

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 11, 2023

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

JUSTICE ENERGY COMPANY, INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2023-0148
A.C. No. 46-03404-569444

Mine: No. 32

DECISION APPROVING SETTLEMENT

Before: Judge William B. 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. The Conference and Litigation Representative, (“CLR”), has filed a Motion to Approve Settlement. The originally assessed amount for the citations at issue was \$4,081.00 and the proposed settlement amount is \$3,061.00. The proposed settlement terms are reflected in the following table:

Citation No.	Originally Proposed Assessment	Settlement Amount	Modification
Docket No. WEVA 2023-0148			
9569727	\$987.00	\$732.00	26% Penalty Reduction
9569728	\$987.00	\$732.00	26% Penalty Reduction
9569730	\$133.00	\$133.00	Sustained as Issued; minimum penalty assessed
9569731	\$987.00	\$732.00	26% Penalty Reduction
9569732	\$987.00	\$732.00	26% Penalty Reduction
TOTAL	\$4,081.00	\$3,061.00	Overall: 25% reduction in total penalty under regular assessment formula

Analysis

Although the overall penalty reductions are moderate for this docket, several disconcerting aspects stand out. For each of the citations in this docket, save the one citation assessed at the minimum penalty, the basis for the reductions is that the injury would not result in more than lost workdays or restricted duty. Motion at 3-4. However, examining the four citations, the now-admitted violations represent serious and extensive conditions, all as found by the issuing MSHA Inspector, Aaron D. Cline, who diligently recorded the conditions and practices he discovered.

As reflected here, citing 30 C.F.R. § 77.404(a),¹ the text of Inspector Cline's demonstrates the significant hazards he found:

Citation No. 9569727 provides the following unchallenged facts of the unsafe truck:

The CAT 785C rock truck #521 is not being maintained in safe operating condition. When checked, the following deficiencies exist:

1. door seal is damaged
2. cab filter is missing
3. **handrail in front of cab broke**
4. **off-side step top rung bent and steps bent into bumper causing no toe clearance**
5. **oil hose on off-side front brake leaking**
6. oil leak inside offside rear wheel
7. **emergency steering does not work**

The operator removed the truck from service until all repairs are made.

Petition for civil penalty at 9.

Seven defects constitute a large number and items 3 through 5 and 7 are particularly worrisome.

Citation No. 9569728

This admitted violation has the effect, in context, of making the serious defects identified in Citation No. 9569727 much worse. The issuing MSHA Inspector, to his great credit, performed due diligence in citing the operator, per 30 C.F.R. § 77.1606 (a),² with a failure to perform a legitimate pre-operational check for the truck cited in Citation No. 9569727, above, noting:

¹ **30 C.F.R. § 77.404 Machinery and equipment; operation and maintenance.** (a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

² **30 C.F.R. § 77.1606 Loading and haulage equipment; inspection and maintenance.** (a) Mobile 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.

The CAT 785C rock truck #521 has not been provided an adequate pre-operational check **on either shift**. When checked, citation 9569727 was issued with numerous deficiencies and **no defects were listed on the pre-ops except the cab filter**.

Petition for civil penalty at 10 (emphasis added).

In settlement motions, the Court has seen a rise as a defense in such motions that there was no citation for failure to perform a pre-check for equipment defects. To address such claims, the Court has stated that inspectors should evaluate whether there has been genuine pre-check for defects affecting safety, something Inspector Cline, to his credit, evaluated here, finding an abnegation by the operator of its duties to comply with the pre-shift exam requirement.

As described below, those two, inextricably related, citations were not the end of the matter.

Citation No. 9569731

Essentially the twin violations problems presented themselves again within the same inspection; that is to say, the inspector found multiple unsafe conditions on yet another truck and these hazards were also coupled with inadequate pre-operational checks.

