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SOL (MSHA) V. R&S 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. CENT 82-105  
A. C. No. 03-01384-03019

v.

J & B No. 1 Mine

R & S COAL COMPANY, INC.,  
RESPONDENT

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlements for the five violations involved in this matter. The proposed settlements are for \$20 apiece.

Based upon the present record, I am unable to approve the proposed settlements. In my opinion, \$20 is a nominal penalty which indicates a lack of gravity. Two citations were issued for failure to secure compressed gas cylinders. The third violation was for the lack of a portable fire extinguisher on a diesel storage tank. The fourth citation was issued for the absence of an automatic warning device on a front end loader. The fifth citation was issued because a gasoline container was not a safety can. On the face of these citations, therefore, it appears that there may well have been some degree of gravity present in all of them. The proposed penalties, therefore, do not appear appropriate or in the public interest.

The Solicitor further states that the violations were not considered significant and substantial since they were not reasonably likely to result in a reasonably serious injury or illness. This motion does not mention 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 which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. The rationale employed in this motion is, however, just like that underlying the regulation since it relies upon the fact that the violation was not significant and substantial.

The MSHA regulation and the rationale expressing it are not binding upon this Commission. Indeed, they are not even relevant. The Act makes very clear that penalty proceedings before the Commission are de novo. The Commission itself

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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. 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.

The Solicitor states with respect to all the violations that exposure was minimal to none. I do not know what this means and even if I did, one such bare conclusion most certainly would not satisfy the requirement that I assess a penalty amount in accordance with the six statutory criteria.

ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlements 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 settlements warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin  
Chief Administrative Law Judge