

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

601 New Jersey Avenue, N.W., Suite 9500

Washington, D.C. 20001

April 8, 2004

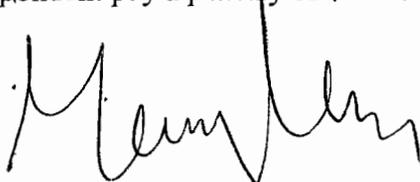
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
Mine Safety and Health :
Administration (MSHA), : Docket No. WEST 2003-348
Petitioner : A.C. No. 34-03330-05505
 :
 : Docket No. WEST 2003-401
v. : A.C. No. 45-03330-04418
 :
 : Docket No. WEST 2003-424
 : A.C. No. 45-02508-05207
ELLENSBURG CEMENT PRODUCTS, INC., :
 : Portable Wash Plant

**ORDER LIFTING STAY/
DECISION APPROVING SETTLEMENT**

Before: Judge Melick

These proceedings are before me upon petitions for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). Petitioner has vacated Citation Nos. 6343801 and 7999820 and filed a motion to approve settlement agreement as to the remaining citations. Modification of Citation No. 6343802 and a reduction in penalty to \$25,614.00, have been proposed. I have considered the representations and documentation submitted in these cases, and I conclude that the proffered settlement is acceptable under the criteria set forth in Section 110(i) of the Act.

WHEREFORE, the pending stay order is lifted, the motion for approval of settlement is **GRANTED**, and it is **ORDERED** that Respondent pay a penalty of \$25,614.00, within 40 days of this order.



Gary Melick
Administrative Law Judge

Distribution:

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/mca

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

ELLENSBURG CEMENT PRODUCTS, INC.	)	CONTEST PROCEEDINGS
Contestant,	)	Docket No. WEST 2003-80-RM
	)	Citation No. 7999819; 10/19/2002
v.	)	Docket No. WEST 2003-81-RM
	)	Order No. 7999820; 10/19/2002
SECRETARY OF LABOR,	)	Docket No. WEST 2003-82-RM
MINE SAFETY AND HEALTH	)	Order No. 7999821; 10/19/2002
ADMINISTRATION (MSHA),	)	Docket No. WEST 2003-83-RM
Respondent	)	Order No. 7999822; 10/19/2002
	)	Docket No. WEST 2003-106-RM
	)	Order No. 6343801; 10/19/2002
)	Docket No. WEST 2003-107-RM
)	Order No. 6343802; 10/19/2002
)	Portable Wash Plant
)	Mine ID: 45-03330
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SECRETARY OF LABOR,)	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH)	Docket No. WEST 2003-348-M
ADMINISTRATION (MSHA),	)	A. C. No. 34-03330-05505
Petitioner,	)	Docket No. WEST 2003-401-M
v.	)	A. C. No. 45-03330-4418
ELLENSBURG CEMENT PRODUCTS, INC.)	Docket No. WEST 2003-424-M
Contestant)	A. C. No. 45-02508-05207
)	Portable Wash Plant
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SECRETARY OF LABOR,)	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH)	Docket No. WEST 2004-32-M
ADMINISTRATION (MSHA),	)	A. C. No. 45-03330-09715 A
Petitioner,)	

	)	Docket No. WEST 2004-71-M
v.	)	A. C. No. 45-03330-11451 A
)	
GEORGE A. SEUBERT, Employed by	)	Portable Wash Plant
ELLENSBURG CEMENT PRODUCTS, INC.)	
)	
Contestant.)	

JOINT MOTION TO APPROVE SETTLEMENT

The Petitioner, Mine Safety and Health Administration (MSHA) and Contestants, Ellensburg Cement Products, Inc., a corporation, and George Seubert, individually, pursuant to 30 U.S.C. § 820(k), hereby move for an order approving their settlement agreement in this case.

1. An inspector from the Mine Safety and Health Administration (MSHA), United States Department of Labor, issued citations under the Federal Mine Safety and Health Act of 1977 for alleged violations at Contestant Ellensburg Cement's Portable Wash Plant.
2. MSHA subsequently issued proposed assessments for violations related to the citations.
3. The Contestants, Ellensburg Cement and George Seubert, contested the violations and requested a hearing before the Federal Mine Safety and Health Review Commission.
4. Following pretrial investigation and review of the facts, pursuant to the presiding Judge's order herein, the parties have entered into a settlement agreement and hereby request approval of their settlement by the Federal Mine Safety and Health Review Commission.

