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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 88-58-M
A.C. No. 33-03990-05524

Jonathan Limestone Mine

DECISION DISAPPROVING SETTLEMENTS
ORDER TO SUBMIT INFORMATION

This case is a petition for the imposition of civil penalties for twenty citations originally assessed at \$2603. Recommending very substantial reductions for all the violations, the Solicitor's proposed settlements total \$1463.80. As set forth herein, I am unable to approve the suggested settlements based upon the present record.

Citation No. 3059195

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12030, because the door on the signal light located at the water pump across from the bag house would not close, thus exposing energized parts. The citation further recites that employees walk and travel in the affected area. The original assessment for this citation was \$157 and the proposed settlement is \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator was moderately negligent in allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059197

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12030, because the outlet located on the bottom of the 110-volt breaker box in the bag house was broken off and hanging by the conductors. The original assessment for this citation was \$157 and the proposed settlement is for \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator was moderately negligent in allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059199

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12034, because the 110-volt light bulb located 3 feet from the drill press in the machine shop was not guarded. The original assessment for this citation was \$98 and the proposed settlement is for \$55.10. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could result in lost workdays or restricted duty. The operator was moderately negligent in allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$55.10. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059382

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12030, because the 110-volt light bulb located 3 feet above the drill bit and bolt bins and near the big shears was broken. The citation further recites that employees work in the affected area. The original assessment for this citation was \$98 and the proposed settlement is for \$55.10.

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The Solicitor offers nothing to support his proposed settlement of \$55.10. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059383

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12030, because the bulb was missing from the light fixture located on the I-beam near the small drill press and approximately 4 feet above the floor. The citation further recites that employees were exposed to 110-volt energized parts. The original assessment for this citation was \$98 and the proposed settlement is for \$55.10. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could result in lost workdays or restricted duty. The operator was moderately negligent in allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$55.10. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059421

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.11002, because an 8 foot section of handrail for the walkway at the top of the steps in the compressor room was not in place. Employees were exposed to falls of 8 feet. The original assessment for this citation was \$126 and the proposed settlement is for \$70.85. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. 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."

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Citation No. 3059395

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12030, because two light bulbs were missing in the walkway of the east tunnel of the packhouse. The light bulbs were approximately six feet above the walkway. The citation further recites that employees were exposed to the 110Å volt energized equipment because they had to work in this area. The original assessment for this citation was \$98 and the proposed settlement is \$55.10. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be lost workdays or restricted duty. The operator was moderately negligent in allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$55.10. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059396

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12023, because grids and energized parts were not guarded on the controls for the elevator for the store rooms. The citation further recites that the voltage was 440. The original assessment for this citation was \$157 and the proposed settlement is \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury in the event of an accident could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably

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likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059399

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12030, because the thermostat box located in the precipitator control room was broken off the hanger and the cover was missing. The original assessment for this citation was \$98 and the proposed settlement is for \$55.10. The Solicitor asserts: "The probability of the occurrence of an event against which cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could result in lost workdays or restricted duty. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$55.10. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059425

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 or maintained from the east to west sides of the third floor of the feedhouse in that employees were walking an 8 inch beam to get from one side to the other. The citation further recites that if people fell while using this beam, they could fall 10 feet. The original assessment for this citation was \$126 and the proposed settlement is for \$70.85. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be permanently disabling. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$70.85. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be permanent disability and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059427

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.9002, because the Pettibone Crane, equipment #29, operating in the coal mill area had a hydraulic oil leak. The citation recites that the oil was leaking off the boom, running down onto the hot exhaust and motor, creating a fire hazard. The original assessment for this citation was \$157 and the proposed settlement is for \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could result in lost workdays or restricted duty. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059405

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12030, because the junction box on the brake relay of the man lift located on the top floor of the finish mill was damaged. The original assessment for this citation was \$157 and the proposed settlement is for \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059406

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12023, because the 440-volt electrical connection on the second floor of the crane was not

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guarded. The citation further recites that employees could make contact with the connection. The original assessment for this citation was \$157 and the proposed settlement is for \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059407

