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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

COLUMBIA PORTLAND CEMENT
COMPANY,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. LAKE 88-55-M
A.C. No. 33-03990-05522

Jonathan Limestone Mine

ORDER OF APPROVAL AND ORDER TO PAY FOR FOUR SETTLEMENTS
ORDER OF DISAPPROVAL AND ORDER TO SUBMIT
INFORMATION FOR SIXTEEN SETTLEMENTS

Before: Judge Merlin

This case is a petition for the imposition of civil penalties for 20 violations originally assessed at \$20 each for a total of \$400. The proposed settlements are for the original amounts. As set forth herein, I approve four of the recommended settlements based upon information contained in the citations, but I am unable to approve the remaining 16 because the present record contains insufficient information.

Citation No. 3059412

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12008, because the feed cable for the portable reducing transformer located on the burner floor did not enter the metal frame through proper bushings and/or fittings. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059413

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12025, because the grounding jumper around the flexible conduit on the motor of the No. 5 separator in the finishing mill was not connected to the frame of the motor. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059414

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12008, because the 440-volt feed cable for the portable welder in the car shop did not enter the metal frame of the welder through proper fittings and/or bushings. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059430

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.14007, because the guard for the V-belt motor for the separator above the No. 8 finish mill was not of substantial construction in that the back of the guard was missing. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in permanent disability."

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The operator exhibited moderate negligence in allowing this violation to exist."

The Solicitor gives no reasons for any of the foregoing conclusions, but the citation states the drive was not in operation. On this basis, I find the violation was non-serious and approve the \$20 settlement.

Citation No. 3059431

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.14006, because the guard was not in place for the coupling between the motor and gear drive on the main feed belt for the No. 8 belt feed located in the finish mill. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in permanent disability. The operator exhibited moderate negligence in allowing this violation to exist."

The Solicitor gives no reasons for any of the foregoing conclusions, but the citation states the belt was not in operation. On this basis, I find the violation was non-serious and approve the \$20 settlement.

Citation No. 3059432

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.14006, because the guard was not in place for the coupling between the motor and chain drive for the gyp belt feeder for the No. 7 mill. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in permanent disability. The operator exhibited moderate negligence for allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is permanent disability.

Citation No. 3059434

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.14006, because the guard for the

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tail pulley on the main gyp and clinker feet belt conveyor was not in place. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in permanent disability. The operator exhibited moderate negligence in allowing this violation to exist."

The Solicitor gives no reasons for any of the foregoing conclusions, but the citation states the belt was not in motion. On this basis, I find the violation was non-serious and approve the \$20 settlement.

Citation No. 3059435

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.14006, because the guard for the sawblade for the electrical saw located in the car shop was not in place. The Solicitor asserts that "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in permanent disability. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Although the citation recites that the saw was not being used, it further states that the motor was energized. More information is needed for me to make a determination on gravity. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is permanent disability.

Citation No. 3059418

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12020, because the breaker and control box for the pump at the settling pond was not provided with a dry wooden platform or insulation mat. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis

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to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059436

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.11001, because safe means of access was not provided for the operator of the haul truck being used to transport dust in that the ladder used to climb in and out of the truck was not substantially constructed so as to provided safe access. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in permanent disability. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is permanent disability.

Citation No. 3059439

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.14006, because a guard was not provided for the chain drive on the dribble belt conveyor. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could result in lost workdays or restricted duty. The operator exhibited moderate negligence in allowing this violation to exist."

The Solicitor gives no reason for any of the foregoing conclusions, but the citation state that the belt was not in motion. On this basis, I find the violation was non-serious and approve the \$20 settlement.

Citation No. 3059441

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12020, because a wooden platform or insulation mat was not provided for the controls at the

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3 inch water pump. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059442

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12025, because the grounding conductor was not connected to the frame of the portable light located in the underground shop. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059445

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12020, because a dry wooden platform or insulation mat was not provided for the controls on the #3250 portable water pump. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis

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to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059446

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12020, because a wooden platform or insulation mat was not provided for the controls at the high pressure wash bay located at the underground wash station. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059448

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12030, because the 440-volt feed cable to the main exhaust fan located at the underground crusher station was damaged and had a conductor showing through. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059450

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12025, because the conduit used as a grounding conductor for the 110-volt light in the walkway

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of the underground bin conveyor was broken. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059452

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12025, because the conduit used for a grounding conductor for the 110-volt outlet at the top landing for the underground man lift was broken. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059453

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12032, because the cover plate for the junction box located near the walkway for the 4A belt was missing, thereby exposing the conductor to damage. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis

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to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Citation No. 3059454

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12025, because the conduit used as a grounding conductor was broken on the 4A underground belt conveyor. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was unlikely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence in allowing this violation to exist."

