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SOL (MSHA) v. PEN ALLEGH COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

Civil Penalty Proceeding

Docket No. PITT 78-97-P

v.

Allegheny No. 2 Mine

PENN ALLEGH COAL CO., INC.,
RESPONDENT

DECISION AND ORDER

After remand, this matter is before me on the parties' motion to approve settlement of this much protracted litigation at a reduction in the penalty from \$106 to \$25.00.

While it appears that the Commission was without authority or jurisdiction to consider the issue it found dispositive, namely the claimed unavailability of the "diminution of safety" defense in an enforcement proceeding, there is no necessity to pursue the consequences of that further in this proceeding.
(FOOTNOTE.1)

Accordingly, it is ORDERED that for good cause shown the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, \$25.00, on or before Monday, December 28, 1981.

Joseph B. Kennedy
Administrative Law Judge

AA

~FOOTNOTE_ONE

Under the Mine Safety Law the Commission does not have de novo review powers. Section 113(d)(2)(iii)(A) and (B) of the Act precludes review of any issue not raised before the administrative law judge or covered by the Order Directing Review. In this case the record shows and the Commission's decision admits that the issue concerning the "diminution of safety" defense was raised by the Commission sua sponte and that neither the trial judge nor the parties were afforded an opportunity to pass on the matter. Compare, Brown & Root, Inc. v. Marshall, ___ F.2d ___, 1981 OSHD Par. 25,741, p. 32110 (5th Cir. 1981); McGowan v. Marshall 604 F.2d 885, 889 (5th Cir. 1979).