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12023, because the 440-volts grids on the third floor of the crane were not guarded. The citation further recites that employees could make contact with the grids. The original assessment for this citation was \$157 and the proposed settlement is for \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059408

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12034, because the light bulb on the north side of the crane and approximately three feet above the floor was not guarded. The original assessment for this citation was \$98 and the proposed settlement is for \$55.10. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could result

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in lost workdays or restricted duty. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$55.10. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059409

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12030, because the breaker handle for the motor of the separator in the No. 7 finish mill had been removed and could not be locked out. The original assessment for this citation is \$157 and the proposed settlement is for \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$88.30. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be a fatality and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059410

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12030, because the back panels for the No. 25808 control panel in the burner control room were missing, exposing employees to 110-volt connections. The original assessment for this citation was \$157 and the proposed settlement is for \$88.30. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

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Citation No. 3059428

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.11001, because safe access was not provided for the walkway on the fourth floor of the finish mill building in that a coal spill was blocking the walkway. The citation further recites that employees had to travel the walkway and that the spill was about 6 feet by 8 feet and 5 feet high. The original assessment for the citation was \$98 and the proposed settlement is for \$55.10. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could result in lost workdays or restricted duty. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$55.10. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be lost workdays or restricted duty and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Citation No. 3059433

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.14006, because the guard for the tailpulley on the main gyp and clinker feed belt conveyor in the No. 7 finish mill was not in place. The citation further recites that the belt was in motion, and that one person per day travels the walkway adjacent to the belt. The original assessment for this citation was \$126 and the proposed settlement is for \$70.85. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be permanent disability. The operator exhibited moderate negligence for allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$70.85. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be permanent disability and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

According to the Solicitor, this citation was for a violation of 30 C.F.R. 56.9003, because the primary brakes for the Caterpillar 992 front end loader, equipment No. 2314, were not adequate in that the loader could not stop within a safe distance when tested. The citation further recites that the right rear wheel cylinder had a very heavy leak with fluid running down onto the wheel and tire, and that the loader was being used to load trucks in the quarry. The original assessment for this violation was \$126 and the proposed settlement is for \$70.85. The Solicitor asserts: "The probability of the occurrence of an event against which the cited standard is directed was reasonably likely. The gravity of projected injury had an accident occurred could be permanent disability. The operator was moderately negligent in allowing this violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$70.85. How can I approve such a small penalty amount when the Solicitor himself tells me it is reasonably likely the cited condition will occur and that if it does, the result will be permanent disability and that the operator was negligent? Under such circumstances the original assessment looks modest indeed.

Discussion of Settlement Disapprovals

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).

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 which 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.,

44Ä45 (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).

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 contrary, I accept his representations regarding good faith abatement and ability to continue in business.

However, the 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 mine's annual hours worked as 417,735. MSHA assigned the mine 7 points and the entity 3 points which is not small. Cf. 30 C.F.R. 100.4. The Solicitor should explain why he believes the operator is small.

No information is given to support the Solicitor's representation that the operator was guilty of moderate negligence in these citations. The Solicitor merely relies upon the box checked by the inspector on the citations. Accordingly, on the critical statutory criterion of negligence, I have no basis to make the necessary determinations.

As already set forth, the representations given by the Solicitor with respect to the gravity of each violation do not appear to support the low recommended settlement amounts. The Solicitor's conclusions relate to "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). 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). Youghioghny and Ohio Coal Company, 9 FMSHRC 2007, 2013 (December 1987). The Solicitor does not discuss the factual considerations for any of the subject citations. But the conclusions he offers do indicate a high degree of gravity which, at least on the present record, is at variance with his insubstantial penalty suggestions. And, as noted above, in some instances the citations contain additional facts, not included in the settlement motion, which apparently add to gravity. I am of course, not bound by the original assessments. However, it must be noted that the Solicitor has cut the original assessments almost in half without explanation.

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

ORDER

It is 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.

Paul Merlin
Chief Administrative Law Judge