

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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October 3, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2017-0158
Petitioner,	:	A.C. No. 46-07809-426807
v.	:	
	:	
ARGUS ENERGY WV, LLC,	:	Mine: Kiah Creek Preparation Plant
Respondent.	:	

**DECISION GRANTING MOTION TO WITHDRAW NOTICE OF CONTEST,
FOLLOWING COURT’S REJECTION OF INADEQUATE SETTLEMENT MOTION
ORDER OF DISMISSAL**

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. At issue is one section 104(a) citation, alleging a violation of 30 C.F.R. § 77.1606(a). This standard is titled “Loading and haulage equipment; inspection and maintenance,” and provides in relevant part “[m]obile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator.” 30 C.F.R. § 77.1606(a). The citation alleged:

The spot mirror was busted out on the Komatsu HD785 Haulage Truck Co. No. 137. Equipment defects affecting safety shall be recorded and reported to the mine operator. There was no pre-operational record completed and reported to the mine operator on this date for this piece of mobile equipment. This truck was being operated to haul overburden on mine property.

Citation No. 8128099.

The inspector marked this alleged violation as S&S, reasonably likely to lead to an illness or injury, likely to lead to a fatal injury, affecting one person, and as moderate negligence. *Id.* The alleged violation was abated with the installation of a new spot mirror, and the Secretary proposed a civil penalty of \$666.00. Secretary’s Petition, Ex. A.

Procedural History

Docket No. WEVA 2017-0158 was assigned to this court on April 19, 2017. On June 26, 2017, the Secretary filed a motion to approve settlement. The initial motion contained boilerplate from the Secretary that, as the Court has previously noted, contravenes Congress' command in section 110(k) of the Mine Act that "no proposed penalty which has been contested before the Commission... shall be compromised, mitigated, or settled *except with the approval of the Commission.*"¹ 30 U.S.C. § 820(k) (emphasis added).

Accordingly, on June 28, 2017, the Court issued an order denying the settlement motion, on the basis that the motion contained no factual information pertaining to the violation itself. Rather, the Secretary pronounced that *he*,

has determined that the S&S and gravity determinations in the citation at issue shall be modified as discussed above. Substantive modifications to citations and orders, including the S&S designation, are within the prosecutorial discretion of the Secretary. *Mechanicsville Concrete Inc.*, 18 FMSHRC 877 (1996)" The Commission's review of settlement proposals involving such substantive modifications is limited to whether the agreed-upon penalty amount is consistent with the agreed-upon substantive modification. Here, a \$134.00 reduction in the penalty from \$666.00 to \$532.00 is appropriate and supported by the reduction in the gravity findings."

Secretary's June 26, 2017 Motion at 2-3.

As previously discussed by this court, the Secretary's reference to *Mechanicsville* reveals a mistaken conflation of his prosecutorial discretion to vacate citations with the claim that he has unbounded discretion to determine what information must be provided in the context of settlements. *Argus Energy WV, LLC*, 39 FMSHRC 1317, 1320 n. 5 (June 28, 2017) (ALJ

¹ The motion included the Secretary's oft-stated language that, "In reaching this settlement, the Secretary has evaluated the value of the compromise, the likelihood of obtaining a better settlement, and the prospects of coming out better or worse after a trial. In deciding that such a compromise is appropriate, the Secretary has not given weight to the costs of going to trial as compared to the possible monetary results that would flow from securing a higher penalty. He has, however, considered the fact that he is maximizing his prosecutorial impact in settling this case on appropriate terms and in litigating other cases in which settlement is not appropriate. The Secretary believes that maximizing his prosecutorial impact in such a manner serves a valid enforcement purpose. Even if the Secretary were to substantially prevail at trial, and to obtain a monetary judgment similar to or even exceeding the amount of the settlement, it would not necessarily be a better outcome from the enforcement perspective than the settlement, in which the alleged violation is resolved and can be used as a basis for future enforcement actions. A resolution of this matter in which the violation is resolved is of significant value to the Secretary and advances the purposes of the Act." Secretary's June 26, 2017 Motion to Approve Settlement at 2. As noted herein, this language provides no useful section 110(k) information to the Commission and, if accepted, would equate the Secretary's presently unfettered authority to vacate citations with his asserted scope of authority in the realm of settlements.

