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SOL (MSHA) V. MATERIAL SERVICE CORP.
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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.

MATERIAL SERVICE CORPORATION,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. LAKE 88-122-M
A.C. No. 11-00070-05507

Romeo Quarry

ORDER DENYING PROPOSED SETTLEMENT
NOTICE OF HEARING

On August 11, 1988, the Secretary of Labor filed a petition for assessment of a civil penalty before this Commission proposing a penalty of \$8,000 for one violation of the mandatory standard at 30 C.F.R. 56.9054. The citation charges as follows:

An employee was fatally injured on October 27, 1987 when the Euclid RA50 co.#54A6929 haulage truck he was operating went over the edge of the live stockpile and fell approximately 50 feet overturning and landing upside down on the Quarry floor. Berms, bumper blocks, safety locks, or similar means to prevent overtravel and overturning was not provided at this dumping location at the time the incident occurred.

In a motion to approve settlement filed with this Commission on September 12, 1988, the Secretary sought to reduce the proposed penalty to \$5,000 and, as grounds therefore, stated as follows:

- 1) A high degree of gravity is involved in the present citation because the event that the cited standard is trying to prevent actually occurred.
- 2) A high degree of negligence is present in this citation because the mine operator knew or should have known that an adequate berm or a similar type of device was required to prevent overtravel and overturning at the dumping location. On September 2, 1988, the undersigned attorney discussed this case with Michael J. Bernardi,

Director of Safety for the Material Service Corporation. Mr. Bernardi stated that during the afternoon prior to the date of the accident a berm had been constructed at the cited location. However, at the time of the accident the material that was removed from the berm had not been totally replaced leaving a berm that was not adequate to prevent an accident.

3) The mine operator demonstrated its good faith by abating the cited condition within the time granted the MSHA inspector.

4) The mine operator had no assessed violations during the 24 month period preceding the issuance of the present citation. See copy of Proposed Assessment Data Sheet, marked as Exhibit A, attached hereto and made a part hereof.

5) During the calendar year preceding the issuance of the present citation the mine involved in this case accumulated a total of 128,522 hours of work and the controlling entity had a total of 1,687,359 hours of work during the same period.

6) Payment of the penalty agreed to in this settlement will not affect the mine operator's ability to remain in business.

Section 110(k) of the Act provides that "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." Penalty proceedings before the Commission are de novo. Neither the Commission or 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. *Secretary v. Phelps Dodge Corp.*, 9 FMSHRC 920 (Chief Judge Merlin 1987); *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147 (7th Cir.1984).

The Commission recently reaffirmed these principles in *Secretary v. Wilmot Mining Co.*, 9 FMSHRC 684 (1987):

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 Corporation*,

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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 Company, 3 FMSHRC 2478, 2480-81 (1981). A judge's oversight of the settlement process "is an adjudicative function that necessarily involves wide discretion." Knox County, 3 FMSHRC at 2479.

In this case the citation at bar sets forth a serious regulatory violation leading to a fatality. The settlement motion also confirms that the fatality was the result of a "high degree" of negligence and the purported excuse or justification for reducing the level of negligence is incomprehensible. In addition the other grounds advanced do not justify the proposed reduction. (Footnote 1)

Accordingly the Motion is denied and this case is set for hearing on the merits at 9:00 a.m. on December 13, 1988, in St. Louis, Missouri. The specific courtroom in which the hearing will be held will be designated at a later date.

Gary Melick
Administrative Law Judge
(703) 756-6261

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1 The Secretary was afforded opportunity to supplement her Motion in this case to furnish additional information to justify her proposed reduction in penalty but declined.