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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

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

Civil Penalty Proceeding

Docket No. DENV 79-151-P
A/O No. 48-00828-03001

v.

Seminole II Mine

ARCH. MINERAL CORPORATION,
RESPONDENT

DECISION DENYING MOTION TO WITHDRAW PETITION
FOR ASSESSMENT OF CIVIL MONEY PENALTY WITH
LEAVE TO FILE MOTION FOR APPROVAL OF SETTLEMENT

AND

ORDER OF CONTINUANCE

On December 13, 1978, the Mine Safety and Health Administration filed a petition for assessment of civil penalty pursuant to section 110 of the Federal Mine Safety and Health Act of 1977 in the above-captioned proceeding. Subsequent thereto, the parties filed a stipulation and joint motion to withdraw the petition for assessment of civil penalty pursuant to 29 CFR 2700.15(b) of the Interim Rules of the Federal Mine Safety and Health Review Commission. (FOOTNOTE 1) For the reasons set forth below, the motion is denied with leave to file a motion requesting the approval of a settlement agreement.

The joint motion filed by the parties relates that the Office of Assessments issued proposed assessments of \$195 for the violation alleged in Citation No. 00390802 and \$210 for the violation alleged in Citation No. 00390813. The motion states that the "Secretary of Labor hereby amends the proposed penalties" to reflect a \$175 assessment for the violation alleged in Citation No. 00390802 and a \$168 assessment for the violation alleged in Citation No. 00390813. The motion further states that the Respondent agrees to withdraw its notice of contest and pay the amended proposed penalty. The parties thereupon requested the following relief:

[T]hat the proposed penalties be amended as reflected herein and that leave be granted respondent to withdraw its notice of contest and leave be granted petitioner to withdraw his petition for assessment of civil penalty, and that the proposed penalty as amended herein become a final order of the Commission.

It appears from the foregoing statements of the parties that they intended to file a motion requesting approval of a settlement agreement. Instead, they have filed a motion requesting a form of relief that cannot be granted under the circumstances existing herein.

The parties have requested a logically inconsistent form of relief. The parties moved to amend the proposed penalties and withdraw the petition for the assessment of civil penalty, with the proposed penalty as amended becoming the final order of the Commission. If the petition is withdrawn pursuant to 29 CFR 2700.15(b), then there will be nothing upon which the Judge or the Commission can act. Therefore, under the circumstances of this case, the withdrawal of the petition will prevent the issuance of a valid order as to the payment of a penalty.

This is a de novo proceeding in which the Judge and the Commission are not bound by any penalty recommended by MSHA. 29 CFR 2700.27(a) and (c).

As mentioned earlier in this decision, it appears that the parties intended to submit a proposed settlement agreement for approval. The Administrative Law Judge is authorized to approve settlement agreements under section 110(k) of the Federal Mine Safety and Health Act, 30 U.S.C. | 820(k); and 29 CFR 2700.27(d). The parties are hereby granted leave to file a motion to approve a settlement agreement and for an order for payment of the agreed-upon penalty. The information set forth in Appendix A attached hereto must be submitted by the parties in conjunction with the motion to approve a settlement agreement so that the record will contain sufficient evidence to determine whether the public interest will be adequately protected by the approval of a settlement.

Accordingly, the joint motion to withdraw the petition for assessment of civil penalty will be denied, with leave to file a motion for approval of settlement.

ORDER

IT IS HEREBY ORDERED that the joint motion to withdraw the petition for assessment of civil penalty be, and hereby is, DENIED.

IT IS FURTHER ORDERED that the parties be, and hereby are, granted leave to file a motion for approval of settlement and for an

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order for payment of the agreed-upon penalty, which motion shall include the information contained in Appendix A attached hereto.

IT IS FURTHER ORDERED that the hearing in this proceeding be CANCELED and the proceedings CONTINUED INDEFINITELY pending receipt and consideration of a motion for approval of a settlement, provided that such motion is received within 20 days of the date of this order.

John F. Cook
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE ONE

1 29 CFR 2700.15(b) states as follows:

"A petition for civil penalty assessment filed by the Secretary under section 105 of the Act may be withdrawn only upon the motion of the Secretary. Such petitions may not be withdrawn, without the approval of the Commission or the Judge."

APPENDIX A

THE FOLLOWING INFORMATION MUST BE SUPPLIED

1. A statement as to the reason(s) why the parties believe that the settlement would effectuate the purposes of the Act and should be approved, i.e., the settlement should be shown to be consistent with the criteria in section 110(i) of the Act. Cases involving a fatality or personal injury or cases where the settlement amount is substantially less than the assessed amount will require greater justification than cases where these factors are absent.

2. Copy of all correspondence between the Assessment Office and the respondent as to the violations involved. This will include any order of assessment or results of initial review and notice of proposed penalty, depending upon what is applicable, and all attachments thereto including any narrative describing the foundation for a special assessment.

3. The amount of the proposed settlement.

4. A statement as to the operator's history of previous violations containing at least the following information:

a. The total number of assessed violations for the preceding 24 months;

b. The total number of inspection days for the preceding 24 months;

(This information is usually contained in the correspondence between the assessment office and the respondent.)

5. A statement as to the size of the operator's business. This will include a statement as to the total tons of production of the mine per year. This will also include a listing as to the annual production for all mines operated by the respondent. In event the respondent is a part of a larger business organization then the listing must include all mines operated by the parent organization. (This information is usually contained in the correspondence between the assessment office and the respondent.)

6. Information as to (a) the negligence of the operator, (b) the gravity of the violation and (c) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. This will usually be contained in the inspector's or his superior's information sheets describing the violation, negligence, gravity and good faith.

7. In event it is claimed that the proposed assessment of penalties will have an effect on the operator's ability to continue in business, information as to the operator's assets, liabilities, and present worth, as well as a current annual operating statement must be submitted.

