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SOL (MSHA) V. COLUMBIA PORTLAND CEMENT  
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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 PROCEEDINGS

Docket No. LAKE 88-59-M  
A.C. No. 33-03990-05525

Jonathan Limestone Mine

DECISION DISAPPROVING SETTLEMENTS  
ORDER TO SUBMIT INFORMATION

This case is a petition for the imposition of civil penalties for six citations originally assessed at \$831.00. Recommending very substantial reductions for all the violations, the Solicitor's proposed settlements total \$467.50. As set forth herein, I am unable to approve the suggested settlements based upon the present record.

Citation No. 3059438

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.3200, because loose material was observed along the highwall in the quarry for a distance of 200 feet thereby creating a fall of material hazard to employees working in the area. The original assessment for this citation was \$136 and the proposed settlement is \$76.50. 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 \$76.50. 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.

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Citation No. 3059440

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 those persons who worked with the pump located in front of the mine portal in that access to the area had been cut off. The citation further recites that if employees fell, they would fall into about five feet of water. The original assessment for this citation was \$98 and the proposed settlement is \$55.10. The Solicitor asserts: "The probability of 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 exhibited moderate negligence for allowing the 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. 3059443

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12032, because the cover for the junction box of the hydraulic press was missing. 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 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. 3059447

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12032, because the cover plate

~1401

for the 110 volt light switch at the entrance to the underground crusher station was missing. The citation further recites employees were exposed to 110 volt energized parts. The original assessment 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 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. 3059451

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12030, because two light bulbs at the top of the man lift were missing, thereby exposing employees to energized parts. 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 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. 3059461

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 #6 belt conveyor was not in place. The citation further recites it was reasonably likely employees would contact the pinch point while travelling. The original assessment for this citation was \$126 and the proposed settlement is \$71. The Solicitor asserts: "The probability

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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 \$71.00. 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., 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

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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). *Youghiogheny 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 factors 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.

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

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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