Using the same language each time, the Solicitor gives no facts or rationale to support any of these conclusions, especially likelihood of occurrence. Therefore, I have no basis to accept his representations. Also, under such circumstances where likelihood is not explained, I have particular difficulty in approving a \$20 penalty when the Solicitor tells me the projected injury is fatal.

Discussion of Settlement Disapprovals

The conclusions which the Solicitor uses each time regarding probability of occurrence are, of course, intended to satisfy the Secretary of Labor's regulation for single penalty assessments (30 C.F.R. 100.4). In effect, a single penalty assessment of \$20 is available under this rule, if the violation is not "significant and substantial," as that term of art has been interpreted by the Commission in contest cases under section 104(d) of the Act. 30 U.S.C. 814(d). Due to the absence of any data or reasoning to support his bare assertions, it appears that the Solicitor in this case has not even satisfied the Secretary's requirements for imposition of a \$20 penalty.

However, the issue in this case is not whether the Secretary of Labor's regulations are met. It is well established that penalty proceedings before the Commission are de novo. Neither the Commission nor its Judges are bound by the Secretary's regulations or 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. 30 U.S.C. 820(i). *Sellersburg Stone Company v. Federal Mine Safety and Health Review Commission*, 736 F.2d 1147 (7th Cir.1984). *Wilmot Mining Company*, 9 FMSHRC 686 (April 1987). *U.S. Steel*, 6 FMSHRC 1148 (May 1984).

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The Commission and its Judges bear a heavy responsibility in settlement cases pursuant to section 110(k) of the Act, 30 U.S.C. 820(k), 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. * * *

The legislative history makes clear Congress' intent in this respect: See S.Rep. No. 95-181, 95th Cong., 1st Sess., 44-45 (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 632-633 (1978).

In order to support his settlement recommendations, the Solicitor must present the Commission Judge with information sufficient to satisfy the six statutory criteria in section 110(i) with respect to the instant citations. I accept the Solicitor's statistics regarding history and in absence of any evidence to the contrary, I accept his representations regarding good faith abatement and ability to continue in business.

However, the Solicitor's representation of the operator as small in size cannot be accepted on the present record. The Proposed Assessment sheet gives the company's annual hours worked as 1,088,152 and the miner's annual hours worked as 417,735. The Solicitor should explain why he believes the operator is small.

No information is given to support the Solicitor's representation that in all these citations, the operator was guilty of moderate negligence. The Solicitor has merely relied upon the box checked by the inspector on the citation. Accordingly, on the critical statutory criterion of negligence, I have no basis to make the necessary determination for sixteen of the citations, as set forth above.

So too, in these sixteen citations no information is given for me to make findings on gravity. As already noted, the Solicitor's unsupported representations relate to "significant and substantial" not "gravity." The Commission has pointed out that although the penalty criterion of "gravity" and the "significant and substantial" nature of a violation are not identical, they are based frequently upon the same or similar factual considerations. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1622 n. 11 (September 1987). *Youghiogeny* and

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Ohio Coal Company, 9 FMSHRC 2007, 2013 (December 1987). Here no factual considerations have been given upon which I can decide gravity. A violation conceivably could possess some degree of gravity, but still not rise to the level of significant and substantial. As a general matter, \$20 would appear to be a nominal penalty appropriate for a non-serious violation, in absence of other unusual circumstances. But here again, the Solicitor has merely relied upon the box checked by the inspector on the citation. Accordingly, for the crucial statutory criterion of gravity, I have no basis to make the necessary determinations.

In light of the foregoing, the recommended settlements for 16 citations cannot be accepted on the present record.

ORDER

Accordingly, it is Ordered that the recommended settlements of \$20 be Approved for the following four citations:

Citation No. 3059430
Citation No. 3059431
Citation No. 3059434
Citation No. 3059439

It is further Ordered the operator pay \$80 for these four citations within 30 days from the date of this decision.

It is further Ordered that the recommended settlements be Disapproved and that within 30 days from the date of this order, the Solicitor submit sufficient information for me to make proper settlement determinations under the Act with respect to the following 16 citations:

Citation No. 3059412
Citation No. 3059413
Citation No. 3059414
Citation No. 3059432
Citation No. 3059435
Citation No. 3059418
Citation No. 3059436
Citation No. 3059441
Citation No. 3059442
Citation No. 3059445
Citation No. 3059446
Citation No. 3059448
Citation No. 3059450

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Citation No. 3059452

Citation No. 3059453

Citation No. 3059454

Paul Merlin

Chief Administrative Law Judge