

CCASE:

SOL (MSHA) V. SOUTH DAKOTA CEMENT PLANT

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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

Civil Penalty Proceeding

Docket No. CENT 80-297-M
A.O. No. 39-00967-05011

v.

South Dakota Cement Plant

SOUTH DAKOTA CEMENT PLANT,
RESPONDENT

DECISION AND ORDER

The Secretary moves to withdraw and dismiss his proposal for penalty as to citation 329618 on the ground the violation charged did not, in fact, occur. This I construe as a motion to withdraw a pleading and to vacate and proposed penalty ab initio pursuant to Rule 11 and not as a motion to approve settlement under Rule 30. See, Pomerleau Bros. Inc., WILK 79-4-PM (February 13, 1979).

Concurrently, the operator moves to withdraw its notice of contest as to citation 330611 and to pay the proposed penalty of \$78. It has long been held that the requirements of Rule 30 and section 110(k) of the Act may not be circumvented by resort to Rule 11 through the withdrawal of a notice of contest since this involves approval of the penalty proposed and therefore approval of a settlement. See Pomerleau, supra. The operator's motion will therefore be considered as a motion to approve settlement.

Based on an independent evaluation and de novo review of the circumstances, I conclude both motions should be granted. Accordingly, it is ORDERED that the motion to withdraw and the motion to approve settlement be, and hereby are, GRANTED. It is FURTHER ORDERED the operator pay the amount of the penalty agreed upon, \$78.00, on or before Monday, November 3, 1980 and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge