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SOL (MSHA) V. HUMPHREYS ENTERPRISES
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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. VA 83-16 A.C. No. 44-05217-03501
v.	No. 1 Strip
HUMPHREYS ENTERPRISES, INC., RESPONDENT	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion for settlement for the eight violations involved in this matter. With respect to seven violations the Solicitor seeks settlements in the amount of $20 apiece. For the eighth violation the Solicitor seeks a settlement in the amount of $147.

First, I will discuss the seven violations. The Solicitor does not discuss the circumstances of any of these violations. He merely states that they did not constitute an imminent danger and are not significant and substantial, paraphrasing the Commission's present interpretation of the term "significant and substantial." In accordance with what apparently now is becoming standard practice, the Solicitor relies upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. 100.4 which provides for the assessment of a $20 single penalty for a violation MSHA believes is not reasonably likely to result in a reasonably serious injury or illness.

I am unable to approve the proposed settlements for these seven violations on the basis of the present record. In my opinion $20 is a nominal penalty which indicates a lack of gravity. I have been told nothing about gravity, negligence or any of the other six statutory factors which would enable me to make an informed judgement as to proper penalty amounts.

The MSHA regulation in question is not binding upon the Commission. Indeed, it is not even relevant. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself recently recognized that it is not bound by penalty assessment regulations adopted by the Secretary but rather that in a proceeding before the Commission the amount of the penalty to be assessed is a de novo determination based upon the six statutory criteria specified in section 110(i) of the Act and the information relevant thereto developed in the course of the adjudicative proceeding. Sellersburg Stone Company, 5 FMSHRC 287 (March 1983). Indeed, if this were not so, the Commission would be nothing but a rubber stamp for the Secretary.

The fact that MSHA may have determined that these violations are not "significant and substantial" as that term presently is defined by the Commission, is not determinative or even relevant in these proceedings. I agree with Administrative Law Judge Broderick that whether a cited violation is checked as significant and substantial is per se irrelevant to the determination of the appropriate penalty to be assessed. United States Steel Mining Co., Inc., 5 FMSHRC 934 (May 1983), PDR granted June 22, 1983. Regardless of the Secretary's regulations, once this Commission's jurisdiction attaches we have our own statutory responsibilities to fulfill and discharge. This can only be done on the basis of an adequate record.

Finally, I am unable to approve the proposed $147 settlement for the eighth violation which was issued for ineffective brakes on a 35-ton truck. The Solicitor states that gravity and negligence were high but that the operator demonstrated good faith abatement and has a relatively good history of complying with the Act. I have been told nothing about the operator's size and its ability to continue in business. When the Solicitor advises that gravity and negligence were high a penalty of $147 seems relatively low unless other factors mitigate against imposition of a more severe penalty. The Solicitor should inform me as to all statutory criteria.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement be Denied.

It is further Ordered that within 30 days from the date of this order the Solicitor file information adequate for me to determine whether the proposed penalties are justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge