# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
**1730 K STREET, N.W., 6TH FLOOR**
**WASHINGTON, D.C. 20006-3868**
April 26, 1999

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| SECRETARY OF LABOR | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 98-268-M |
| Petitioner | : | A. C. No. 29-01882-05502 LUO |
| | : | |
| v. | : | |
| BOWEN INDUSTRIES | : | |
| INCORPORATED, | : | Ivanhoe Concentrator |
| Respondent | : | |

**ORDER LIFTING STAY**
**DECISION DISAPPROVING SETTLEMENT**
**ORDER TO SUBMIT INFORMATION**

**Before: Judge Merlin**

On December 8, 1998, this case was stayed pending a final determination by the Secretary whether to pursue actions under Section 110(c). The parties have now filed a joint motion to approve settlement. Therefore, the stay previously entered is hereby **LIFTED**.

The parties' settlement motion seeks a penalty reduction for the one violation involved from $1,600 to $188.

Aside from the substantive deficiencies discussed infra, I would not approve this motion. The motion was signed and filed by an individual who styles herself as a law clerk. Although the motion contains the names of three Solicitors in ascending degrees of responsibility, none of them has signed the motion. Commission Rule 2700.3, 29 C.F.R. § 2700.3, sets forth the individuals and categories of individuals who are permitted to practice before the Commission. Under subparagraph (a) attorneys are permitted to practice and under subparagraph (b) a non attorney may practice if he is a party, a representative of miners or certain designated individuals associated with specified entities. The individual who signed and filed the settlement motion in this case is not an attorney and is not one of the described non attorneys allowed to appear before the Commission. Subparagraph (c) permits any other person to practice with the approval of the presiding judge or the Commission. My approval has not been sought for the appearance of the individual in question.

This purported filing from the Dallas Office of the Solicitor is in contrast to procedures previously followed by the national Office of the Solicitor in seeking permission for non attorneys to appear before the Commission. In 1994, when the Office of the Solicitor wished to have Conference and Litigation Representatives (CLR) appear on behalf of the Secretary in mine safety cases, information was furnished regarding the training and credentials of these individuals. Cyprus Emerald Resources Corp., 16 FMSHRC 2359 (November 1994). Thereafter, in every case where a CLR wishes to represent the Secretary, he has filed a motion for permission to appear. When a supplemental settlement motion is filed in this case, as

ordered infra, it must be signed by an attorney in the Office of the Solicitor or it will not be approved.

The subject citation was issued under section 104(d)(1) of the Mine Act for a violation of 30 C.F.R. § 56.11027 which provides:

> Scaffolds and working platforms shall be of substantial construction and provided with handrails and maintained in good condition. Floor boards shall be laid properly and the scaffolds and working platforms shall not be overloaded. Working platforms shall be provided with toeboards when necessary.

The citation describes the alleged violation as follows:

> Bowen Industries, Inc. a sub-contractor at the plant failed to provide adequate scaffolds for employees to use when installing a iron beam on a wall at the maint-shop. Employee was observed standing on top of scaffold railing trying to reach the iron beam to weld on. The employee did have his safety wear, but was secured 4/5 foot below him for security, exposing the employee to a potential fall hazard if accidentally slipping and falling. The company inspector Lillian Medina had warned the employees on 4-9-98 of them not using the proper scaffolding and stopped operations until proper scaffolding was erected to continue the operations.
>
> Employees admitted that Ms. Medina had warned them of not following company safety policies and needed to erect a proper platform.

The inspector subsequently modified the citation to add the following information to the condition or practice:

> Supervisor and employees knew of inadequate scaffold, the company safety inspector on 04-09-1998 stopped the operation on welding informing employee that they needed an adequate work platform to work off or to extend scaffolding. Employee elected not to fix work platform. This violation is an unwarrantable failure.

The standard sets forth requirements for the construction of scaffolds and working platforms, mandating that they be of substantial construction with handrails and properly laid floor boards and where necessary, with toeboards. Also they must not be overloaded. The citation, however, does not find that the scaffold was improperly constructed, lacked any of the items described, or was overloaded. Rather, it found the scaffold was inadequate because the employee was standing on top of the scaffold's railing trying to reach an I-beam. The condition described by the inspector therefore, had nothing to do with the scaffold itself but with its location. The problem was one of safe access to the I-beam and not any deficiencies in the characteristics of the scaffold. Accordingly, it does not appear that the standard cited applies to the situation set forth in the citation. The parties must address this issue in the supplemental motion.

Even assuming the cited standard applies, the settlement motion is deficient. The motion

merely states that further investigation reveals the degree of negligence and likelihood of injury should be modified. It alleges that upon further investigation the Secretary has determined there is insufficient evidence to support the conclusion that the operator knew of the violation. This allegation is contrary to the citation and its modification which expressly state that just a few days previously the company inspector found employees using scaffolding that did not reach and told them the scaffolding should be extended. If true, this prior misconduct by employees called for heightened supervision by the operator. In any event, the representations in the motion must be reconciled with the statements in the citation and if the citation is in error, the motion must say so.

The motion also represents that gravity should be less than originally found because the employee was wearing a safety harness. But the citation recognizes that although a harness was worn, it was tied off at the wrong place. The motion must identify those factors which justify a finding of reduced gravity.

Finally, the motion seeks a penalty reduction of 85% and a modification of the citation to one issued under section 104(a) citation, but the generalized and unsupported statements in the motion do not justify such actions. The motion states that the operator's size, history and good faith have been reviewed and are set forth in Exhibit A to the penalty petition. A printout attached to the assessment sheet indicates that the operator had two violations in July and one violation in September, but the number of inspection days is not given so I do not know whether this is a good, average or bad history. Also, there is no information about size and ability to continue in business. The Commission has held that the judge must consider all six criteria when assessing a penalty. Sec. of Labor on behalf of James Hyles, et al. v. All American Asphalt, 21 FMSHRC 34, 56-57 (Jan. 1999); Sec. Labor on behalf of Kenneth Hannah, et al. v. Consolidation Coal Co., 20 FMSHRC 1293, 1302-1303 (Dec. 1998); Sec. Labor on behalf of Richard Glover v. Consolidation Coal Co., 19 FMSHRC 1529, 1539 (Sept 1997).

In light of the foregoing, it is ORDERED that the motion for approval of settlement be DENIED.

It is further ORDERED that within 30 days of the date of this order the Solicitor and the operator submit appropriate information to support their settlement request. Otherwise, this case will be set for hearing.

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

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