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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. DENV 79-340-P  
A.O. No. 29-00845-03003

v.

West York Strip Mine

KAISER STEEL CORPORATION,  
RESPONDENT

ORDER DENYING IN PART MOTION TO APPROVE SETTLEMENT

Based upon an independent evaluation and de novo review of the circumstances relating to the 77.512 and 77.1710(g) violations, I conclude the Secretary's motion to approve settlement at the amounts originally proposed by the Assessment Office \$78.00 and \$84.00 respectively be GRANTED.

Because the record submitted shows that the failure to provide an audible back-up alarm on the Ford cement mixing truck created a serious risk of death or disabling injury to each of the eleven men working on the construction site for respondent's bathhouse and was the result of a knowing failure to comply with the mandatory safety standard set forth in 30 CFR 77.410, I find the penalty proposed as the basis for settlement, \$52.00, is insufficient to deter future violations and ensure voluntary compliance. For these reasons, the motion to approve settlement as to this violation must be DENIED.

The Regional Solicitor's lack of concern for vigorous and effective enforcement as reflected in his refusal to consider an increase in the amount of this penalty is most disturbing. (FOOTNOTE 1)

For the reasons set forth in my order in the Pomerleau Bros. case WILK 79-4-PM, February 13, 1979, I reject Mr. James White, the Regional Solicitor's suggestion, that the only function of the Judge or the Commission is to rubber stamp his settlement agreements. As I noted in Pomerleau:

To remedy what was felt to be an abdication of enforcement responsibility, the new Act decreed that all settlements of violations, once contested, be made a matter of public record subject to approval by the Commission and public scrutiny by Congress, the miners and the people. It is evident, therefore, that Congress imposed upon the Commission an obligation to eschew the role of rubber stamp and to exercise an independent and reasoned judgment in evaluating settlements with respect to both the six statutory criteria and the impact of payment of the proposed amounts upon future operator conduct and compliance.

\* \* \*

The language of section 110(k) plus Congress' expressed dismay at the history of the civil penalty program and the Senate's conviction that the independent Review Commission would reverse this history by providing close scrutiny of settlements, dictate a finding that the Commission's mandate is to review all settlements of contested violations, not just those involving reduction of assessed amounts. It would be anomalous to conclude that the Commission is to enforce the public interest in mine safety only when the Secretary seeks to reduce assessments but must bow to the Regional Solicitor's interpretation of the public interest when settlement is proposed at the amounts assessed by him.

I think it fortunate that Mr. White's views, as he stated, may not reflect any policy other than his own. I do think that because of his position they should be a matter of concern to the Solicitor, the Secretary, the Commission, and the Legislative Oversight Committees.

Accordingly, it is ORDERED:

1. That for the 77.512 and 77.1710(g) violations the operator pay a penalty of \$162.00 on or before Tuesday, June 5, 1979.

2. That the motion to approve settlement of the 77.410 violation be, and hereby is, DENIED.

3. That the pretrial order and notice of prehearing conference issued May 10, 1979 be, and hereby is, reinstated as to the 77.410 violation and that compliance with Part A thereof be accomplished on or before Wednesday, June 6, 1979.

Joseph B. Kennedy  
Administrative Law Judge

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FOOTNOTES START HERE

~FOOTNOTE ONE

1 Counsel for Kaiser on the other hand indicated a willingness to consider an amendment to the motion that would increase this penalty to an amount considered adequate by the Presiding Judge. I think it unfortunate that the Regional Solicitor's intransigence has protracted unnecessarily the final disposition of this matter