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SOL (MSHA) V. DEVELOPERS INTERNATIONAL
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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

CIVIL PENALTY PROCEEDING

Docket No. CENT 88-132-M
A.C. No. 03-00479-05501

v.

Wilson Springs Pit & Plant

DEVELOPERS INTERNATIONAL
SERVICE CORPORATION,
RESPONDENT

ORDER DENYING PROPOSED SETTLEMENT NOTICE OF HEARING

On September 19, 1988, the Secretary of Labor filed a petition for assessment of a civil penalty before this Commission proposing a penalty of \$4,000 for a "significant and substantial" regulatory violation allegedly causing the electrocution of a miner. In a motion to approve settlement filed with this Commission on January 13, 1989, and seeking a 25 percent reduction in penalty the Secretary stated as follows:

The proposed assessments were reduced for the following reasons:

- a. Respondent demonstrated extraordinary good faith in achieving rapid compliance.
- b. Respondent does not have a lengthy history of prior violations.
- c. Respondent's size of business is relatively small.
- d. Payment of the fine will not materially impair Respondent's ability to continue in business.
4. Respondent has paid the agreed proposed penalty of \$3,000 sought by Petitioner; therefore, Respondent hereby withdraws the notice of contest filed in this case.
5. Respondent states that Respondent will comply with the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

The information provided by the Motion is totally inadequate for an independent and proper evaluation of the alleged violation under the criteria set forth in Section 110(i) of the Federal Mine Safety and Health Act of 1977.

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The motion provides no factual basis to support any of the criteria that must be considered by the Commission under Section 110(i). Indeed the motion fails to even address the important issues of negligence and gravity.

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 nor 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.

In Secretary v. Wilmot Mining Co., 9 FMSHRC 684 (1987) the Commission stated as follows:

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, 8 FMSHRC 668 (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.

Under the circumstances the Motion to Approve Settlement Agreement is denied and this case is set for hearing on the merits on March 7, 1989 at 8:30 a.m. in Hot Springs, Arkansas. 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