

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 15, 2005

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-397-M
Petitioner	:	A. C. No. 35-03260-28580
v.	:	
	:	Harvey W. Buche Building
HARVEY W. BUCHE ROAD BUILDING,	:	
INC.,	:	
Respondent.	:	

DECISION APPROVING SETTLEMENT

ORDER TO MODIFY

ORDER TO VACATE CITATIONS

ORDER TO PAY

Before: Judge Lesnick

This case is before me pursuant to an order of the Commission dated December 23, 2004, remanding this matter for further consideration and determination as to whether the operator, Harvey W. Buche Road Building, Inc. (“Buche”) is entitled to relief under Rule 60(b) of the Federal Rules of Civil Procedure.¹ In particular, Rule 60(b)(1) provides relief from a final judgment in cases where there has been a “mistake, inadvertence, surprise, or excusable neglect.”

This matter arose because Buche failed to file a timely response to the Secretary of Labor’s (“Secretary”) petition for assessment of civil penalty and my subsequent Order to Show Cause. In its request to reopen, Buche asserts that after the show cause order was issued, it began negotiations with the Solicitor’s Office and reached a settlement. However, Buche contends the agreement was inadvertently misplaced. As soon as the matter was brought to its attention, it forwarded the signed agreement to the Solicitor’s Office. The Secretary has not filed a response to Buche’s request, but she has filed a settlement motion.

Based upon the evidence presented before the Commission, the record before me, and the submission of the settlement motion by the Secretary - an seemingly indirect statement that she does not oppose the reopening of the assessment, I conclude that the penalty assessment should be reopened pursuant to Rule 60(b).

¹While the Commission is not obligated to adhere to the Federal Rules of Civil Procedure, the Commission has found guidance and has applied “so far as practicable” Rule 60(b). See 29 C.F.R. § 2700.1(b).

Accordingly, the penalty assessment is reopened, and this case shall proceed pursuant to the Mine Act and the Commission Procedural Rules, 29 C.F.R. § 2700.

Settlement Motion

The parties propose a reduction in penalty from \$2,491.00 to \$1,882.00. The parties also request that the negligence for Citation Nos. 6352339, 6352341, 6352342, and 6352355 be modified as outlined in the settlement motion. I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. The settlement amounts are as follows:

<u>Citation No.</u>	<u>Date</u>	<u>C.F.R.</u>	<u>Assessment</u>	<u>Settlement</u>
6352339	03/04/04	46.8(a)(1)	\$ 1,033.00	\$ 805.00
6352341	03/04/04	56.14107(a)	286.00	199.00
6352342	03/04/04	56.14107(a)	286.00	199.00
6352355	03/05/04	56.14101(a)(2)	286.00	199.00
6352340	03/04/04	56.12013(b)	60.00	60.00
6352343	03/05/04	56.9300(a)	60.00	60.00
6352344	03/05/04	56.14107(a)	60.00	60.00
6352345	03/05/04	56.14107(a)	60.00	60.00
6352346	03/05/04	56.11002	60.00	60.00
6352348	03/05/04	56.4201(a)(2)	60.00	60.00
6352349	03/05/04	47.41(a)	60.00	60.00
6352350	03/05/04	47.31(a)	60.00	60.00
6352353	03/05/04	56.14101(a)(3)	60.00	Vacate
6352354	03/05/04	56.14103(b)	60.00	Vacate
Total:			\$ 2,491.00	\$ 1,882.00

WHEREFORE, the motion for approval of settlement is **GRANTED**.

It is **ORDERED** that the negligence for Citation Nos. 6352339, 6352341, 6352342, and 6352355 be **MODIFIED** as outlined in the settlement motion. It is also **ORDERED** that Citation Nos. 6352353 and 6352354 be **VACATED**.

It is further **ORDERED** that the operator pay a penalty of \$1,882.00 within 30 days of this order.² Upon receipt of payment, this case is **DISMISSED**.

Robert J. Lesnick
Chief Administrative Law Judge

Distribution:

Patricia Drummond, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212

Harvey W. Buche, Owner, Harvey W. Buche Road Building, Inc., 35111 S. Wilhoit Road, Molalla, OR 97038

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²Payment may be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 360250M, PITTSBURGH, PA 15251.