

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. WEST 94-637-M
v. :
: Cedar Creek Quarries
CEDAR CREEK QUARRIES, INC., :
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 parties have filed a motion to approve a settlement agreement.¹ The agreement provides that the proposed penalty of \$2,000.00 will be "withdrawn."

Citation No. 3923238 alleges a violation of Section 103(a) of the Act, 30 U.S.C. ' 813(a), because, according to the motion, the Respondent's president:

refused to be interviewed by an MSHA special investigator concerning a ' 110(c) violation, [30 U.S.C. ' 820(c)], refused to allow his foreman to be interviewed, and refused to provide the names of employees who were present at the quarry on the day that an earlier citation - which was the subject of the investigation - was issued.

Apparently as mitigation, the motion relates that after contacting his attorney, arrangements were made for the investigator to return to the mine 13 days later, at which time the president and his employees were interviewed. The motion further recounts that the company has cooperated during subsequent inspections, that the president understands that MSHA is required to inspect all surface mines twice a year and that

¹ This case was scheduled for hearing on April 27, 1995, but the hearing was canceled when the parties advised that the case had been settled.

MSHA inspectors and investigators have a right to enter the mine and mine offices without a warrant for the purpose of conducting inspections and investigations.

This motion must be disapproved for two reasons. First, 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." While the facts provided in this motion might provide support for reducing the proposed penalty, they certainly are insufficient to support doing away with it entirely.

Secondly, and more importantly, Section 110(a) of the Act, 30 U.S.C. ' 820(a), provides that "[t]he operator of a coal or other mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this Act, shall be assessed a civil penalty by the Secretary" Consequently, if there is a violation, there must be a civil penalty. *Island Creek Coal Co.*, 2 FMSHRC 279, 280 (February 1980). It certainly appears that there was a violation in this case. See *U.S. Steel Corp.*, 6 FMSHRC 1423, 1433 (June 1984). Therefore, there has to be some civil penalty, it cannot be "withdrawn."

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 an agreement that conforms to the Act and

the Regulations, either by providing for a suitable civil penalty or, if the Secretary deems it appropriate, vacating the citation. Failure 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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