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SOL (MSHA) V. SAN JUAN 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 83-10 A. C. No. 29-01153-03502
v.	San Juan Mine - Prep Plant
SAN JUAN COAL COMPANY, RESPONDENT	

DENIAL OF SETTLEMENT
DENIAL OF DISMISSAL
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to dismiss this matter on the grounds that the operator has paid the proposed penalty in this case thereby making further action unwarranted. The fact that the operator has made payment is not dispositive of this matter and cannot preclude the Commission from acting in accordance with the governing statute.

Moreover, an examination of the file in this case indicates that more is involved than payment of the proposed penalty by the operator. There is one violation involved in this case and the proposed penalty is $20. The assessment sheet indicates that this was a "single penalty assessment" which was made pursuant to 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 subject citation was issued because the operator did not take a valid respirable dust sample during the August-September 1982 bi-monthly period from a designated work position as shown on an attached computer printout.

In my opinion, $20 is a nominal penalty which indicates, among other things, a lack of gravity. I cannot say on the face of this violation alone that it is nonserious. Moreover, I have been told nothing about any of the other statutory criteria which would enable me to make an informed judgment as to a proper penalty assessment for this violation.

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 this violation is 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. The Solicitor cannot finesse the matter by purporting to ignore the MSHA regulation in merely asking for dismissal because the operator has paid the minimal penalty of $20.

ORDER

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

Paul Merlin
Chief Administrative Law Judge