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SOL (MSHA) V. CASPER CONCRETE
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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 83-30-M
A.C. No. 48-00715-05501

v.

Casper Gravel Pit

CASPER CONCRETE COMPANY,
RESPONDENT

DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The parties have filed a motion to approve settlements for the seven violations involved in this matter. The proposed settlements are for the originally assessed amounts. Six violations were assessed at \$20 apiece and one violation was assessed at \$98.

The motion for settlement approval contains no discussion whatsoever regarding any of the alleged violations. Rather the motion merely states that the Secretary agrees with and relies upon MSHA's evaluation of the statutory criteria and concludes:

WHEREFORE, the parties pray that the proposed penalties be approved, respondent be granted leave to withdraw its contest to the penalties as proposed by the agency, and an order be entered requiring respondent to pay the proposed penalties within forty days of the filing of an order approving the penalties.

Although the Secretary may be willing to rely upon MSHA's evaluation of the statutory criteria, this Commission most certainly cannot do so without violating its statutory mandate. In my opinion, \$20 is a nominal penalty which denotes a lack of gravity. A reading of these citations indicates that at least on their face the possibility that some degree of gravity may have been present. I have been told nothing about any of the other six statutory criteria.

~1326

The \$20 "single penalty assessments" are obviously predicated 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 MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. These regulations are not binding upon the Commission and indeed are not even relevant in these proceedings.

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.

Moreover, I cannot approve the \$98 settlement for the remaining violation. This citation was issued for a failure to ground a wire in violation of section 56.12-25. On the citation form the inspector indicated occurrence of the feared event was reasonably likely, injury could be fatal and negligence was moderate. I do not believe I can predicate approval or disapproval of a proposed settlement on nothing more than boxes checked by an inspector. But I note that these checks, without more, indicate that the proposed \$98 penalty would be too low.

~1327

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