

CCASE:
SOL (MSHA) V. MERCER LIME & STONE
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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. PENN 83-72-M
A. C. No. 36-03448-05502

v.

Mercer Lime & Stone Co. Mine

MERCER LIME & STONE COMPANY,
RESPONDENT

PARTIAL APPROVAL AND PARTIAL DISAPPROVAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlement for the two violations involved in this matter.

The Solicitor submits a proposed settlement in the amount of \$48 for Citation No. 2007509 which was issued for a violation of 30 C.F.R. 56.9-22. The inspector observed that a berm was not provided for the outer bank of the elevated roadway around the No. 1 and No. 2 ponds. The Solicitor advises that the operator demonstrated good faith efforts to abate the cited condition by constructing a berm for the outer bank of the elevated roadway around both ponds well within the time specified for abatement. The proposed settlement is not large but in view of the Solicitor's advice that the operator is small and that it has a very small history of prior violations, I will approve the recommended settlement for this item.

With respect to the second item which was issued for a violation of 30 C.F.R. 56.11-1 when the inspector observed that a safe means of access was not provided at the dust screws under the cyclones, the Solicitor recommends a \$20 penalty. This proposed settlement is predicated solely upon 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 which is not reasonably likely to result in a reasonably serious injury or illness.

I am unable to approve the proposed \$20 settlement. In my opinion, \$20 is a nominal penalty which indicates a lack of gravity. A reading of the citation indicates that gravity may well have been present. In any event, I have been told nothing about gravity or negligence so as to enable me to make an informed judgment with respect to the proper penalty amount for this citation.

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The MSHA regulation in question is not binding upon the Commission. Indeed, it is not even relevant. 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 this violation is 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 with respect to Citation 2007509 be approved. I will not issue an order directing the operator to pay \$48 for this citation until information is submitted with respect to the other citation as set forth immediately hereafter.

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 penalty in settlement is warranted for Citation No. 2007508. If the Solicitor does not do so, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge