

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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February 25, 2010

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Petitioner	:	Docket No. YORK 2008-104-M
	:	A.C. No. 28-00975-137827
v.	:	
	:	
PC SAND & GRAVEL,	:	PioCosta T/A PC Sand & Gravel
Respondent	:	

DECISION AND ORDER APPROVING SETTLEMENT

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). The parties filed a Joint Motion to Approve Settlement, which was received on September 8, 2008. On August 21, 2009, the undersigned issued an Order to Submit More Information. The Secretary was ordered to submit additional information supporting the vacation of thirteen citations as a part of the settlement. By letter, dated August 31, 2009, the Secretary, through her representative, argued that she has “unreviewable prosecutorial discretion to vacate citations after issuance.”

In support of her position, the Secretary cites *RBK Construction, Inc.*, 15 FMSHRC 2099 (Oct. 1993). In *RBK Construction*, the Commission held that the Secretary had the authority to vacate the citations, citing the decision of the U.S. Supreme Court in *Cuyahoga Valley Ry. Co. v. United Transportation Union*, 474 U.S. 3 (1985). In *Cuyahoga Valley Ry. Co.*, the Supreme Court concluded that, based on the distinct roles of the Secretary and the Commission, established by the Mine Act, the Secretary’s decision to withdraw a citation is not reviewable by the Commission. 474 U.S. at 7-8.

RBK Construction dealt solely with citation withdrawals; the present case, however, involves the vacation of citations in the context of a motion to approve a settlement agreement. Section 110(k) of the Mine Act states, in relevant part, that “No proposed penalty which has been contested before the Commission under Section 105(a) shall be compromised, mitigated, **or settled** except with the approval of the Commission.” 30 U.S.C. § 820(k)(emphasis added). Interestingly, the Secretary has previously recognized a difference between cases involving vacated citations and cases involving settlements. In *RBK Construction*, for example, the Secretary argued before the Commission “that 110(k) applies only to settlements of penalties, not to vacations of citations or orders.” 15 FMSHRC at 2101.

Moreover, Section 307 of the Act empowers the Secretary to promulgate rules and regulations to enforce the Act. 30 U.S.C. § 801(g). The regulation entitled “Penalty Assessment”, included in Section 2700.31, reads:

- (a) General. A proposed penalty that has been contested before the Commission may be settled only with the approval of the Commission upon motion.
- (b) Settlement Motion. A motion to approve settlement shall include the following information for each violation:
 - (1) The amount of the penalty proposed by the Secretary;
 - (2) The amount of the penalty agreed to in settlement; and
 - (3) Facts in support of the penalty agreed to by the parties.
- (c) Order approving settlement. Any order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record. Such order shall become the final decision of the Commission 40 days after the issuance unless the Commission has directed that the order be reviewed.

29 C.F.R. § 2700.31.

Under the Rules, promulgated by the Secretary, a settlement must be moved, and approved, by the Commission. 29 C.F.R. § 2700.31(a). Furthermore, a motion to approve settlement must include facts supporting the agreed-to penalty. 29 C.F.R. § 2700.31(b)(3). In the present case, such relevant facts were not included in the initial motion. Similarly, the regulations require that an order approving a settlement, issued by an administrative law judge, “set forth the reasons for approval and shall be supported by the record.” 29 C.F.R. § 2700.31(c). Based on the motion filed by the parties, the record was incomplete, and did not provide adequate reasons upon which to base approval.

Despite the initial resistance to offer any explanation for the withdrawal of thirteen citations, however, the Secretary complied with my order by proffering legitimate reasons for vacating the citations in the August 31, 2009 letter. Accordingly, I find the record now substantiates approval of the parties’ joint motion and that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the Joint Motion to Approve Settlement in **GRANTED** and it is **ORDERED** that Respondent pay a penalty of \$784.00, within 60 days of this order.¹

Robert J. Lesnick
Chief Administrative Law Judge

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¹Payment 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