

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 26, 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 DENYING MOTION TO APPROVE SETTLEMENT

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 to \$12,065 is proposed. The parties propose that the proposed \$12,065 civil penalty will be paid in an initial installment of \$2,500, with the remaining \$9,565 to be paid in nineteen monthly installments. The proposed substantial reduction and extended payment schedule are based on Big Buck Asphalt's reported financial condition that allegedly 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.'s 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 and an unspecified “cost of revenue” of \$1,304,010 resulting in a reported loss of \$27,856. 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.

I am unable to approve the settlement terms without additional information concerning the relationship between Big Buck Asphalt and Pete Gallegos Paving, Inc. Specifically, **IT IS ORDERED** that the parties provide, **within 21 days of this Order**, additional information and financial documentation concerning whether the financial condition of Pete Gallegos Paving, Inc., is a relevant consideration in determining whether there is a financial hardship that justifies the structured payment schedule and substantial reduction in the civil penalty proposed by the parties. The information should include a complete list of the corporate officers and management personnel of each corporation and a description of their responsibilities and job duties. The parties may provide any additional information they deem relevant. All financial documentation submitted should be audited. Accordingly, the Motion to Approve Settlement **IS DENIED**. If sufficient information to support the proposed settlement is not provided within 21 days, these matters will be scheduled for hearing.

Jerold Feldman
Administrative Law Judge

Distribution:

Thomas A. Paige, Esq., Office of the Solicitor, U.S. Department of Labor,
525 South Griffin Street, Suite 501, Dallas, TX 75202

Pete Gallegos, Sr., President, Big Buck Asphalt, 4320 Trade Center Blvd., Laredo, TX 78041,

Donato D. Ramos, Esq., Attorney At Law, Walker Plaza, Suite 100, 5810 San Bernardo Ave.,
Laredo, TX 78041