Moran). The Court further noted that if it accepted the Secretary's claims, the Secretary could present identical boilerplate language for any proposed modification, untethered from any case-specific facts. *Id.* at 1321.

On July 7, 2017, the Secretary filed a motion to certify for interlocutory review the Court's order denying settlement. The motion sought certification of two questions:

1. Whether the ALJ erred in rejecting the Secretary's interpretation of the term "approval" in Section 110(k) of the Mine Act (30 U.S.C. § 820(k)), and instead adopting a standard of review that fails to recognize that the Secretary is exercising his statutory enforcement discretion when he proposes a settlement agreement?
2. Whether the ALJ erred in rejecting the Secretary's position that modifications to the gravity findings of an enforcement action, including whether a violation is significant and substantial ("S&S"), are within the unreviewable enforcement and prosecutorial discretion of the Secretary?

Secretary's July 7, 2017 Motion to Certify and to Stay Proceedings at 1-2.

The Court denied the motion to certify on July 11, 2017, on the basis that immediate review would not materially advance final disposition of the proceedings.

Shortly afterwards, the Court scheduled a conference call with the parties to set a date for hearing. That call was canceled upon notification from the parties that the Respondent planned to withdraw its contest and pay the proposed penalty, with no modifications to the single citation.

Subsequently, on August 4, 2017, the Respondent filed the instant submission, titled "Notice of Withdrawal of Notice of Contest and Parties Joint Request That This Proceeding Be Dismissed." ("Notice")² The motion states that the Respondent has agreed to pay the originally assessed amount of \$666.00 in full, seeking "that its notice of contest of Citation Number 8128099 and the related penalty assessed for this violation be withdrawn, and that an order be issued affirming this violation and assessing the proposed penalty of \$666. ... the Secretary is in agreement with this withdrawal and with the proposed assessment of \$666." Notice at 1.

Discussion

Under Commission Rule 11 "[a] party may withdraw a pleading at any stage of a proceeding with the approval of the Judge or the Commission." 29 C.F.R. § 2700.11, *Sec. v. Performance Coal* 34 FMSHRC 587, 592 (Mar. 2012) (Chief Judge Lesnick and Judge Miller). As Administrative Law Judge David F. Barbour noted in *Sec. v. Consolidation Coal*, 1993 WL 396898 (Feb. 1993), "[h]aving withdrawn its contest, there remains no challenge to the Secretary's civil penalty petition, and it too is GRANTED." *Id.* Administrative Law Judge Thomas P. McCarthy observed, a Respondent's withdrawal of contest makes a current civil penalty proceeding moot and the "matter reverts back to the status quo ante prior to said

² The Court construes the Respondent's notice as a motion and it will be referred to as such in this decision.

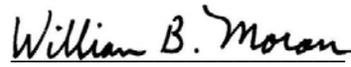
contest,” with the effect that the penalty as originally proposed by the Secretary is imposed. *Dickenson-Russell Coal Co., LLC*, 35 FMSHRC 698 (Mar. 2013) (ALJ McCarthy).

The Court views the events, as recounted above, as yet another example of the importance of the Commission’s role in the review of settlements, per the direction of Congress under section 110(k) of the Mine Act.

The Court has considered the Respondent’s notice to withdraw its notice of contest and the related penalty for the one citation in this matter and the request that an order be issued affirming the violation and assessing the proposed penalty of \$666 and the parties’ joint request that the proceeding be dismissed. The Respondent’s notice of withdrawal is recognized and the parties’ request that this proceeding be dismissed is GRANTED.

WHEREFORE, the motion to withdraw is **GRANTED**.

It is **ORDERED** that Respondent pay a penalty of \$666.00 within 30 days of this order.³


William B. Moran
Administrative Law Judge

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/JM

³ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO 63179-0390