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SOL (MSHA) V. MACASPHALT
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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. SE 83-26-M A.C. No. 08-00826-05501
v.	Newburn Pit
MACASPHALT, INC., RESPONDENT	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

In accordance with what apparently now is becoming standard practice, the Solicitor has filed a motion for settlement in the amount of $60, $20 each, for the three violations involved in this matter.

The Solicitor does not discuss any of the violations. He only attaches the proposed assessment sheet and the citations. He states that the inspector's evaluation is attached but it is not.

In my opinion $20 is a nominal penalty which indicates a lack of gravity. The first violation was issued for an inoperative automatic reverse signal alarm on a front end loader. The second violation was issued because brakes on the front end loader needed adjustment or repair. The third violation was issued for a missing section of hand railing on the walkway on the first floor of the plant in front of the roll screen. On the face of these violations I would have no basis to conclude they are nonserious. Moreover, I have been told nothing by the Solicitor about the rest of the six statutory criteria.

The assessment sheet indicates that the $20 penalties were issued in accordance with the so-called "single penalty assessment" under section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This regulation is, however, not binding upon the Commission or

even relevant in these proceedings. The fact the operator has paid the original assessed amounts cannot preclude the Commission from acting in accordance with the governing statute.

The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983.

Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge