

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 24, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 96-6-M
Petitioner	:	A.C. No. 47-02846-05509
v.	:	
	:	Mine Unit No. 4
YAHARA MATERIALS INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 97-4-M
Petitioner	:	A.C. No. 47-02846-05510
v.	:	
	:	Mine Unit No. 4
JAMES B. HOPPMAN,	:	
Respondent	:	

ORDER DISAPPROVING SETTLEMENT AGREEMENT

These cases are before me on Petitions for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary, by counsel, has filed a motion to approve a settlement agreement. Reduction in penalty from \$2,500.00 to \$1,250.00, for the operator, and from \$600.00 to \$250.00, for Hoppman, are proposed.

The citation alleges a violation of section 56.11001 of the Regulations, 30 C.F.R. § 56.11001, because:

The foreman was observed on the red Portec stacker conveyor gaining access to the head pulley so he could grease the bearings. The conveyor was not equipped with a walkway or handrails on both sides of the belt. A tagline was not available to tie a safety belt or line. The company has not provided a safe access for persons greasing the head pulley. A fall of about 12' existed to the limestone floor. The foreman traveled the belt for a distance of about 50'. The conveyor belt was about 30" wide. A fatality could occur from a 12' fall. The wind was gusting at the time the violation occurred.

The citation, issued under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), was found to result from the operator's "unwarrantable failure" to comply with the regulation. The petition against the foreman under section 110(c) of the Act, 30 U.S.C. § 820(c), requires a finding that the foreman "knowingly" violated the regulation.

As justification for the settlement, the agreement provides that:

A reduction from the original assessment is warranted based on a review of the complete history of the mine, the fact that there is no legal issue involved in this citation/order, the size of the operator, and the fact that the Respondent YAHARA MATERIALS INC., accepts the underlying citation/order (number 4210784). MSHA reduces the penalty for the underlying citation/order from the original assessment of \$2,500 to \$1,250 based upon the operator's good faith in abating the cited condition immediately and its strong commitment to enforcing compliance more strenuously in the future. Further, the operator furnished the Secretary with information regarding its policies and practices related to safety procedures around conveyors at Unit No. 4.

. . . .

Respondent JAMES R. HOPPMAN, employed by Yahara Materials Inc., accepts the citation/order issued against him under § 110(c). MSHA reduces the penalty for the underlying citation/order from the original assessment of \$600 to \$250 based on the reasons stated above.

The Mine Act was passed with the intention that the Commission "assure that the public interest is adequately protected before approval of any reduction in penalties." S. Rep. No. 95-181, 95th Cong., 1st Sess. 45 (1977), reprinted in *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 633 (1978). In this connection, it is the judge's independent responsibility to determine the appropriate amount of penalty, in accordance with the six criteria set out 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, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481 (April 1996).

For this reason, Commission Rule 31(b)(3), 29 C.F.R.

§ 2700.31(b)(3), requires that a motion to approve a settlement include "{f}acts in support of the penalty agreed to by the parties" so that the judge can verify that the reduced penalty is appropriate. No such facts are provided with this agreement.

A "complete history of the mine" was not furnished with the agreement. Nor was there any explanation of what precisely in the history justifies the reduction in penalty. It is unclear what "no legal issue involved" in the citation means, nor why this should redound to the benefit of the Respondents. Nothing is offered concerning how the size of the operator supports a further reduction in penalty. Finally, no reason is given for why the Respondents' "acceptance" of the citation is a justification for reducing the penalty.

Furthermore, the Respondents' history of violations, the company's size and its abatement efforts were presumably considered, as required by section 100.3 of the Regulations, 30 C.F.R. § 100.3, when the penalty was originally assessed. Therefore, absent extraordinary circumstances, which should be thoroughly detailed in a settlement agreement, these factors provide no basis for an additional reduction in penalty. Likewise, a commitment to comply with the law in the future is expected of everyone. Reinforcing that commitment if one of the anticipated results of a citation. It is not a reason for reducing a penalty.¹

The petitions in these cases allege that the foreman acted knowingly and that the company's failure to adhere to the regulation resulted from an unwarrantable failure. More than the normal case, sufficient justification must be provided before penalties can be reduced. Moreover, the deficiencies present in these cases have previously resulted in settlement agreements being disapproved. *Fox River Stone Company*, 18 FMSHRC 1312 (July 1996); *Peabody Coal Company*, 18 FMSHRC 1309 (July 1996), *Coal Miners Incorporated*, 18 FMSHRC 827 (May 1996).

The Secretary has failed to include any facts to support the penalty agreed on in either of these cases. Consequently, having considered the representations and documentation submitted, I am unable to approve the proffered settlement.

ORDER

¹ Providing "the Secretary with information regarding its policies and practices related to safety procedures around conveyors at Unit No. 4" is not a reason for reducing a penalty. This is so obvious it does not require further discussion.

Accordingly, it is **ORDERED** that the motion for approval of settlement is **DENIED**. The parties have **15 days** from the date of this order to submit additional information to support the motion for settlement. Failure to submit additional information, or to resubmit a new agreement, within the time provided will result in the cases being scheduled for hearing.

T. Todd Hodgdon
Administrative Law Judge

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