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SOL (MSHA) V: EL PASO SAND  
DDATE:  
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TTEXT:

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.

EL PASO SAND PRODUCTS, INC.,  
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 88-53-M  
A.C. No. 41-00046-05520

Docket No. CENT 88-65-M  
A.C. No. 41-00046-05521

Docket No. CENT 88-79-M  
A.C. No. 41-00046-05522

Docket No. CENT 88-83-M  
A.C. No. 41-00046-05523

Docket No. CENT 88-104-M  
A.C. No. 41-00046-05524

Docket No. CENT 88-141-M  
A.C. No. 41-00046-05525

El Paso Quarry & Plant

ORDERS REJECTING PROPOSED SETTLEMENTS

Statement of the Proceedings

These proceedings concern proposed civil penalty assessments filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a). The petitioner is seeking civil penalty assessments in the amount of \$8,835.00, for 23 alleged violations of certain mandatory safety and health standards found in Part 56, Title 30, Code of Federal Regulations.

These cases were docketed for hearing in El Paso, Texas, during the hearing term January 10-12, 1989. However, the hearings were continued and cancelled after the parties informed me that they had reached a proposed settlement in all of the cases. The parties have now filed motions seeking approval of the proposed settlements, the terms of which require the respondent to pay civil penalty assessments in the amount of \$6,626.25, in settlement of all of the alleged violations. The alleged violations, initial proposed civil penalty

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assessments, and the proposed settlement amounts are as follows:

DOCKET NO. CENT 88-53-M

30 C.F.R.

Citation No.	Date	Section	Assessment	Settlement
3060567	06/24/87	56.14003	\$345	\$258.75

DOCKET NO. CENT 88-65-M

30 C.F.R.

Citation No.	Date	Section	Assessment	Settlement
2869424	04/23/87	56.14029	\$126	\$ 94.50

DOCKET NO. CENT 88-79-M

30 C.F.R.

Citation No.	Date	Section	Assessment	Settlement
3060786	01/11/88	56.9022	\$178	(Total of \$370.50 for all citations)
3060788	01/12/88	56.11001	\$ 79	
3060789	01/12/88	56.12032	\$ 79	
3060793	01/12/88	56.20003	\$ 79	
3060795	01/12/88	56.20011	\$ 79	

DOCKET NO. CENT 88-83-M

30 C.F.R.

Order No.	Date	Section	Assessment	Settlement
3060996(A)	10/15/87	56.14001	\$1,000	(Total of \$3,765 for all citations)
3060996(B)	10/15/87	56.14029	\$1,000	
3060785	01/11/88	56.3131	\$1,000	
3060790	01/12/88	56.4201(5)(b)	\$ 20	
3060847	02/17/88	56.3131	\$2,000	

DOCKET NO. CENT 88-104-M

30 C.F.R.

Citation No.	Date	Section	Assessment	Settlement
3060571	06/25/87	56.12028	\$ 20	(Total of \$262.50 for all citations)
3060791	01/12/88	56.16006	\$ 79	
3062861	03/01/88	56.12030	\$ 36	

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3062862	03/01/88	56.12030	\$ 20
3062863	03/01/88	56.12030	\$ 36
3062864	03/01/88	56.11001	\$ 68
3062865	03/01/88	56.9002	\$ 91

DOCKET NO. CENT 88-141-M

Citation/ Order No.	Date	30 C.F.R. Section	Assessment	Settlement
3062866	03/01/88	56.15005	\$1,000	(Total of
3062867	03/01/88	56.9022	\$ 500	\$1,875 for all
3062868	03/01/88	56.3200	\$ 600	citations)
3062869	03/01/88	56.6001	\$ 400	

After review and consideration of the motions filed by the parties, and for the reasons which follow below, I have approved one of the proposed settlements (Docket No. CENT 88-53-M), tentatively approved two of the proposed settlements (Docket Nos. CENT 88-79-M and CENT 88-104-M), subject to the filing of additional information, and I have rejected three of the proposed settlements (Docket Nos. CENT 88-53-M, CENT 88-83-M, and CENT 88-141-M), subject to their re-filing with additional information.

#### Discussion

The Commission's Rules concerning proposed settlements are found at 29 C.F.R. 2700.30, and they provide as follows:

- (a) General. No proposed penalty that has been contested before the Commission shall be compromised, mitigated, or settled except with the approval of the Commission after agreement by all parties to the proceeding.
- (b) Contents of settlement. A proposal that the Commission approve a penalty settlement shall include the following information for each violation involved; (1) the amount of the penalty proposed by the Office of Assessments of the Mine Safety and Health Administration; (2) the amount of the penalty proposed by the parties to be approved; and (3) facts in support of the appropriateness of the penalty proposed by the parties.