This was a gross deficiency, far exceeding the 7 deficiencies found for Citation No. 9569727, as Citation, Citation No. 9569731 was considerably worse. Citing the same standard violated in Citation No. 9569727, this time Inspector Cline found **19 (nineteen) defects presenting unsafe conditions**. The citation provided the following unchallenged facts of the unsafe truck:

The Maroon Mack Lube truck #0009 is not being maintained in safe operating condition. When checked, the following deficiencies exist:

1. Door seal driver side damaged
2. Door seal passenger side damaged
3. **inside door handles don't work inside cab both doors**
4. **no passenger seat, wooden box is in place of seat, no buckle for seat belt**
5. **hood latch broke**
6. **hood handle gone**
7. oil leak on motor
8. ball stud has excessive slack on off side tie rod end
9. air dryer not working and leaking
10. green antifreeze tank ratchet strapped not bolted down
11. **no valve to shut air line off that must be changed from antifreeze to grease tanks, blows air out on operator**
12. 12. jake brake is weak
13. 13. shock missing on off side front
14. 14. oil covering walkway in bed
15. 15. oil covering hose bay
16. 16. 2 lights out on rear

17. 17. ladder to top of truck no toe clearance
- 18. 18. no handrail on top of tank and no antiskid material**
- 19. All 6 brakes are out of adjustment.**

The operator removed the truck from service until all repairs are made. Standard 77.404(a) was cited 12 times in two years at mine 4603404 (12 to the operator, 0 to a contractor).

Petition for a civil penalty at 12-13 (emphasis added).

Here too, in the diligent performance of his inspection responsibilities, Inspector Cline issued Citation No. 9569732, with his unchallenged statement that:

The maroon mack lube truck #0009 has not been provided an adequate pre-operational check on either shift. When checked, **no deficiencies were listed** on the pre ops and citation 9569731 was issued listing 17³ deficiencies on the truck.

Standard 77.1606(a) was cited 2 times in two years at mine 4603404 (2 to the operator, 0 to a contractor).

Petition for Civil Penalty at 14. (emphasis added).

In the Court's view, the motion is appalling, both because of the large number of hazards found on the two trucks and the dereliction of duties by the operator in not performing a legitimate precheck. The Respondent provides the same, empty, rationale to support the across-the-board 26% reductions for each of these four conceded violations.

The Respondent offers the *same* empty language for *each* of four admitted violations:

In the unlikely event of a mine accident, the listed conditions would not result in more than a lost workdays or restricted duty injury.

Motion at 3-4. (emphasis added).

There is no substance to back up the bald claim; only the assertion is made.

The Secretary, acting through Conference and Litigation Representative David Trent, in like fashion, has an equally hollow response *for each*, stating:

The Secretary recognizes **that the ALJ** may find merit in the facts and arguments presented by the Respondent and in light of the contested evidence and given the uncertainties of litigation,

Id. (emphasis added).

³ The reference to 17 deficiencies appears to be a typographical error, as Inspector Cline listed 19, not 17, separate safety deficiencies in Citation No. 9569731.

Despite its statutory role to protect miners, the Secretary does not inform if he/she consulted with the issuing inspector, who saw the admitted violations, for his take on the ‘lost workday, restricted duty’ claims. Further, for the Secretary to make no distinction between the numerous defects and the arguably more serious violation of not performing an honest pre-operational check, weakens the importance of the latter, and is a disservice to miners. Such a response is inimical to the Secretary’s safety and health duties.

Reasonable Inquiry by the Court is not Permitted

It is obvious that for egregious violations such as these, the Court would have questions aplenty. However, Reasonable Inquiry about the contentions advanced in settlement motions is not Permitted

This is because, under the Commission’s interpretation of section 110(k) of the Mine Act, Congress only intended that the three elements as laid out in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018), need be considered under the Commission’s standard for review of settlement submissions. The settlement motion does not require more information from the Secretary. Accordingly, per the Commission’s decisions on the scope of a judge’s review authority of settlements, the “information” presented in this settlement motion is sufficient for approval.

The Commission has stated that the administrative law judges have “front line oversight” of the settlement process and as such that it is an adjudicative function that “necessarily involves wide discretion.” Despite those muscular words, the Commission has clearly set forth that the Secretary is not required to offer any comment at all as to the merits of the Respondent’s arguments.

