

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

May 30, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-187-M
Petitioner	:	A.C. No. 41-03751-05516
	:	
	:	Docket No. CENT 2002-188-M
	:	A.C. No. 41-03751-05517
	:	
v.	:	Docket No. CENT 2002-249-M
	:	A.C. No. 41-03751-05518
	:	
	:	Docket No. CENT 2002-266-M
BIG BUCK ASPHALT,	:	A.C. No. 41-03751-05519
Respondent	:	
	:	Docket No. CENT 2003-18-M
	:	A.C. No. 41-03751-05520
	:	
	:	Docket No. CENT 2003-91-M
	:	A.C. No. 41-03751-05522
	:	
	:	Phelps Pit

ORDER ON RECONSIDERATION
APPROVING SETTLEMENT MOTION

Before: Judge Feldman

These cases are before me upon petitions for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). The Secretary has filed a motion to approve a settlement agreement and to dismiss these matters. A reduction in civil penalty from \$48,262.00 to \$12,065.00 is proposed. The parties have proposed that the agreed upon \$12,065.00 civil penalty will be paid in an initial installment of \$2,500.00, with the remaining \$9,565.00 to be paid in nineteen monthly installments. The proposed substantial reduction and extended payment schedule are based on Big Buck Asphalt's alleged financial condition that reportedly precludes its ability to pay a higher civil penalty.

In support of its assertion that payment of a higher penalty would impact on its ability to remain in business, the parties rely on a financial statement for the year ending February 28, 2002, for Four G. Asphalt, Inc., d/b/a Big Buck Asphalt, prepared by a certified public accountant. The financial statement furnished by the Secretary lacks the Accountant's Review Report designated as page 1 in the Table of Contents. Consequently, the financial statement does not reflect whether the information contained therein was audited. In this regard, the financial statement notes that the reported amounts of revenues and expenses are based on management "estimates and assumptions." Unaudited financial statements do not provide a basis for establishing payment of a civil penalty will adversely affect a mine operator's ability to continue in business. *See Spurlock Mining Co., Inc.*, 16 FMSHRC 697, 700 (April 1994).

The financial statement reflects gross income of \$1,276,154.00 and an unspecified "cost of revenue" of \$1,304,010.00 resulting in a reported loss of \$27,856.00. The financial statement reflects Pete Gallegos, Sr., is the President of Big Buck Asphalt. The financial statement further reflects that Pete Gallegos Paving, Inc., "is the parent owner" and "primary customer" of Big Buck Asphalt. Javalina Ready-Mix, Inc., also owned by Pete Gallegos Paving, Inc., also is a significant customer of Big Buck Asphalt.

The parties' Motion to Approve Settlement was denied on February 26, 2003. 25 FMSHRC 101. The motion was denied because of outstanding questions concerning the relationship between Big Buck Asphalt and Pete Gallegos Paving, Inc., that may impact on whether there is a financial hardship that justifies the structured payment schedule and substantial reduction in the civil penalty proposed by the parties. Consequently, the February 26, 2003, Order denying the approval of the settlement terms requested the submission of more detailed financial information, including audited financial statements. 25 FMSHRC at 102.

On March 25, 2003, counsel for Big Buck Asphalt replied that, as a consequence of its dire financial condition, the company "cannot afford the luxury of having audited financial statements." (*Resp. To Feb. 26, 2003, Order*, at p.2). Big Buck provided additional assurances that its financial condition precluded payment of a higher civil penalty.

On May 30, 2003, the Secretary's counsel reiterated her support of the parties' proposed settlement terms. In support of the settlement agreement, the Secretary relies on the unaudited financial statement for the business year ending February 28, 2002. As additional support, the Secretary notes a letter from CitiCapital Commercial Corporation identifying a Big Buck Asphalt debt that is in default.

While I remain skeptical, given the additional assurances, I will not interfere with the parties' settlement in these matters. Accordingly, based on the representations and documentation submitted in these proceedings, I conclude that the proffered settlement is not inconsistent with the penalty criteria set forth in Section 110(I) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED**. **Accordingly**, on reconsideration, **IT IS ORDERED** that the respondent pay a total civil penalty of \$12,065.00.

Pursuant to the parties' agreement, payment is to be made in twenty (20) monthly installments. The first installment shall be \$2,500.00 payable on July 1, 2003. The remaining nineteen (19) installments shall be paid at the rate of \$500.00 per month payable on the first of each month beginning on August 1, 2003, with the exception of the last payment which shall be in the amount of \$565.00. Failure to abide by this payment schedule will result in the remaining balance becoming immediately due and payable. Upon timely payment of the entire \$12,065.00 civil penalty, these cases **ARE DISMISSED**.

Jerold Feldman
Administrative Law Judge

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