(c) Order approving settlement. Any order by the Judge approving a proposed settlement shall be fully supported by the record. In this regard, due consideration, and discussion thereof, shall be given to the six statutory criteria set forth in section 110(i) of the Act. Such order shall become the final decision of the Commission 40 days after approval unless the Commission has directed that such approval be reviewed. [Emphasis added.]

In support of the proposed settlements and reductions of the initial proposed civil penalty assessments for each of the violations in issue, the parties rely in part on the following "boilerplate" argument which is included in each of the motions filed in these cases:

There was little or no negligence involved, since the violations could not have been reasonably predicted.

Probability of injury was overevaluated since very few employees were exposed to the risk, these employees were not, during the normal course of their work, exposed to the risk with any great frequency, these employees were not in the zone of danger, and the employees were not working under stress or where their attention would be distracted. (Emphasis added).

A review of MSHA's initial pleadings, including the citations/orders, and the "narrative findings" by MSHA's Office of Assessments, reflects the following:

Docket No. CENT 88-65-M

Section 104(a) Citation No. 2869424. The citation states that a miner became entangled in the tail pulley of a conveyor belt while it was in motion, and that he suffered severe injuries to his left arm. It also states that the plant operator could not observe the miner and that the miner was entrapped between the pulley, belt, and support structure until he was rescued by another miner. The inspector found that permanently disabling injuries occurred. The violation was issued because of the failure to shut off the machine or to otherwise block it against motion.

Imminent Danger Order No. 3060996(A & B). The order and narrative findings made by MSHA's assessment officer reflects that an employee was shoveling up spillage from under an unguarded conveyor tail pulley, and that the shovel was within 4 inches of the pulley, and the miner was within 1 foot of the pulley. This work was being performed while the machine was in motion and the power on. The inspector found that the employee's exposure to the unguarded pulley pinch point would highly likely result in permanently disabling injuries, and that the violations were the result of a high degree of negligence by the respondent.

Imminent Danger Order No. 3060785. This order was issued on January 11, 1988. The inspector observed a loader operator and two haulage units working at and near the base of a pit highwall approximately 60 to x feet high, and the highwall contained "loose boulders and unconsolidated materials above the employees and equipment." The inspector found that the cited conditions would highly likely result in fatalities, and that the violation resulted from a high degree of negligence.

Imminent Danger Order No. 3060847. This order was issued on February 17, 1988, after the inspector observed a front-end loader and two haul trucks loading materials from the base of an 80 to 90 foot highwall. The loader was observed operating directly below loose materials located approximately 60 to 70 feet from the base of the highwall. The inspector took note of the fact that this violative condition took place in the same area where he issued the previous January 11, 1988, order, and he concluded that fatal injuries were highly likely. The inspector made a negligence finding of "Reckless Disregard."

Docket No. CENT 88-141-M

Imminent Danger Order No. 3062866. This order was issued by the inspector after he observed a drill operator working on top of a 40-foot highwall within 2 feet of the edge of the highwall, and the drill helper walking around the front of the drill within approximately 16 inches from the edge of the highwall. Neither employee was wearing a safety belt or line, and the inspector concluded that they were in danger of falling off the highwall, and that it was highly likely that a fatality would occur.

Unwarrantable Failure Citation No. 3062867. This citation was issued at 2:40 p.m., on March 1, 1988, after the

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inspector observed that the outer edge of a roadway approaching the "upper-most bench" of the quarry was not bermed or guarded with guardrails to prevent vehicles using the roadway from dropping off of the 40 to 100 foot "drop off." The roadway was used to haul explosives to the top of the hill, and other vehicles and equipment also used the roadway, including a truck used to transport two drill operators to the top of the bench. The inspector noted that the superintendent admitted that he had inspected the area at 6:30 a.m., on the same day the violation was issued, and that the roadway was not bermed or otherwise guarded. The inspector also found that permanently disabling injuries were highly likely. The inspector found that the violation resulted from a high degree of negligence.

Unwarrantable Failure Order No. 3062868. This order was issued by the inspector at 2:45 p.m., on March 1, 1988, after he observed two drillers drilling and travelling the upper bench of the quarry where loose boulders were "hanging on the wall" which was approximately 30 to 40 feet high. The inspector noted that some boulders had fallen off the face of the highwall from vibration from a nearby blast. The inspector found that permanently disabling injuries were highly likely, and that the violation resulted from a high degree of negligence.

