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SOL (MSHA) v. ASARCO MINING
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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
v.

Civil Penalty Proceeding
Docket No. WEST 80-303-M
A/O No. 05-00516-05016
Leadville Unit

ASARCO INCORPORATED,
NORTHWESTERN MINING DEPT.,
RESPONDENT

DECISION APPROVING SETTLEMENT

The proposed assessment for the two alleged violations in this case is \$930 and the Secretary proposes to settle for \$1. For the reasons set forth hereinafter, I accept the settlement agreement.

The assessment sheet (Exh. A) lists two withdrawal orders with the number 333112, but the first order is followed by an A and the second by B. The only order in the file is numbered 333112 but appears to allege violations of two standards.

The charge is that ice and snow builds up on a stairway during the winter months and that once a week a miner has to climb the stairs with a 5 gallon can of oil. This condition, it is alleged, violates both the standard requiring a safe access to a working place (30 C.F.R. 57.11-1) and the standard requiring that ice and snow be removed or sanded as soon as practicable (30 C.F.R. 57.11-16). Somehow the assessment office came to the conclusion that even though only one condition existed, the violation of section 57.11-16 was more serious than the other and it assessed \$190 more for that violation than it did for the violation of section 57.11-1. The Secretary stipulates that this action was erroneous and it agreed to vacate "citation listed as No. 333112A." Actually, 333112A was not a citation but was derived from an imminent danger order. In a sense it was a creation of the assessment office and I'm not sure that imminent danger orders can be properly treated in that manner. Nor am I sure that an imminent danger order without more can form the basis of a civil penalty proceeding. Section 107(a) of the Act, after setting forth the procedures for issuing an imminent danger order, states "the issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110." The implication is that if an inspector thinks that there is a violation of a standard as well as an imminent danger, he should also issue a citation. Section 105(a) of the Act which deals with proposed civil penalties, states that such a proposal should be made if "the Secretary issues a citation or order under section 104, * * *." There is no mention of an order issued under section 107, so I have serious doubts as to the validity of the procedures followed in this case. A decision on that proposition however, should be made only after briefs and

arguments rather than in a vacuum; so I will confine myself to expressing the doubt stated above.

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The parties stipulated that Respondent has an adequate rule and policy as to cleaning up ice and snow and salting as soon as practicable, and it is obvious from the stipulation that the Secretary does not believe the statement of a former employee that he was not reminded of that policy.

In Secretary of Labor v. CO-OP Mining Company, Docket No. DENV 79-1-P (December 10, 1980), 2 FMSHRC Decisions 3475, the Commission stated that if a settlement motion indicates that no violation occurred, the settlement should not be accepted, but the citation should be vacated and the case dismissed. In one of its earlier decisions, however, Secretary of Labor v. Wolf Creek Collieries Company, PIKE 78-70-P (March 26, 1979), in the unpaginated March 1979 issue of FMSHRC Decisions, the Commission agreed with former decisions of the Interior Department's Board of Mine Operations Appeals to the effect that a withdrawal order could not be reviewed in the course of a civil penalty proceeding. I think that the Commission should reexamine that proposition, but again this does not seem like the appropriate case for that. I could and would dismiss the civil penalty suit outright if I was sure that there was no violation, but because of the bare possibility that there might have been a violation, and that it might be proper to assess a civil penalty where no citation or 104 order has been issued, I will accept the \$1 settlement.

Respondent is therefore ordered to pay to MSHA, within 30 days, a civil penalty of \$1.

Charles C. Moore, Jr.
Administrative Law Judge