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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. CENT 87-2-M A.C. No. 29-00159-05516
v.	Tyrone Mine & Mill
PHELPS DODGE CORPORATION- TYRONE BRANCH, RESPONDENT	

DISAPPROVAL OF SETTLEMENT NOTICE OF HEARING

Before: Judge Merlin

The parties have filed a motion to approve a settlement for the one violation in this case. The proposed settlement is for the original assessed amount of $192. One man was killed and another seriously injured as a result of the accident which was the subject of the citation. Based upon the present record, the proposed settlement cannot be approved.

The Commission and its Judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act which provides:

> (k) No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission.

See S.Rep. No. 95Ä181, 95th Cong., 1st Sess. 41Ä5 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 632Ä633 (1978).

Penalty proceedings before the Commission are de novo. Neither the Commission nor its Judges are bound by the Secretary's proposed penalties. Rather, they must determine the appropriate amount of penalty, if any, in accordance with the six

criteria set forth in section 110(i) of the Act. Sellersburg Stone v. Federal Mine Safety and Health Review Commission, 736 F.2d 1147 (7th Cir.1984).

The Commission has recently reaffirmed the authority of its Judges to review and, where necessary, disapprove settlements, stating:

> Settlement of contested issues and Commission oversight of that process are integral parts of dispute resolution under the Mine Act. 30 U.S.C. 820(k); see Pontiki Coal Corp., 8 FMSHRC 668, 674 (May 1986). The Commission has held repeatedly that if a judge disagrees with a penalty proposed in a settlement he is free to reject the settlement and direct the matter for hearing. See, e.g., Knox County Stone Co., 3 FMSHRC 2478, 2480Ä81 (November 1981). A judge's oversight of the settlement process "is an adjudicative function that necessarily involves wide discretion." Knox County, 3 FMSHRC at 2479.

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Secretary of Labor v. Wilmot Mining Company, Docket Number LAKE 85Ä47, slip op. at 3, 8 FMSHRC Ä--- at (April 30, 1987).

The Commission further explained:

> we believe that [the] better practice requires that if a judge rejects a written settlement proposal he issue an order to that effect. Specifying the reasons for the rejection might sharpen the issues for trial and even possibly encourage an acceptable settlement proposal.

Id. at Footnote 1.

The subject Citation; No. 2662005, dated January 6, 1985 describes the condition as follows:

> Two employees of an independent contractor were seriously injured on November 25, 1985, and one died on December 19, 1985, when a bundle of three, 12 inch by 45 feet long pipe that were banded together slid from a stack and pinned the victims between pipe on the ground they were attempting to put a choker

> on, and the falling bundle. The pipe had been stacked about one week prior to the accident by an employee of the production-operator in a manner that contributed to a fall of material hazard in that the south stack of five bundles of pipe had three pipe in the bottom bundle, three pipe in the next bundle and four pipe in the top three bundles, resulting in a total height of approximately 5 1/2 feet. The top bundle of four pipe in the south stack apparently slid to the north and pushed the three pipe off the north pile onto the victims.

The mandatory standard is 30 C.F.R. 56.16001 which requires that:

> Supplies shall not be stacked or stored in a manner which creates tripping or fall-of-material hazards.

The file also contains the MSHA Accident Investigation Report which sets forth, inter alia, these facts: Phelps Dodge Corporation contracted with Hamilton Western Construction Company, Inc., to install a 6,000ÄfootÄlong 12-inch dewatering pipeline. This arrangement required that Hamilton Western lay the pipeline in accordance with a provided design while Phelps Dodge was to provide, among other items, the plastic pipe specified. Phelps Dodge purchased the required pipe which was delivered to the mine-site by common carrier. As in previous deliveries, the pipe was received by Phelps Dodge warehousing personnel who unloaded the pipe with a Phelps Dodge forklift. The pipe was unloaded and stacked at a pre-determined location ahead of the approaching pipeline construction. The pipe in question was delivered and unloaded on November 12, 1985, thirteen days before the accident. A total of 49 pipes was delivered packaged in seven 3Äpipe and seven 4Äpipe bundles. The pile nearest the pipeline contained three 4Äpipe bundles overlain by two 3Äpipe bundles (north stack). Abutting this pile on the south was a 22Äpipe pile consisting of two 3Äpipe bundles on top of which were stacked four 4Äpipe bundles (south stack). This pile was inherently unstable since the base bundles were 12 3/4 inches narrower than the width of 16 pipe lengths it supported. During preceding pipe-laying activity, pipe bundles were reportedly stacked only 2 or 3 units high (approximately 43.5 inches). On this occasion, however, the bundles were stacked 6Ähigh (87 inches). The crew therefore, was faced with a significantly different set of physical conditions. The pipeline construction crew consisted of a crane operator and two laborers. They had previously received their work assignment and proceeded to the jobsite without their supervisor's presence. The crane operator moved a cherry picker into hoisting position as the first laborer readied the fusion equipment. The crane operator began cutting

the steel-securing bands of the top 3Äpipe bundle of the south stack nearest the crane. He cut 5 of the 6 bands and, positioning himself in the clear, cut the last band. This allowed the 3Äpipes to fall to the ground on the south side of the steel service pipeline. He then obtained hoisting slings while the second laborer positioned a dozer to drag fused lengths of pipe away from the fusion machine. As the crane operator was attaching the hoisting sling to the first pipe on the ground, the remaining 3Äpipe bundle of the north stack slid to the ground landing on top of him and pinning the second laborer's right leg against the steel service pipeline. Apparently at the same time the top 4Äpipe bundle of the south stack also slid off to the north and across the pipe bundle lying atop the crane operator. Twenty-four days later the crane operator died of his injuries. The second laborer suffered a broken leg.

The Accident Investigation Report describes the cause of the accident in this manner:

> The direct cause of this accident was the failure to recognize the instability of the irregularly stacked pipe bundles.
>
> Possibly contributing to this accident was the fact that the crew members were not accustomed to working with pipe piled higher than 2 or 3 bundles. In this accident the bundles were stacked 6Ähigh. The light rainfall of the past night may have created even greater pile instability; wet plastic pipe presents a very slippery surface.

The settlement motion submitted by the parties states that the pipes were stacked by the operator's warehousing personnel and states that two employees of the independent contractor working for the operator were removing pipe when the accident occurred. The settlement motion recognizes that according to the citation the stacking of the pipes contributed to the hazard of falling material. It then sets forth that the operator does not agree with all the facts set forth in the citation, including an attached drawing showing how the pipes were stacked and fell. Nor does it agree with the finding of a violation. Nevertheless, the parties propose that the inspector's finding of low negligence be amended to no negligence for the following reasons:

> (i) The supplies had been stacked for approximately two weeks without any indication or incident of instability;

(ii) The employees had received adequate training, instruction and supervision in the conduct of their work involving the handling of pipe bundles and had completed approximately one-half of such work required of them at Respondent's workplace without incident;

(iii) The evidence does not indicate to what extent the weight of the 4Äpipe bundle on the south stack caused the remaining 3Äpipe bundle to fall, as compared to the extent the 3Äpipe bundle fell perhaps because of the movement generated by the removal of the initially removed 3Äpipe bundle; and

(iv) The employees had experience in handling stacks of pipes of approximately the same height and weight.

I cannot accept the proffered settlement. Both the citation and the investigation report identify as a cause of the accident, the manner in which the pipes were stacked. The fact that the pipes gave no indication of instability until they were touched, does not as the settlement motion suggests, warrant a finding of no negligence, or even low negligence. The motion further asserts the employees were adequately, trained, instructed and supervised and were experienced, but does not indicate whether it is referring to the operator's employees who stacked the pipes or the independent contractor's employees who removed them. In any event, the investigation report states that these particular bundles were stacked differently than preceding ones had been and the victims were not accustomed to working with pipes stacked so high. The motion's assertion that the evidence does not show to what extent the stacking caused the fall as opposed to the manner in which the pipes were removed, does not justify this settlement. The accident could have had one cause or multiple causes and if the latter, it is not necessary to fix the degree of causation with mathematical certainty. Finally, no information has been furnished regarding the liability of the independent contractor.

In summary, therefore, the settlement motion, far from presenting matters in a posture which would support a reasoned settlement, raises many questions which must be answered at a hearing on the record. Only in this way can it properly be determined whether a civil penalty should be assessed and, if so, the proper amount.

Accordingly, it is ORDERED that this matter be set for hearing at 9 a.m., July 1, 1987 at the United States Tax Court,

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Federal Building, Room 235, 555 N. Central Avenue, Phoenix, Arizona 85004. (FOOTNOTE 1)

It is further ORDERED that the Solicitor insure attendance at the hearing by the inspector who issued the subject citation and the authors of the Accident Investigation Report. The Solicitor should be prepared to elicit the circumstances of the accident from these individuals.

The operator may call whatever witnesses it wishes. Documentary evidence may be offered.

It is further ORDERED that on or before June 12, 1987, the parties submit a list of the witnesses they intend to call and copies of the documentary exhibits they propose to submit.

Paul Merlin
Chief Administrative Law Judge

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~FOOTNOTE_ONE

1 Any request for continuance will be viewed with extreme disfavor. The case has been pending for several months. The prehearing and hearing order was issued in January. After the Solicitor finally advised the case was settled, four phone calls were made to her during April in repeated attempts to elicit the motion. When she was told the case would be dismissed for want of prosecution, the motion finally was submitted.