:	
THE OHIO COUNTY COAL COMPANY	:	

ORDER GRANTING REVIEW AND APPROVING SETTLEMENT

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). On May 7, 2018, an Administrative Law Judge issued a decision denying a motion to approve settlement. On June 1, 2018, the Secretary of Labor filed a motion asking the Judge to certify the ruling for interlocutory review. The Judge granted this request on June 4, 2018.

Commission Procedural Rule 76(a), 29 C.F.R. § 2700.76(a), provides that interlocutory review is not a matter of right but of the sound discretion of the Commission. In addition, Rule 76(a)(2) requires a majority of Commission members to conclude that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding.

This standard having been satisfied, we grant review. The question on review is whether the Judge abused his discretion in denying the Secretary's motion to approve settlement. We conclude that he did, reverse his decision, and approve the settlement.

Factual and Procedural Background

This case involves five citations, for which the Secretary of Labor initially proposed a total penalty of $10,075. On May 4, 2018, the Secretary filed a settlement motion agreed to by both parties. By the terms of that settlement, all five citations would be affirmed, four of them as issued. For those four citations, the penalty amounts would remain as proposed by the Secretary.

Pursuant to the settlement, the remaining citation (Citation No. 9090883) would be modified to change the negligence level from moderate to low. The proposed penalty for that citation would be reduced from $5,426 to $2,438. This is the penalty amount that the Secretary would have assessed pursuant to his penalty regulations, 30 C.F.R. Part 100, had the negligence initially been assessed as low. The overall penalty for the docket would be reduced from $10,075 to $7,087, constituting approximately 70 percent of the total proposed initial penalty assessment.

Citation No. 9090883 charged the operator with a violation of 30 C.F.R. § 75.202(b), which prohibits miners from working or traveling under unsupported roof. It alleged in pertinent part that both pads of the automated temporary roof support equipment ("ATRS") were not in contact with the roof while roof bolting was being performed. It stated that since both pads need to be touching the roof to create a supported area, the miner working on roof bolting would have been reaching past roof support into the unsupported area (because one pad was not in contact with the roof).

The settlement motion noted the operator's argument that it was not aware of this practice,[1] which was committed by an hourly employee. The motion further acknowledged that the inspector's notes confirmed that the foreman was not present when the violation occurred.

The Judge denied the settlement on the basis that it was insufficiently supported. Dec. Denying Settlement Mot. at 2. He reasoned that the justification for the penalty reduction for Citation No. 9090883 was inconsistent with information involving one of the other citations (Citation No. 9090884).

Citation No. 9090884 charged the operator with a violation of 30 C.F.R. § 75.1725(a), which requires that machinery and equipment be maintained in safe operating condition. The citation alleged that the automatic temporary roof support (ATRS) on the machine would not pivot to allow both pads to contact the roof when uneven roof was present. The negligence level was marked as low. The Secretary proposed a penalty of $1,096 for the violation, and under the settlement, the operator agreed to pay the full amount of the proposed penalty.

In denying the settlement, the Judge stated that:

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[1] Since "practice" connotes something which is done on a usual or regular basis, it might have been clearer and more accurate if the Motion for Settlement had referred to the miner's use of the roof bolt machine under unsupported roof as an "action" rather than a "practice."

> The two citations, 9090883 and 9090884 were issued on October 27, 2017, within minutes of one another. The problem is that the justification for the 55 % reduction for No. 9090883 does not square with the information contained in Citation No. 9090884, unless the Secretary is asserting that these citations *do not* relate to the same piece of equipment. This is so because, for Citation No. 9090883, the Secretary declares that the Respondent "argue[s] that the operator was unaware of *the cited practice*, which was committed by an hourly employee." Motion at 4 (emphasis added). Yet, Citation No. 9090884 does not indicate an incorrect practice. Rather it indicates *a defect* with the machine's ATRS, as it would not pivot to allow both pads to contact the roof, a function which the machine should have the ability to do.
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> Therefore the Motion is insufficiently supported.

Dec. Denying Settlement Mot. at 2.

