

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

May 24, 1996

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. YORK 95-115-M  
Petitioner : A. C. No. 18-00017-05551  
v. :  
 : Union Bridge Maryland  
LEHIGH PORTLAND CEMENT :  
COMPANY, :  
Respondent :

DECISION APPROVING SETTLEMENT  
ORDER TO PAY

Before: Judge Merlin

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Solicitor has filed a motion to approve settlements for the two violations in this case. A reduction in the penalties from \$7,000 to \$3,500 is proposed.

Citation No. 3591774 was issued for a violation of 30 C.F.R. ' 56.5002 which requires that dust, gas, mist, and fume surveys be conducted as frequently as necessary to determine the adequacy of control measures. The inspector issued the citation because two miners became ill in the area around the mill feed control center and kiln stack where he believed toxic gases had accumulated. It appeared to the inspector that the gases came from the stack of the kiln, which was in the process of being preheated by three oil torches. According to the inspector's description on the citation, statements obtained from company personnel at the scene indicate that the torches may not have been burning properly. Shortly after the first miner became ill, a company foreman measured greater than 2 ppm of sulfur dioxide and 19% oxygen between the 4th and 5th pier on the south side of the kiln. The citation was designated significant and substantial and negligence was rated as high. The originally assessed penalty was \$5,000 and the proposed settlement is \$2,500.

The Solicitor represents that the reduction is warranted because negligence and gravity are less than originally thought.

According to the Solicitor, the allegation in the citation that the two employees suffered headaches due to exposure to sulphur dioxide is not fully supported by available evidence. The Solicitor states that six gas readings were taken by the foreman

immediately prior to the display of symptoms. Only one of these readings revealed a measurable quantity of sulphur dioxide but that reading was unreliable because radio frequency interference from the foreman's portable radio may have triggered a false reading. According to the Solicitor, although the symptoms displayed indicated exposure to some gas accumulation, identification and quantity cannot factually be established.

It appears from his motion that the Solicitor will be unable to prove the degree of gravity or even the correctness of evidence regarding the gas readings. However, since readings were taken, the degree of negligence is lessened. Accordingly, I accept the Solicitor's representations, and approve the proffered settlement which remains a substantial amount.

Citation No. 3591775 was issued for a violation of 30 C.F.R. ' 56.4330(a) which requires operators to establish emergency firefighting, evacuation, and rescue procedures and directs that these procedures be coordinated in advance with available firefighting organizations. This citation was issued at the same time as the one discussed above. A Lehigh Cement Management employee entered a taped off area despite a request from a fire department officer to wait for properly equipped and trained personnel. The inspector stated on the citation that the management employee wanted to remove an employee of an independent contractor from the area.

The violation was designated significant and substantial and negligence was rated as moderate. The originally assessed penalty was \$2,000 and the proposed settlement is \$1,000. The Solicitor represents that the reduction is warranted because negligence is not as high as originally thought. According to the Solicitor, the management official who had just monitored the area, found no problem with excess gas levels and did not experience any physical symptoms. The Solicitor states that the official only entered the area in order to evacuate the employee of a contractor. In addition, my review of the file shows that on the day after the citation was issued, the inspector modified it by reducing the likelihood of injury from occurred to highly likely and the number of miners affected from two to one. Finally, I note that no mention was made in the narrative findings to the effect that this violation caused an injury. In light of the foregoing, I approve the proffered settlement which remains a substantial amount and find it is appropriate under section 110(k) of the Act, 30 U.S.C. ' 820(k).

I note that these violations do not represent the first time the operator has encountered problems like those described in the subject citations. The operator should consider itself on notice

that if violations like these occur in the future, I will not approve penalty reductions of this magnitude.

WHEREFORE, the motion for approval of settlements is GRANTED, and it is ORDERED that the operator PAY a penalty of \$3,500 within 30 days of this decision.

Paul Merlin  
Chief Administrative Law Judge

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