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SOL (MSHA) V. MEDUSA 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. LAKE 83-74-M
A.C. No. 20-02514-05501

v.

Medusa Cement Company
(Plant)

MEDUSA CEMENT COMPANY,
RESPONDENT

DISAPPROVAL OF SETTLEMENT

ORDER OF ASSIGNMENT

The Solicitor has filed a motion to approve settlement in the above-captioned proceeding. The Solicitor proposes to settle the eleven violations in this case for the original assessments total of \$326.

Six of the violations were originally assessed for \$20 apiece. The Solicitor advises that one of these violations involved no negligence, three involved a low degree of negligence and one involved a moderate degree. The Solicitor also represents that in two of these violations there was no likelihood of an injury and in three the occurrence of an injury was unlikely. He notes that abatement was accomplished in each instance. However, the Solicitor gives no basis for any of his assertions regarding negligence and gravity. In one instance, Citation No. 2088996, he makes no representations at all regarding negligence and gravity.

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

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Commission would be nothing but a rubber stamp for the Secretary. The mere recitation by the Solicitor of bare conclusions is not a sufficient basis upon which I can predicate settlement approvals of \$20 apiece. Of course, as I previously have held the Commission is not bound by 30 C.F.R. 100.4 which is the basis of the six \$20 "single penalty assessments."

The five remaining violations were assessed for amounts ranging from \$30 to \$68. The Solicitor advises that two of these violations involved no negligence and three involved a low degree of negligence. The Solicitor also states that each of these violations was significant and substantial. He notes that abatement was accomplished in each instance. The Solicitor gives no basis for his assertions regarding negligence or the significant and substantial nature of these violations. The inspector has checked boxes concerning negligence and gravity for all five violations.

I have recently held in many other cases that the term "significant and substantial" is irrelevant in a penalty proceeding before the Commission. Under section 110(i) the relevant criterion is gravity. But as I also have previously stated, I cannot base a settlement approval upon an inspector's checks in boxes on a form without some explanation from the Solicitor. In absence of other evidence penalty amounts of \$30 or \$39 as recommended in some of these cases would appear low. The Solicitor has told me nothing about size, prior history, or ability to continue in business.

In another case involving this operator (LAKE 83-80-M) I disapproved a similarly inadequate settlement motion from this Solicitor and ordered him to submit additional information. However, the additional information he submitted still did not support approval of the proffered settlement and I therefore, assigned the case for hearing. Assignment of this case also appears to be the most expeditious manner of proceeding. See also LAKE 83-75-M, LAKE 83-77-M and LAKE 83-81-M.

Accordingly, the settlement motion is Denied and this case is assigned to Administrative Law Judge James A. Broderick.

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All future communications regarding this case should be addressed to Judge Broderick at the following address:

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Paul Merlin
Chief Administrative Law Judge