Disposition

The Commission reviews a Judge's denial of a proposed settlement under an abuse of discretion standard. *Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014).[2] When the Commission and its Judges evaluate settlement motions, we consider "whether the settlement of a proposed penalty is fair, reasonable, appropriate under the facts, and protects the public interest." *American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016).

We conclude that the Judge's denial of the settlement motion constituted an abuse of discretion. First, he did not refer to the applicable standard set forth above. In fact, he failed to articulate any standard under which he evaluated this settlement.

Moreover, the Judge's reason for rejecting the settlement is unsound. His order states that he denied the settlement motion, even though four out of five citations stand as written by the inspector and the accompanying penalties are those originally assessed by the Secretary, because the fifth citation was reduced from moderate to low negligence (with a corresponding reduction in penalty) based on a rationale which he found inconsistent with the wording of one of the other citations.

We readily find an explanation for the wording in the motion that the Judge found so troubling. Both citations were based on the following scenario: a miner was bolting in an entry of a mine. The basis for Citation No. 9090884, which alleges a failure to maintain machinery in safe working condition, was that the ATRS on the roof bolting machine was defective in that it

[2] An abuse of discretion may be found where there is no evidence to support the Judge's decision or if the decision is based on an improper understanding of the law. 36 FMSHRC at 1101.

did not properly pivot so as to allow both pads to contact the roof when uneven roof was present (the situation at the time of the violation). This is a defect in the mining equipment. The negligence was alleged as "low." Citation No. 9090883, for which the negligence and penalty would be reduced under the terms of the settlements, alleges a violation for working under unsupported roof: Despite the fact that only one of the two pads of the ATRS was in contact with the roof, the roof bolter operated the machine anyway. This was an action or "practice" by the roof bolt operator. The citation alleges "moderate" negligence. In the settlement, MSHA agreed to change the citation to "low" negligence because the foreman was not present.

The Judge cited an alleged conflict between the explanation in the motion for the reduced negligence level for Citation No. 9090883, in which the Secretary referenced a "practice," and Citation No. 9090884, which does not indicate that an illegal practice occurred, but instead charges that there was a defect in the machinery. We do not see a conflict in the citations or their explanation in the Motion for Settlement. Section 75.1725(a) (the standard that Citation No. 9090884 alleges was violated) mandates that machinery be maintained in good condition. Therefore, as one would anticipate, this citation describes a defect in machinery and not the conduct of a miner.

In short, Citation No. 9090883 was issued because of an action or "practice" by an individual machine operator (charged with working under unsupported roof) while Citation No. 9090884 was issued for a different reason (a defect in the machine itself). The fact that the practice (working under unsupported roof) occurred in the context of the second violation (the defective machinery) does not mean that both citations must be described in similar terms, nor would we expect them to be. There is thus no conflict between these assertions, which are reconciled by a simple and logical explanation.

The operator's knowledge (actual or constructive) is a key component of a negligence determination. Here, the Secretary has acknowledged that a supervisor was not present when the miner worked under unsupported roof. In light of this, the Secretary has agreed to reduce the negligence level for that citation to "low."[3] Similarly, the Secretary has alleged "low" negligence for the operator's failure to fix a defect in the roof bolter. The parties' requested settlement therefore would align the negligence alleged for the cited action or practice with the negligence alleged against the operator for the equipment defect. We therefore do not discern an internal inconsistency in the settlement terms that undermines the parties' agreement. The Judge's conclusion to the contrary cannot stand.

[3] The actions of a foreman may be attributable to an operator, but the actions of a rank-and-file miner alone may not be so attributable. *See, e.g., Midwest Material Co.*, 19 FMSHRC 30, 35 (Jan. 1997) ("a foreman . . . is held to a high standard of care."); *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995) (holding that the conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes and that, instead, the operator's supervision, training, and disciplining are relevant).

Conclusion

In denying the settlement motion, the Judge abused his discretion. Consequently, we reverse his decision. We conclude that the proposed settlement meets the standard set forth above, grant the motion for review of the Judge's decision, and approve the settlement.

William I. Althen, Acting Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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