

CCASE:  
SOL (MSHA) V. CHARLES MERLO  
DDATE:  
19870529  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. PENN 86-226  
A.C. No. 36-00845-03503

v.

Cambria Slope No. 33

CHARLES J. MERLO,  
INCORPORATED,  
RESPONDENT

ORDER OF DISMISSAL

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), seeking a civil penalty assessment in the amount of \$30 for an alleged violation of mandatory safety standard 30 C.F.R. 77.1605(d), as stated in section 104(a) Citation No. 2688979, served on the respondent on May 16, 1986.

The respondent filed a timely answer and notice of contest, and the case was scheduled for a hearing on the merits in Indiana, Pennsylvania, on May 28, 1987. However, by motion filed with me on May 15, 1987, pursuant to Commission Rule 30, 29 C.F.R. 2700.30, the petitioner seeks approval of a settlement of the case. The petitioner also seeks my approval of a proposed modification of the citation to substitute and name Beth Energy Mines, Inc., as the responsible party and respondent for the alleged violation in question.

Discussion

The petitioner proposes to settle this matter with no civil penalty assessment payment by the respondent Charles J. Merlo, Inc. In support of the motion, petitioner's counsel states that during the inspection the inspector observed that

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respondent's Caterpillar Dozer Model DÄ9H, Serial Number 9014013, did not emit an audible warning and that the directional lights in the front and rear did not function. However, counsel submits that the responsibility for the alleged violation lies with the Beth Energy Mines, Inc. Counsel states that the Cambria Slope Preparation Plant, the site inspected, was owned and operated by Beth Energy Mines, Inc., and while it leased the dozer from Charles J. Merlo, Inc., on a month-to-month basis, it had exclusive control of the dozer for over 4 years. Further, the lessor and lessee had an arrangement whereby Charles J. Merlo, Inc. would repair the dozer when a problem was reported by Beth Energy. Beth Energy had not advised Charles J. Merlo, Inc. of the defective warning device and lights nor had it requested repairs be performed. Charles J. Merlo, Inc., therefore, had no duty to correct the defects. Moreover, at the time of the inspection, the equipment was being operated by Tom Cochran, an employee of Beth Energy. No Charles J. Merlo, Inc. employees were exposed to the hazard.

#### Conclusion

On the facts of this case, it seems clear to me that the respondent is not the party responsible for the alleged violation. Under the circumstances, I find no basis for approving the proposed settlement which provides for no civil penalty assessment payment by the respondent. To the contrary, I conclude and find that the respondent should be dismissed as the responsible party in this proceeding, and I will treat the petitioner's motion as a motion to withdraw its civil penalty proposal against Charles J. Merlo, Inc. The respondent is free to institute a new civil penalty proceeding against Beth Energy Mines, Inc., for the alleged violation in question.

#### ORDER

The petitioner's proposed civil penalty assessment filed against the respondent Charles J. Merlo, Inc., is deemed to be withdrawn, and this proceeding is dismissed.

George A. Koutras  
Administrative Law Judge