

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 24, 2019

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

v.

YAHARA MATERIALS INC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2019-0025
A.C. No. 47-02926-474835

Mine: Unit No. 7

ORDER ACCEPTING APPEARANCE
DECISION APPROVING SETTLEMENT
ORDER TO MODIFY
ORDER TO PAY

Before: Judge McCarthy

This case is before the undersigned upon a Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

The Secretary of Labor's Conference and Litigation Representative ("CLR") filed a notice of limited appearance with the penalty petition. It is **ORDERED** that the CLR be accepted to represent the Secretary. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

The CLR has filed a motion to approve settlement proposing a reduction in the penalty from \$2,361.00 to \$286.00. The CLR also requests that Citation No. 8956042—the sole citation in this matter—be modified to change the type of action from a section 104(d)(1) citation to a section 104(a) citation, and to reduce the level of negligence from high to moderate.

The citation alleges that the operate violated 30 CFR § 56.9300a by failing to provide a berm at a dump site. The Respondent, as part of the motion, alleges that there was always a spotter at the dump site and, in direct contradiction to the citation, that there were berms.

On February 13, 2019, the undersigned's law clerk requested further information in light of the apparent contradiction between the motion and the citation. The law clerk also inquired as to whether the inspector took any photographs of the missing berm. Although first indicating on February 13, 2019 that he was going to file an amended motion, the CLR responded on February 21, 2019 that the Petitioner was going to rely on the motion as submitted. The CLR also indicated that the inspector had taken photographs, but that they would not be provided to the undersigned.

Although Petitioner presents sufficient support for resolving the motion, Petitioner's failure to produce the requested clarification and documentary evidence is troubling. When an ALJ requests further information concerning a motion, it is usually an indication that there is insufficient support to grant that motion or, at the very least, a proper resolution is not clear from the motion as submitted. Ignoring such requests risks the denial of the motion. *See American Aggregates of Michigan, Inc.*, Unpublished Order (May 24, 2019) (denying motion for settlement based on lack of probative factual support).

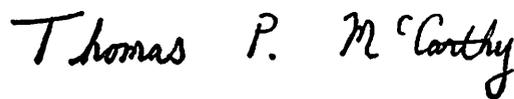
However, as the undersigned ultimately resolves this motion without receiving the requested information—and the issue of producing evidence in support of a motion for settlement is already pending before the Commission on assignments of error to *Solar Sources, Inc.*, 39 FMSHRC 2052 (Nov. 2017) (ALJ)—this is not the appropriate case to discuss this matter further.

The undersigned has considered the representations and documentation submitted in this case, and the undersigned concludes that the proffered settlement is fair, reasonable, appropriate under the facts, and protects the public interest under *The American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016), and is appropriate under the criteria set forth in section 110(i) of the Act.

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that Citation No. 8956042 be **MODIFIED** to change the type of action from a section 104(d)(1) citation to a section 104(a) citation, and to reduce the level of negligence from high to moderate.

It is further **ORDERED** that the operator pay a penalty of \$286.00 within thirty days of this order.¹



Thomas P. McCarthy
Administrative Law Judge

¹ Payment should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution:

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