5. In this settlement, Contestants agree to pay, and MSHA agrees to accept payment of, amended penalties, totalling \$25,614 for Ellensburg Cement and \$600 for Mr. Seubert.
6. While these cases involve multiple citations, Contestant Ellensburg Cement has represented that it is not actually contesting all of the citations and civil penalties. Accordingly, Ellensburg Cement and the Secretary of Labor have agreed that it is appropriate that the citations and penalties not in controversy be settled for the original amounts proposed based on the findings originally made by MSHA as set forth in the Petitions for Assessment of Civil Penalties in these cases.
7. In addition, Contestant George Seubert has indicated that he wishes to withdraw his contest and accept the civil penalty related to Citation No. 7999819 in Case Docket No. WEST 2003-32-M without further contest of MSHA's findings therein or in the Secretary's Petition for Assessment of Civil Penalty in this case. Mr. Seubert states that his contest in this case was prompted initially by the fact that he did not believe there was a danger of falling which would require safety belts and lincs, under 30 C.F.R. § 56.15005, for persons going a short distance up an inclined stacker belt. He further states, however, that he now understands that even an elevation as low as five feet can pose a fall hazard as the subject regulation has been interpreted.
8. At this time, the Secretary (MSHA) and Ellensburg Cement and George Seubert are also proposing settlements with respect to the remaining citations and penalties, which are the citations and penalties that specifically prompted Contestants' contests herein. The terms and bases proposed for settlement of

these citations and penalties are set forth in the following paragraphs, Nos. 9 through 12:

9. Citation Number 6343802 is dated October 19, 2002 and was issued for an alleged violation of 30 C.F.R. § 56.14211(c) (alleged failure to secure a raised component). It was issued after an employee was struck by the boom of an excavator that was being positioned to lift and reorient a stacker conveyor belt. The excavator operator, Mr. Seubert, would testify that he moved into an area of sun glare that interfered with his vision. Mr. Seubert stopped the excavator so he could open his windshield to get a better view. He proceeded to lock the excavator, but meanwhile employees had moved into position under the boom to attach a chain to the conveyor belt. At that point, locking out was the only option open to Mr. Seubert. However, in the process of locking out what the operator believes to be a latent defect in the controls (later identified and recorded on video tape) caused an unexpected and unintended fall of the boom, causing a fatal injury to an employee.
10. On the basis of evidence reviewed in preparation for trial, the Secretary agrees with the Contestants that this is not a case of high negligence or knowing violation. Accordingly, the Secretary is modifying citation number 6343802 to eliminate the allegations of unwarrantable failure and high negligence. The citation will now be a section 104(a) moderate negligence violation. The civil penalty is less than the maximum and the parties agree that it will remain as proposed. All other citation findings will remain as previously set forth in the

citation and in the Secretary's Petitions for Assessment of Civil Penalties in these cases.

11. Consistent with the foregoing, the parties agree that the charge and proposed penalty against George Seubert related to Citation Number 6343802 should be vacated and civil penalty case Docket No. WEST 2004-71-M should be dismissed.
12. Citation Number 6343801 was issued on October 19, 2002, for an alleged violation of 30 C.F.R. § 46.7(a) (alleged failure to provide new task training). The parties have agreed that the citation should be vacated because evidence indicates that the experience level of the superintendent who was operating the equipment was such that the assignment to operate said equipment was not a new task within the meaning of the regulation.
13. Citation Number 7999820 was issued on October 19, 2002 for an alleged violation of 30 C.F.R. § 56.12016 (failure to electrically lock out the stacker conveyor). The parties have agreed that the citation should be vacated because steps were taken to prevent accidental activation of the equipment and because the decision in *Phelps Dodge Corp. v. Federal Mine Safety and Health Review Commissioner* arguably precludes application of the cited standard to the facts of this case.
14. The Secretary believes that the proposed penalties are fair and the Respondents do not dispute the penalties on the basis of size of business or ability to continue in business. Thus, the parties are in agreement regarding the total amount of penalties.

15. The parties believe that this settlement is in the public interest and will effectuate the statutory purpose of the civil penalties issued for such violations.
16. Each party agrees to bear its own fees, costs and other expenses incurred by such party in connection with any stage of the above referenced proceedings(s) including but not limited to attorneys fees which may be available under the Equal Access to Justice Act as amended.

WHEREFORE, the parties request that this settlement agreement be approved.

Ellensburg Cement Products

By *James P. Hutchinson*
James Hutchinson, President

Date 3-29-04

George Seubert

George Seubert

Date 3-29-04

Ogletree, Deakins, Nash, Smoak & Stewart PC

By *Michael T. Heenan*
Michael T. Heenan
Attorney for Respondents

Date 3-29-04

U.S. Department of Labor

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Attorney

By *Rochelle Kleinberg*
Bruce L. Brown
U.S. Department of Labor

Date March 30, 2004

Orders of Federal Mine Safety and Health
Review Commissioner Judge Melick