

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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May 9, 1995

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 94-360  
Petitioner : A. C. No. 46-06750-03551  
v. :  
: Peats Branch No. 3  
OLD HICKORY COAL COMPANY, :  
Respondent :

## ORDER DISAPPROVING SETTLEMENT AGREEMENT

Before: Judge Hodgdon

This case is before me on a petition 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. A reduction in penalty from \$10,000.00 to \$5,500.00 is proposed.

In addition, both orders in the case are to be modified from 104(d)2) orders, 30 U.S.C. ' 814(d)(2), to 104(a) citations, 30 U.S.C. ' 814(a), by deleting the "unwarrantable failure" designations and reducing the degree of negligence from "high" to "moderate."

Order No. 4184405 alleges a violation of Section 77.404(a) of the Regulations, 30 C.F.R. ' 77.404(a), because five safety defects were found on the cut rock truck. Two of these conditions had been reported on previous pre-shift inspection records. The agreement states that evidence would not support a finding of "unwarrantable failure" because:

Although the brake lights and handrails had been reported on the pre-shift examination records within a week of the issuance of the order, none of the safety defects were reported on either the day the order was issued or the preceding day. Consequently, the Respondent may have reasonably concluded that the brake

lights and handrails had been repaired before the order was issued. Although the operator has a duty to ensure that reported hazards are corrected, there is no indication that the failure to correct the reported hazards, or the failure to detect the additional, unreported hazards, was due to more than ordinary negligence.

Order No. 4184413 is for a violation of Section 77.1001, 30 C.F.R. ' 77.1001, because loose, unconfined material, consisting of large rocks which were shot and broken up, was observed in the highwall area where equipment was working. The agreement avers that the Secretary could not establish that this violation was due to the Respondent's "unwarrantable failure" because "[a]llthough rocks were present in the highwall area, they were imbedded in the mud seam. Consequently, the operator's failure to take action in light of this condition did not constitute aggravated conduct."

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." With respect to the first order, rather than leading to the conclusion that the violation did not result from the Respondent's "unwarrantable failure," the facts set out create a strong inference that the respondent was indifferent or exhibited a serious lack of reasonable care. The facts set out concerning the second order are simply insufficient to reach a conclusion one way or the other concerning "unwarrantable failure."

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).

Based on the statements provided, I have no way of making such a determination in this case. Consequently, having

considered the representations and documentation submitted, I am unable to approve the proffered settlement.

**ORDER**

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 case being rescheduled for hearing.

T. Todd Hodgdon  
Administrative Law Judge

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