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SOL (MSHA) V. YAKIMA CEMENT
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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. WEST 83-37-M
A.C. No. 45-00727-05501

v.

East Salah Pit & Plant

YAKIMA CEMENT PRODUCTS
COMPANY, INC.,
RESPONDENT

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve a settlement for the five violations involved in this matter. The proposed settlement in the amount of \$110 is the originally assessed amount. (FOOTNOTE 1)

The Solicitor has given me no basis whatsoever to approve the proposed settlement. None of the violations are explained or analyzed. The Solicitor merely states that the operator has paid the originally assessed amount. Four of the violations were assessed at \$20 apiece and one violation was assessed at \$30. In my opinion these amounts denote a lack of gravity. The citations are for lack of guarding on a belt drive, missing or misplaced covers on various equipment which might create a shock hazard and an unintentional ground fault. I do not know whether these conditions are serious or not but I certainly could not find lack of gravity on the face of the subject violations. On two of the citations the inspector has checked boxes relating to gravity and negligence. I do not believe I can approve settlements based upon checking boxes when no reasons are given. Also here in one case negligence was checked as moderate and in the other occurrence of the feared event was thought likely.

It appears from the assessment sheet that the four violations which are assessed at \$20 each were done so as the result of the so-called "single penalty assessment" which is set forth in 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

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penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This regulation is not binding upon the Commission and is not a basis upon which I could approve a settlement.

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

FOOTNOTE START HERE-

1 The Solicitor's motion mistakenly sets forth the amount as \$100. This is obviously wrong since both the assessment sheet and the memorandum to the Solicitor from MSHA set forth the amount as \$110.