

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N.W., SUITE 9500
WASHINGTON, D.C. 20001
(202) 434-9958

December 23, 2008

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEVA 2006-654
Petitioner	:	A.C. No. 46-08801-087351-01
v.	:	
	:	Docket No. WEVA 2006-655
ARACOMA COAL COMPANY, INC.,	:	A.C. No. 46-08801-087351-02
Respondent	:	
	:	Docket No. WEVA 2006-656
	:	A.C. No. 46-08801-087351-03
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	:	Docket No. WEVA 2006-657
	:	A.C. No. 46-08801-087351-04
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	:	Docket No. WEVA 2006-658
	:	A.C. No. 46-08801-087351-05
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	:	Docket No. WEVA 2006-660
	:	A.C. No. 46-08801-087351-07
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	:	Docket No. WEVA 2006-734
	:	A.C. No. 46-08801-090231-01
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	:	Docket No. WEVA 2006-735
	:	A.C. No. 46-08801-090231-02
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	:	Docket No. WEVA 2006-857
	:	A.C. No. 46-08801-092750-01
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	:	Docket No. WEVA 2006-858
	:	A.C. No. 46-08801-092750-02
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	:	Docket No. WEVA 2006-931
	:	A.C. No. 46-08801-094139
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	:	Docket No. WEVA 2007-36
	:	A.C. No. 46-08801-097671-01
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	:	Docket No. WEVA 2007-37
	:	A.C. No. 46-08801-097671-02

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: A.C. No. 46-08801-100295-01
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: A.C. No. 46-08801-114238-01
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: A.C. No. 46-08801-114238-02
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: A.C. No. 46-08801-115168-03
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: A.C. No. 46-08801-124353-01
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: A.C. No. 46-08801-131178-02
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: A.C. No. 46-08801-133380-01

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: A.C. No. 46-08801-138996-02
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: A.C. No. 46-08801-142965-01
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: A.C. No. 46-08801-142965-02
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: A.C. No. 46-08801-142965-03
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: A.C. No. 46-08801-142965-04
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: A.C. No. 46-08801-142965-05

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: A.C. No. 46-08801-142965-06
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: A.C. No. 46-08801-146530-01
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: A.C. No. 46-08801-146530-08
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: A.C. No. 46-08801-146530-09
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: A.C. No. 46-08801-148658
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: Docket No. WEVA 2008-1292
: A.C. No. 46-08801-149961-01
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: A.C. No. 46-08801-149961-02
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: A.C. No. 46-08801-151759
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: Docket No. WEVA 2008-1475
: A.C. No. 46-08801-153619
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: A.C. No. 46-08801-155207
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: A.C. No. 46-08801-155441-01
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: A.C. No. 46-08801-155441-02
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: Docket No. WEVA 2008-1622
: A.C. No. 46-08801-155953
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: Aracoma Alma Mine #1
: Mine ID 46-08801
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: Docket No. WEVA 2006-803
: A.C. No. 46-08802-090232-01
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: Docket No. WEVA 2006-804
: A.C. No. 46-08802-090232-02
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: A.C. No. 46-08802-090232-03
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: A.C. No. 46-08802-090232-04
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: A.C. No. 46-08802-097672-01
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: A.C. No. 46-08802-010749-01

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: A.C. No. 46-08802-117552
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: A.C. No. 46-08802-142966-01
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: A.C. No. 46-08802-142966-02
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: Docket No. WEVA 2008-905
: A.C. No. 46-08802-142966-03
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: Docket No. WEVA 2008-1054
: A.C. No. 46-08802-146531
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: A.C. No. 46-08802-149962
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: Docket No. WEVA 2008-1567
: A.C. No. 46-08802-155442-01
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: Docket No. WEVA 2008-1568
: A.C. No. 46-08802-155442-02
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: Hernshaw Mine
: Mine ID 46-08802

DECISION APPROVING SETTLEMENT
ORDER TO PAY

Appearances: Edward Clair, Esq.; Douglas White, Esq.; Heidi Strassler, Esq.; Keith Bell, Esq.; Jerald Feingold, Esq.; W. Christian Schumann, Esq.; Francine Serafin, Esq.; Office of the Solicitor, U.S. Department of Labor, for the Secretary of Labor

Mark Heath, Esq., for the Respondent

Before: Judge Lesnick

These cases are before me upon petitions for assessment of the civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. These proceedings consist of 102 penalty dockets and 1,302 citations and orders. The parties have filed a joint motion to approve a global settlement of citations incorporated in the above captioned dockets with a total proposed penalty of \$2,806,027. The parties propose to reduce the total penalty to \$1,700,000.¹ The alleged violations in these proceedings involve several mandatory standards and include 25 violations designated as contributory to the January 19, 2006, fire at Aracoma's Alma Mine #1 that resulted in the death of two miners. In relation to the civil penalty settlement of the designated contributory violations, the Secretary recognizes that Aracoma has agreed to pay the United States an additional \$2,500,000 in fines for criminal violations related to the fire. I held a hearing in this matter on December 22, 2008, limited to issues raised in the joint motion.

In support of the proposed settlement, the parties agree that Aracoma will (outside the pattern of violations procedures set forth at 30 C.F.R. Part 104) be given a one-time opportunity to voluntarily provide MSHA with plans to reduce and/or maintain the rate of Significant and Substantial ("S&S") violations at both the Alma Mine #1 and the Hernshaw Mine to a rate at or below 125% of the national S&S issuance rate at all underground bituminous coal mines during that quarter.² MSHA will monitor the S&S issuance rate

¹ The civil penalty is to be apportioned in payment of each covered citation and order in the same proportion as \$1,700,000 is to the total assessment of \$2,806,027.

² Under this provision, an S&S reduction plan adopted at the Alma Mine #1 and/or Hernshaw Mine will remain in effect only as long as the mine remains in immediate jeopardy of receiving a potential pattern warning letter after the plan's adoption. Upon the first MSHA pattern review in which it is determined that either mine is no longer in jeopardy of receiving a potential pattern warning letter because the mine does not meet the screening criteria set

quarterly commencing with the first full calendar quarter beginning after this settlement becomes final, commencing April 1, 2009.

The parties acknowledge that the goals for the Alma Mine #1 and the Hernshaw Mine are to reduce the number of S&S violations to a level at which the mines are not in jeopardy of receiving a potential pattern warning letter. The Alma Mine #1 goals are based on an incremental 30% reduction from the 15.6 S&S citations and orders issued per 100 on-site inspection hours at the mine during the baseline 24 months ending on the last day of June 2008. The goals for the Alma Mine #1 are set forth below:

First Quarter	10.9
Second Quarter	7.6 or 125% of the National Average for all Underground Bituminous Coal Mines this Quarter, whichever is higher.
Each Subsequent Quarter	125% of the National Average for all Underground Bituminous Coal Mines this Quarter

The S&S issuance rate for all underground bituminous coal mines during the baseline 24 months ending on the last day of June 2008 was 7.1 issuances per 100 on-site inspection hours. The Hernshaw Mine's S&S issuance rate per 100 on-site inspection hours during the 24 months ending on the last day of June 2008 was 8.9. The Hernshaw Mine short-term goal is to achieve and/or maintain an S&S issuance rate of 125% of the 7.1 national rate, which is 8.9 S&S citations and orders issued per 100 on-site inspection hours for the first full calendar quarter beginning after this settlement becomes final. Thereafter, MSHA will measure the mine's S&S issuance rate against the S&S issuance rate for all underground bituminous coal mines each quarter. As long as the mine's S&S issuance rate remains at or below 125% of the national average for that quarter, the mine will not be considered to be exhibiting a potential pattern of violations.

If Aracoma chooses to adopt such voluntary S&S reduction plans, it will submit such plans to MSHA within 30 days of the date that this settlement becomes final. As long as each mine continues to achieve and maintain the goals described above, that mine will be able to remain on its S&S reduction plan indefinitely and MSHA will forego issuing potential pattern warning letters. If either mine fails to achieve the quarterly goals described herein, that mine will be eligible to receive a potential pattern warning letter during all subsequent MSHA pattern of violation reviews. Under no circumstances will MSHA issue these mines

forth at <http://www.msha.gov/pov/POVScreeningCriteria.pdf>, that mine will no longer qualify for participation in the voluntary S&S reduction plan described herein, and will thereafter be evaluated, along with all other mines, under MSHA's normal pattern of violations process.

pattern of violation notices until after MSHA has instituted the pattern procedures under Part 104 against those mines.

In further support of the motion, the parties aver that in addition to the civil penalties referenced above, Aracoma has reached an agreement with the United States Attorney for the Southern District of West Virginia to enter a guilty plea to a ten-count information related to the January 19, 2006, Alma Mine #1 accident, and to pay a criminal fine of Two and One-Half Million Dollars (\$2,500,000) to the United States of America. In addition, as a condition of probation, Aracoma has agreed to pay restitution as ordered by the Court.

The parties agree that, in light of the factual circumstances of the violations at issue, defenses that might be available to Aracoma, and the deterrent effect of both the civil and criminal penalties that are to be imposed, the amounts agreed upon by the parties herein are appropriate in light of the criteria set forth at Section 110(i) of the Mine Act and promote the purposes of the Act. The Secretary's assertions of the gravity of the violations and Aracoma's negligence are set forth in each of the citations and orders. Aracoma contends that it might be able to produce evidence to mitigate the Secretary's assertions and that several citations and orders are overlapping as to penalties assessed. The parties agree that the uncertainty of resolution of any such issues supports a reduction in the Secretary's proposed penalties. Although I held a hearing in this matter, it was not a full hearing on the merits; consequently, I must rely upon counsels' representations.