Per the Commission’s decisions in *AmCoal* and *Rockwell Mining*, to approve a settlement motion there are three requirements. Meeting the first two requirements is automatic and perfunctory.

- (1) The motion must state the penalty proposed by the Secretary.

This requirement is met in every civil penalty petition, as the petition contains the proposed penalty. The amount is rarely, if ever, an issue, and if in issue, it is resolved before the penalty petition is filed.

- (2) The amount of the penalty agreed to in settlement.

This requirement is also automatic; there could not be a settlement motion without the parties stating the penalty amount to which they have agreed.

- (3) “Facts,” as the Commission has employed that term, in support of the penalty agreed to by the parties.

In the context of settlement motions, “facts” have an atypical meaning.⁴ In discussing what

⁴ In settlements, “facts” do not mean things that are known or proved to be true, nor does the term mean something that has actual existence or a piece of information presented as having objective reality. *Fact*, Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/fact> (accessed Nov. 18, 2021). Accordingly, in settlements, a fact does not mean something that is true, nor is there a requirement that a statement of fact be verifiable.

constitute “facts” for settlements, the Commission stated “there is no requirement that facts supporting a proposed settlement must necessarily be submitted by the Secretary. Facts supporting a penalty reduction in a settlement motion may be provided by any party individually or by parties collectively.” AmCoal at 990. The only associated requirement with such “facts” is that “there is a certification by the filing party that any non-filing party has consented to the granting of the settlement motion.” *Id.* (emphasis added).

Accordingly, the Commission rejected the view that a respondent’s assertions of fact need to “present legitimate questions of fact,” and further that the Secretary need not comment yea or nay to the facts asserted by a respondent. Instead, the Commission announced that “[f]acts alleged in a proposed settlement need not demonstrate a ‘legitimate’ disagreement that can only be resolved by a hearing.” Instead, the Commission allows that parties may submit facts that reflect a mutual position that the parties have agreed is acceptable to them . . .” *Id.*

It should not come as a surprise that, under the Commission’s AmCoal test for review of settlements, all such motions are approved. In the rare instances where a judge has denied a settlement motion, post-AmCoal, those decisions have met with reversals by the Commission. Hopedale Mining, 42 FMSHRC 589 (Aug. 2020), American Aggregates, 42 FMSHRC 570 (Aug. 2020) (Chairman Traynor and Commissioner Jordan, dissenting).

The Court has considered the Secretary’s Motion and approves it **solely on the basis of the Commission’s decisions in *The American Coal Co.*, 40 FMSHRC 983 (Aug. 2018) and *Rockwell Mining, LLC*, 40 FMSHRC 994 (Aug. 2018)** for the standard to be applied by Commission administrative law judges when reviewing such settlement motions under the Commission’s interpretation of section 110(k) of the Mine Act. Per the Commission’s decisions on the scope of a judge’s review authority of settlements, the “information” presented in this settlement motion is sufficient for approval.

WHEREFORE, the motion for approval of settlement is **GRANTED**. With significant misgivings, the penalties are reduced, per the summary table above, and those four reduced penalties are modified to provide that the injury or illness reasonably to be expected is downgraded from ‘fatal’ for each to ‘lost workdays or restricted duty.’ The Respondent is **ORDERED TO PAY** a penalty of **\$3,061.00** within 30 days of this order.⁵ Upon receipt of payment, this case is **DISMISSED**.

William B. Moran

William B. Moran
Administrative Law Judge

⁵ Penalties may be paid electronically at Pay.Gov, a service of the U.S. Department of the Treasury, at <https://www.pay.gov/public/form/start/67564508>. Alternatively, send payment (check or money order) to: U.S. Department of Treasury, Mine Safety and Health Administration, P.O. Box 790390, St. Louis, MO 63179-0390. It is vital to include Docket and A.C. Numbers when remitting payments.

Distribution:

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