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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 88-62-M
A.C. No. 33-03990-05526

Jonathan Limestone Mine

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

This case is a petition for the imposition of civil penalties for five violations. Two of the violations were originally assessed at \$20 each and the proposed settlements are for the original amounts. As set forth herein, I approve the recommended settlement for one of the \$20 penalties, but am unable to do so for the other.

The remaining three citations were originally assessed at \$371 and the Solicitor recommends reduced settlements for them totaling \$208.70. Based upon the present record, I cannot approve these suggested settlements.

Citation No. 3060309

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12030, because a 110-volt light bulb socket was not provided with a bulb, thus exposing employees to energized parts. The citation further recites that one employee was stationed in this area and travelled it frequently. This socket was located in the east tunnel. The original assessment for this citation was \$112 and the proposed settlement is \$63. 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 \$63. 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 lost workdays or restricted duty and that the operator was negligent. Under such circumstances the original assessment looks modest indeed.

Citation No. 3060310

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12016, because an employee was working on the wilfley pump in mill #46 without deenergizing the electrical controls. There was no warning notice at the power switch. The citation further recites that several employees work in the affected area. The original assessment for this citation was \$147 and the proposed settlement is \$82.70. 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 permanent disability. The operator was moderately negligent in allowing the violation to exist."

The Solicitor offers nothing to support his proposed settlement of \$82.70. 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. 3060311

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12030, because the control switch box door on the #47 wilfley pump could not be closed. The citation recites that the conductors inside the box were 440 volts and were energized and that several employees work in that section of the mill. The original assessment for this citation was \$112 and the proposed settlement is \$63. 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 of 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 \$63. 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 lost workdays or restricted duty and that the operator was negligent. Under such circumstances the original assessment looks modest indeed.

Citation No. 3060312

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.12025, because the equipment grounding conductor for the west screw in the basement of the packhouse was broken off the drive motor. The original assessment for this citation was \$20 and the proposed settlement is \$20. 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 had an accident occurred could be fatal. The operator exhibited moderate negligence for allowing this violation to exist."

Using the pro forma language he employs in all cases of \$20 settlements, 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. 3059478

According to the Solicitor, this citation was issued for a violation of 30 C.F.R. 56.16005, because a compressed gas cylinder located in the underground maintenance shop was not secured in any manner. The original assessment for this citation was \$20 and the proposed settlement is \$20. 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 had an accident occurred could be lost workdays or restricted duty. The operator was moderately negligent in allowing this violation to exist."

The Solicitor gives no reason for any of the foregoing conclusions, but the citation states that the cylinder had a protective cap in place. On this basis, I find the violation was non-serious and approve the \$20 settlement.

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 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. The conclusions he offers for the three citations where he recommends penalty reductions 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 in these cases the Solicitor has cut the original assessments almost in half without explanation.

With respect to the recommended settlement of \$20, it must be noted that as a general matter, \$20 would appear to be a nominal penalty appropriate for a non-serious violation, in absence of other unusual circumstances. The Solicitor has merely relied upon the boxes checked by the inspector on the citations. 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 four of the citations set forth above, cannot be accepted on the present record.

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ORDER

Accordingly, it is Ordered that the recommended settlement of \$20 be Approved for the following citation:

Citation No. 3059478

It is further Ordered the operator pay \$20 for this citation 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 4 citations:

Citation No. 3060309

Citation No. 3060310

Citation No. 3060311

Citation No. 3060312

Paul Merlin
Chief Administrative Law Judge