

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

MAY 03 2016

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

v.

D. HOLCOMB & COMPANY, LLC,
Respondent.

CIVIL PENALTY PROCEEDING:

Docket No. WEST 2015-382-M
A.C. No. 45-03570-371757

Mine: Black Diamond Quarry

DECISION

Appearances: Hanah Harris-Yager, Esq., U.S. Department of Labor, Office of the
Solicitor, Denver, Colorado for Petitioner

Denis J. Holcomb, D. Holcomb & Company, LLC, Port Angeles,
Washington for Respondent

Before: Judge David Barbour

This proceeding arises under the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 801 *et seq.* It involves one alleged violation of the Secretary of Labor's mandatory safety standards for metal/non-metal mines found at 30 C.F.R. Part 56. The violation allegedly occurred on June 25, 2014, at the scale house trailer of the Black Diamond Quarry, a construction sand, gravel and rock quarry owned and operated by D. Holcomb & Company, LLC. According to the Secretary, on that date an inspector from the Secretary's Mine Safety and Health Administration ("MSHA") entered the trailer and observed a generator running inside the building near a company supervisor and a customer (a truck driver). According to the inspector, exhaust from the generator was not being vented directly outside, and the supervisor was not monitoring the exhaust to determine the carbon monoxide ("CO") levels inside the trailer. The inspector checked the level and found it was in excess of 180 parts per million four feet inside the trailer's only functioning door. The inspector cited the company for a violation of 30 C.F.R. § 56.5002, a mandatory safety standard requiring in part that "gas . . . surveys . . . be conducted as frequently as necessary to determine the adequacy of control measures." The inspector found that the violation was highly likely to result in the deaths of the supervisor and the customer and that the violation was a significant and substantial contribution to a mine safety hazard. The inspector further found the alleged violation was the result of the company's "high" negligence.¹

¹ Compounding the company's negligence was the fact the company was cited previously for operating a generator inside the scale house trailer and for not monitoring the gas levels while doing so.

After issuance of the citation, MSHA applied its special assessment procedures and proposed a civil penalty of \$52,000 for the alleged violation. The company contested the proposal, and the Secretary petitioned the Commission to assess the penalty. The company answered the Secretary's assertions by stating the inspector who cited the company for the prior violation told the company if the windows in the scale house were kept open the generator could be used inside. The company asserted all of the windows and the trailer's only door were open when the generator was running. The company also asserted that exposure of persons inside the scale house was limited to two minutes.

After the answer was received, the Chief Judge assigned the case to the court which issued a prehearing order requiring the parties to confer to determine if they could settle the matter. The court also required the parties to exchange information, and the court set out the rules for discovery. Subsequently, the parties reported they were unable to agree on a settlement. Upon receiving the report, the court asked counsel for the Secretary and the representative of the operator if they would agree to the appointment of a settlement counsel to work independently of the court to resolve the case short of a hearing. The parties agreed, and the court appointed an independent settlement counsel. However, to preclude open-ended discussions, the court also set the case for hearing on March 29, 2016, in Port Angeles, Washington. The court made clear to the parties that if the efforts of the settlement counsel failed, the case would be heard on March 29.

In mid-March, 2016, the settlement counsel advised the court that his efforts were not successful. The case then proceeded to hearing and the parties appeared with documentary evidence and witnesses on the appointed day at the appointed hour in Port Angeles.²

The trial was scheduled to begin at 8:30 a.m., but due to a previously scheduled jury call, the clerk of the court advised all present that the room in which the case would be heard would not be available until approximately 9:30 a.m. The delay proved fortuitous. The court asked counsel and the representative of the company to use the time to make a final attempt to settle the case, and after a face-to-face discussion and a telephonic conference with the Solicitor's Office, counsel and the representative agreed to a compromise settlement. When the clerk then announced that the hearing room was available, the court convened the hearing so that counsel for the Secretary could describe the settlement and move for its approval. Upon hearing the explanation, the court granted counsel's motion for approval. Tr. 12. The court incorporates the explanation and the court's approval into the decision by reference.³ Tr. 9-12.

² Shortly before March 29, 2016, counsel for the Secretary withdrew and a substitute counsel entered her appearance on the government's behalf.

³ The court again thanks counsel and the representative for their persistence and their patience with one another and reiterates its view that the settlement is in the best interest of all involved. *See* TR. 7-12.


THE SETTLEMENT

<u>CITATION NO.</u>	<u>DATE</u>	<u>30 C.F.R. §</u>	<u>PROPOSED PENALTY</u>	<u>SETTLEMENT</u>
8780364	6/25/14	56.5002	\$52,500	\$30,000

Under the agreement, the compromise penalty will be paid in the amount of \$2,500 per month for a period of 12 consecutive months. Tr. 11.

ORDER

On June 1, 2016, the company **SHALL PAY** the Secretary of Labor the first of 12 consecutive payments each in the amount of \$2,500. The other eleven payments of \$2,500 **SHALL BE PAID** on the first business day of each succeeding month (to wit: July 1, August 1, September 1, October 3, November 1 and December 1, 2016 and January 2, February 1, March 1, April 3 and May 1, 2017).⁴ Upon the completion of full payment, this case **IS DISMISSED**.


David F. Barbour
Administrative Law Judge

Distribution: (Certified Mail)

Hanah Harris-Yager, Esq., U.S. Department of Labor, Office of the Solicitor, MSHA Backlog Project, 1244 Speer Boulevard, Suite 216, Denver, Colorado 80204

Denis J. Holcomb, Owner, D. Holcomb & Co., LLC, 112 Klahanie View Drive, Port Angeles, Washington 98363

/db

⁴ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P.O. BOX 790390, ST. LOUIS, MO. 63179-0390.