

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

August 20, 1998

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 98-34-M
Petitioner	:	A. C. No. 27-00315-05501
	:	
v.	:	
AMBROSE BROTHERS	:	Portable Crushing Plant 128 X 108
INCORPORATED,	:	
Respondent	:	

**DECISION DISAPPROVING SETTLEMENT**  
**ORDER TO SUBMIT INFORMATION**

**Before: Judge Merlin**

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlement for the one violation in this case. A reduction in the penalty from \$3,000 to \$2,000 is proposed. A fatality is involved.

Citation No. 7702165 was issued for a violation of 30 C.F.R. ' 56.9201 because a concrete and steel barrier for the portable crushing plant was not secured or removed while the crusher was relocated. The former president of the company was fatally injured when he was struck by the unsecured barrier while directing the relocation of the crusher. The violation was designated significant and substantial and negligence was assessed as high. The Solicitor states that the basis for the reduction is that the violation was the result of employee misconduct and the employee's misconduct was against the stated policy of the operator.

I cannot approve the settlement motion. The Solicitor is 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). These considerations are especially pertinent in the case of a fatality.

The violation in this case is the ultimate in gravity. However, the Solicitor fails to discuss

any of the facts surrounding the fatality nor does he offer any analysis to support his statements regarding the employee's conduct. There is no discussion of the operator's policies and of how the employee, the former president, violated them. Nor does the Solicitor explain the position and duties of the decedent at the time of the accident. Finally, the Solicitor does not explain how negligence can remain unchanged at high where there is employee misconduct and a failure to follow established procedures of the operator. Therefore, I have no information that would permit assessment of an appropriate penalty or a reduction from the original amount.

In light of the foregoing, it is **ORDERED** that the motion for approval of settlement be **DENIED**.

It is further **ORDERED** that within 30 days of the date of this order the Solicitor submit appropriate information to support his settlement motion. Otherwise, this case will be set for hearing.

Paul Merlin  
Chief Administrative Law Judge

Distribution: (Certified Mail)

Ralph R. Minichiello, Esq., Office of the Solicitor, U. S. Department of Labor, Room E-375, John F. Kennedy Federal Building, Government Center, Boston, MA 02203

Mr. Edward A. Ambrose, President, Ambrose Brothers Incorporated, P. O. Box 155, Meredith, NH 03253

/gl