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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 83-77-M A.C. No. 20-00038-05503
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 $691.

Six of the violations were originally assessed for $20 apiece. The Solicitor advises that two of these violations involved a moderate degree of negligence and four involved a low degree. The Solicitor also states that in each violation the occurrence of an injury would have been unlikely. He notes that abatement was accomplished in each instance.

Three of these $20 violations, which involved the failure to properly locate emergency stop devices at unguarded pinch points, were originally determined to be significant and substantial violations. Each citation was modified because, the inspector found, "the endangered party would probably be able to activate the emergency stop cord or would be drawn into it which would activate the emergency stop and accomplish its purpose of minimizing injury. Therefore [the citation] is modified to indicate the occurrence is unlikely." The inspector's statement that an endangered party "probably" could activate the emergency cord or otherwise "be drawn into it" does not by itself constitute a sufficient basis to conclude whether or not the violation was significant and substantial. On the contrary, the statement is particularly vague and uninformative. Most importantly, for present purposes I do not have any basis upon which to determine gravity.

Another of the $20 violations, which involved the failure to guard a drive chain, also was determined originally to be a significant and substantial violation. The citation was modified because, according to the inspector, roping off an area in front of and to the side of the chain drive and attaching a sign to the rope "would alert anyone coming on to the scene to the unusual condition and would make it unlikely that anyone would be injured as a result of the missing guard." The inspector's statement, alone, does not justify a $20 penalty, which in my opinion, most often denotes an absence of 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 Commission would be nothing but a rubber stamp for the Secretary. The 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 $85 to $136. The Solicitor advises that one of these violations involved a moderate degree of negligence and four involved a low degree. The Solicitor also states that each of these violations was significant and substantial. He notes that abatement was accomplished in each instance. Here again, the Solicitor gives no information for his conclusions regarding negligence and gravity. "Significant and substantial" is not the same as gravity. The inspector did check boxes concerning negligence and gravity for all five of these violations. Most of the checked boxes coincide with the Solicitor's conclusions. In one instance, Citation No. 2089050, however, the inspector indicates a moderate degree of negligence while the Solicitor indicates a low degree.

In many other cases I have previously stated that I cannot base a settlement approval upon an inspector's checks in boxes on a form without some explanation from the Solicitor. As already pointed out, under section 110(i) of the Act I am charged with the responsibility of determining an appropriate penalty in light of the six specified criteria. In addition to inadequate data on gravity and negligence, the Solicitor has told me nothing about size, prior history, or ability to continue in business.

Accordingly, the proposed settlements must be Denied.

In another case involving this operator (LAKE 83-80-M) I disapproved a 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 83-74-M, LAKE 83-75-M and LAKE 83-81-M.

In light of the foregoing, this case is assigned to Administrative Law Judge James A. Broderick.

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

Federal Mine Safety and
Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, VA 22041

Telephone No. 703-756-6215

Paul Merlin
Chief Administrative Law Judge