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SOL (MSHA) V. NUGENT SAND
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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. LAKE 83-57-M
A.C. No. 20-00801-05501

v.

Nugent Sand Mine

NUGENT SAND COMPANY, INC.,
RESPONDENT

PARTIAL APPROVAL AND PARTIAL DISAPPROVAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlements for the six(FOOTNOTE 1) violations involved in this matter. The proposed settlements are for the originally assessed amounts. Three violations were assessed at \$20 apiece and the others were assessed at \$91, \$126 and \$136, respectively. The operator has already tendered payment of \$413.

One citation was issued for failure to properly maintain a guard at the head pulley. The violation was serious and negligence was low. This violation was originally assessed for \$91. A second citation was issued because a grinding machine did not have an adjustable tool rest. The violation was serious and negligence was moderate. This violation was originally assessed for \$126. A third citation was issued because miners were working on the drive gear of a dryer machine without the power control box being locked out. The violation was serious and negligence was moderate. This violation was originally assessed for \$136. The Solicitor proposes to settle these citations for the originally assessed amounts. On the basis of the foregoing, I conclude these settlement amounts are appropriate.

~1422

There is insufficient information, however, regarding the three \$20 violations. In my opinion, \$20 denotes a lack of gravity. However, the \$20 violations are for lack of a fire extinguisher on a front-end loader, lack of a guard on a take-up pulley and lack of a guard on a head pulley. I do not know whether these conditions are serious or not but I could not find a lack of gravity on the face of the subject violations.

It appears from the assessment sheet that the three violations which are assessed at \$20 each were done so as the result of the so-called "single penalty assessment" set forth in section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. 100.4. This regulation 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 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 this proceeding. 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.

~1423

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.

I will not order that this case be dismissed with respect to the \$91, \$126 and \$136 proposed settlements pending final disposition of the three \$20 proposed settlements.

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 three proposed \$20 penalties are justified and if not, what settlement amounts the parties believe are 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 states that there are eight citations. The record, including the assessment sheet shows that only six citations are involved.