

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
1730 K STREET, N.W., 6<sup>TH</sup> FLOOR  
WASHINGTON D.C. 20006-3868

August 26, 1998

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 98-189
Petitioner	:	A. C. No. 15-10306-03539
	:	
v.	:	Big Sandy River Dock
PEN COAL CORPORATION,	:	
Respondent	:	

**ORDER ACCEPTING APPEARANCE**  
**DECISION APPROVING SETTLEMENT IN PART**  
**DECISION DISAPPROVING SETTLEMENT IN PART**  
**ORDER TO MODIFY**  
**ORDER TO PAY**  
**ORDER TO SUBMIT INFORMATION**

**Before: Judge Merlin**

It is **ORDERED** that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of limited appearance he has filed with the penalty petition. Cyprus Emerald Resources Corporation, 16 FMSHRC 2359 (November 1994).

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 six violations in this case. A reduction in the penalties from \$612 to \$448 is proposed.

Citation No. 4586911 was issued for a violation of 30 C.F.R. ' 77.202 because loose coal and float coal dust accumulated on an electric motor for the hydraulic truck dump and inside the breaker box. The originally assessed penalty was \$102 and the proposed settlement is \$50. The parties request that the citation be modified to delete the significant and substantial designation. The parties advise that the breaker box is located outside and that no miners were assigned to the area which made exposure to the hazard very limited. In addition, the parties state that all other protective circuits were operating properly, therefore there were no ignition sources. This recommended settlement is approved.

Citation No. 4586917 was issued for a violation of 30 C.F.R. ' 77.1606(c) because the dump truck had defects which were not corrected prior to being put into service. The originally assessed penalty was \$102 and the proposed settlement is \$50. The parties also request that the citation be modified to delete the significant and substantial designation. According to the parties, the truck was operated only at this site and at very low rates of speed not exceeding 10 miles per hour. In addition, the truck operated in an area where miners were not regularly assigned to work. This recommended settlement is approved.

Citation No. 4586918 was issued for a violation of 30 C.F.R. ' 77.1606(c) because the coal truck had defects which were not corrected prior to being put into service. The originally assessed penalty was \$102. The parties state that the operator has agreed to pay this penalty in full. This recommended settlement is approved.

The three remaining violations, Citation Nos. 4586912, 4586913, and 4586916, were issued for violations of 30 C.F.R. ' 77.1104 because coal dust and oil soaked coal dust accumulated on the engine and engine frame of three end loaders. Each violation was assessed a penalty of \$102 and the parties propose a settlement of \$81. The parties also request that the citations be modified to reduce the likelihood of injury from reasonably likely to unlikely thereby making the violations non-significant and substantial. The parties state that the reasons for the reductions and modifications are that had a fire occurred the operator could have exited the end loader and that a fire extinguisher was provided for each piece of equipment.

I cannot approve the settlements for these last three violations. The rationale advanced in the settlement motion is unacceptable because it is contrary to governing case law. In Buck Creek Coal, Incorporated v. Federal Mine Safety and Health Administration, 52 F.3rd 133 (7th Cir. 1995), the operator challenged the significant and substantial finding regarding coal dust accumulations on the basis that the operator had fire suppression systems in place. The court rejected the challenge stating as follows:

The fact that Buck Creek has safety measures in place to deal with a fire does not mean that fires do not pose a serious safety risk to miners. Indeed, the precautions are in place (as MSHA regulations require them to be) precisely because of the significant dangers associated with coal mine fires.

52 F.3rd at 136; See also Enlow Fork Mining Co., 19 FMSHRC 5, 9 (January 1997); Mid-Continent, 17 FMSHRC 1234, 1242 (July 1995). In addition, the parties offer no support for their assertion that the loader operator could exit the loader should a fire occur.

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).

In light of the forgoing, it is **ORDERED** the motion for approval of settlement for Citation Nos. 4586911, 4586917, and 4586918 is **GRANTED**.

It is further **ORDERED** that the motion for approval of settlement for Citation Nos. 4586912, 4586913, and 4586916 be **DENIED**.

It is further **ORDERED** that Citation Nos. 4586911 and 4586917 be **MODIFIED** to delete the significant and substantial designations.

It is further **ORDERED** that the operator **PAY** penalties totaling of \$202 for Citation Nos. 4586911, 4586917, and 4586918 within 30 days of the date of this decision.

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 Nos. 4586912, 4586913, and 4586916. Otherwise, these violations will be set for hearing.

Paul Merlin  
Chief Administrative Law Judge

Distribution: (Certified Mail)

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