

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

March 16, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. KENT 95-32  
Petitioner : A. C. No. 15-16627-03562  
 :  
v. : No. 2 Darby  
JERICOL MINING INCORPORATED, :  
Respondent :

**DECISION APPROVING PARTIAL SETTLEMENTS**  
**DECISION DISAPPROVING PARTIAL SETTLEMENT**  
**ORDER TO SUBMIT INFORMATION**

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a joint motion to approve settlements for the sixteen violations in this case. A reduction in the penalties from \$7,723 to \$5,994 is proposed.

The parties propose to settle fifteen of the violations, Citation Nos. 4240494, 4240495, 4470149, 4240496, 4240497, 4240498, 4240499, 4240500, 4482801, 4470154, 4470155, 4470156, 4470157, 4469837 and 4469839 in this case for the originally assessed penalties. I have reviewed these violations in light of the six criteria and determine that the proposed settlements are appropriate.

With respect to the remaining violation the parties propose a reduction in the penalty. Citation No. 4470153 was issued for a violation of 30 C.F.R. ' 75.342(b)(2) because the methane monitor on the continuous mining machine was not visible to the person operating 20 to 25 feet behind the machine. According to the parties, the operator's witnesses would challenge the validity of the citation as well as the significant and substantial designation by asserting that the operator was granted a waiver which allowed it to make cuts that were 25 feet deep. At the time the waiver was considered by MSHA, inspectors came to the mine and recommended the waiver be granted and approved the placement of the monitor. The operator would testify that the monitor was in the same place on the miner when the citation was issued as when MSHA inspected the miner for the waiver. The operator would also present testimony that the miner operator could see the monitor from where he was operating the machine.

Based on the operator's representations, the parties agree to reduce the penalty from \$1,779 to \$50.

The motion as presented for this violation cannot be approved. The parties are reminded that the Commission and its judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act. 30 U.S.C. ' 820(k); See, S. Rep. No. 95-181, 95th Cong., 1st Sess. 44-45, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632-633 (1978). It is the judge's responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set forth in section 110(i) of the Act. 30 U.S.C. ' 820(i); Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir. 1984). A proposed reduction must be based upon consideration of these criteria.

The parties in the instant motion have merely stated the operator's positions with respect to the violation. There is no indication whether the Secretary agrees with the operator's assertions. Nowhere in the settlement motion is there any suggestion that the citation designated as significant and substantial be modified. The penalty amount of \$50 is usually reserved for non-significant and substantial, violations. Under the provisions of the Act, as set forth above, I can only approve a settlement justifiable under the six criteria of section 110(i), supra. Accordingly, the parties must explain why the proposed penalty should be reduced in light of the six criteria. For instance, if the facts indicate a lesser degree of gravity or negligence than first thought, the parties, and most especially, the Solicitor, must say so.

In light of the foregoing, it is ORDERED that the motion for approval of settlements for Citation Nos. 4240494, 4240495, 4470149, 4240496, 4240497, 4240498, 4240499, 4240500, 4482801, 4470154, 4470155, 4470156, 4470157, 4469837 and 4469839 be APPROVED.

It is further ORDERED that the motion for approval of settlement for Citation No. 4470153 be DENIED.

It is further ORDERED that within 30 days of the date of this order the parties submit appropriate information to support their settlement motion for Citation No. 4470153. Otherwise, this case will be set for hearing.

Paul Merlin  
Chief Administrative Law Judge

Distribution: (Certified Mail)

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