The parties also agree that the violations were abated in good faith. They stipulate that Aracoma is a large operator which, prior to January 19, 2006, had an average history of previous violations (see Exs. A attached to the penalty petitions), and that payment of the proposed penalty amount will not adversely affect Aracoma's ability to continue in business.

Based upon the review of the facts and the assessment procedures at 30 C.F.R. Part 100, the parties believe that the agreed upon civil penalty of \$1,700,000 for the citations and orders set forth in Addenda 1 and 2 of the settlement motion is reasonable, and that payment of this amount will serve to effect the intent and purpose of the Act.

The parties note that, pursuant to this settlement agreement and the criminal plea expected to be entered in District Court, Aracoma will pay the United States of America a total of \$4,200,000, all relating to conduct involved in the violations at issue here. The criminal fine, in conjunction with the civil penalties, serves an additional deterrent purpose and will encourage Aracoma's future compliance with the Mine Act and its mandatory standards.

Although I grant the settlement motion proffered by the parties, I do so reluctantly. The Commission has noted: "In determining whether to approve a proposed settlement a judge must consider, *inter alia*, whether the amount proposed will accomplish the underlying purpose of a civil penalty – to encourage and induce compliance with the Mine Act and its standards." *Madison Branch Management*, 17 FMSHRC 859, 867 (June 1995) (citations

omitted).³ Moreover, in reviewing settlement agreements, Commission Judges must also “accord due consideration to the entirety of the proposed settlement package, including both its monetary and non-monetary aspects . . . [to] determine whether it is ‘fair, adequate and reasonable’ . . . [and] ‘adequately protects the public interest.’” *Id.* at 868 (citations omitted).

Here, the parties have agreed that Aracoma will pay a Mine Act penalty of \$1.7 million dollars, which is approximately 61 percent of the penalty originally proposed by the Secretary. In contrast, the Chairman, Chief Executive Officer, and President of Massey Energy Company, Aracoma's parent company, received in 2007 a compensation package that probably exceeded \$23 million. *Massey CEO's pay increased more than 35 percent in 2007*, Herald-Dispatch (Huntington, West Virginia), April 15, 2008.⁴ I question whether a penalty of \$1.7 million is adequate in light of Aracoma's enormous size as indicated by the compensation of its leader. However, I must look beyond the Mine Act penalty and consider “‘all relief’” in determining whether the settlement “‘is consistent with the public interest.’” 17 FMSHRC at 868. I have thus determined that the penalty to which the parties have agreed is appropriate in light of the criminal sanctions Aracoma has agreed to pay in federal court proceedings. Mot. at 8 (noting that Aracoma “‘has reached an agreement with the United States Attorney for the Southern District of West Virginia to enter a guilty plea to a ten-count information related to the January 19, 2006, Alma Mine #1 accident, and to pay a criminal fine of Two and One-Half Million Dollars (\$2,500,000) to the United States of America. In addition, as a condition of probation, Aracoma has agreed to pay restitution as ordered by the Court.’”). In approving the settlement motion, I have also deferred to the prosecutorial discretion of the Secretary with the understanding that the settlement may reflect problems of proof and questions of resource allocation.

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

³ In *Wilmot Mining Co.*, the Commission stated: as follows: “Settlement of contested issues and Commission oversight of that process are integral parts of dispute resolution under the Mine Act. 30 U.S.C. § 820(k) . . . A judge's oversight of the settlement process ‘is an adjudicative function that necessarily involves wide discretion.’” 9 FMSHRC 684 (1987) (citations omitted).

⁴ The Herald-Dispatch article is available online at: www.herald-dispatch.com/business/x1615608967. The \$23,000,000 estimate may be conservative. The AFL-CIO Executive Paywatch Database estimates that Massey's CEO received \$37,059,912 in total 2007 compensation. <http://www.aflcio.org/corporatewatch/paywatch/ceou/database.cfm>.

WHEREFORE, the motion for approval of settlements is **GRANTED**, and it is **ORDERED** that the operator pay a penalty of \$1,700,000 within 60 days of this order. Upon receipt of payment, this matter is **DISMISSED**.

Robert J. Lesnick
Chief Administrative Law Judge

Distribution:

Francine Serafin, Esq., U. S. Department of Labor; Office of the Solicitor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-2296

Mark Heath, Esq., Spilman, Thomas & Battle, PLLC, 300 Kanawha Boulevard, East P.O. Box 273, Charleston, WV 25321

/ro, mvw