Unwarrantable Failure Order No. 3062869. The order was issued after the inspector found two blasting caps in an office desk drawer of an employee. The inspector found that permanently disabling injuries were reasonably likely, and that the violation was the result of a high degree of negligence.

Contrary to the assertions by the parties that no employees were "in the zone of danger," the aforementioned information with respect to each of the violations reflects that miners were directly exposed to hazards, and that one miner suffered serious disabling injuries to his arm when it was caught in a moving conveyor belt. Further, the assertion that employees were not exposed to any risk "with any great frequency" is irrelevant. From a gravity point of view, the issue is whether or not any employee was exposed to any hazard, regardless of its frequency. For example, the employee who caught his arm in a moving conveyor may have only been exposed to a risk on this one occasion, but the result was disastrous.

With regard to the question of negligence, the unexplained assertions by the parties that there "was little

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or no negligence" is totally without foundation. The inspectors found that the violations noted above were the result of a high degree of negligence, and in one case, the inspector made a negligence finding of reckless disregard.

I have reviewed the answers filed by the respondent in each of these cases, including the defenses advanced with respect to each of the violations. If the parties believe that these defenses have merit, or should be considered by the judge in mitigation of the civil penalties, it is incumbent on the parties to place these arguments clearly and succinctly before the judge for his consideration. Reliance on boilerplate contradictory language that bears no rational or reasonable relationship to the particular facts of a case is simply unacceptable, and I will continue to reject such submissions in support of proposed settlements. In this regard, this is not the first time I have rejected a proposed settlement filed by the Dallas Regional Solicitor's Office based on the identical language used in these cases. See: Secretary v. Boorhem-Fields, Incorporated, Docket No. CENT 88-56-M, August 29, 1988, Order Rejecting Proposed Settlement.

Apart from the gravity and negligence contradictions noted above, the Commission's rules governing proposed settlements requires the judge to consider and discuss all information with respect to the civil penalty criteria found in section 110(i) of the Act. The failure by the parties to submit clear and complete information to the judge as part of their submissions in support of any settlement puts the judge in the untenable position of attempting to decipher MSHA's civil penalty "point system." In these cases, the parties have failed to provide any narrative discussion with respect to the section 110(i) criteria concerning the respondent's size, good faith abatement, or history of prior violations. They simply state that they have reviewed and reconsidered the operator's size, good faith, and prior history of violations, but have failed to advance any arguments or conclusions as to how this information may impact on the proposed settlements or civil penalty assessment reductions. They simply refer me to "Exhibit A to the Complaint." It is incumbent on the parties, and not the judge, to extrapolate this information, and to submit it in some meaningful narrative form.

With regard to Docket Nos. CENT 88-79-M, CENT 88-83-M, CENT 104-M, and CENT 88-141-M, the proposed settlement amounts for each of the violations are lumped together in one lump sum. Commission Rule 30(b), 29 C.F.R. 2700.30, requires the parties to submit a proposed settlement amount for each violation. Again, it is incumbent on the parties, not the judge,



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to prorate or allocate the specific amounts to be assessed for each individual violation, and unexplained lump sum proposals are simply unacceptable.

#### CONCLUSIONS AND ORDERS

In view of the foregoing, I make the following dispositions of these cases:

1. Docket No. CENT 88-53-M. I will approve the proposed settlement of this case, and a separate dispositive decision will follow.

2. Docket Nos. CENT 88-79-M and CENT 88-104-M. The proposed settlements in these cases are tentatively approved, subject to the submission and receipt of further information from the parties with respect to the section 110(i) civil penalty criteria concerning the respondent's size, good faith abatement, history of prior violations, and the allocation of the specific settlement amounts for each of the violations. Upon receipt of this information, I will issue further dispositive decisions.

3. Docket Nos. CENT 88-65-M, CENT 88-83-M, and CENT 88-141-M. The proposed settlements in these cases are rejected, subject to their re-filing. The parties ARE ORDERED to resubmit amended motions with a full discussion and explanation clarifying or justifying the proposed penalty reductions in light of the apparent gravity and negligence contradictions noted herein. The parties ARE FURTHER ORDERED to submit a discussion concerning the civil penalty criteria with respect to the respondent's size, good faith abatement, history of prior violations, and the allocation of the specific settlement amounts for each of the violations.

The parties ARE FURTHER ORDERED to submit all of the aforementioned information to me within thirty (30) days of the receipt of these Orders.

George A. Koutras  
Administrative Law Judge