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SOL (MSHA) V. ABRAXIS 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. KENT 83-44
A. C. No. 15-12403-03504

v.

No. 2 Mine

ABRAXIS COAL COMPANY, INC.,
RESPONDENT

DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has submitted a motion for settlement with respect to the five violations involved in this matter. The Solicitor's motion cannot be granted on the basis of the present record.

Citations No. 2053271 and 2053272 each allege a violation of 30 C.F.R. 75.1719-1(d). These concern the failure of the operator to provide illumination in addition to the illumination provided by the cap lamp of the operator, on a shuttle car. The Solicitor states in his motion that the Office of Assessments correctly evaluated the six criteria when it assessed a penalty of \$130 for each of these two violations. However, the assessment sheet indicates that the proposed penalty assessment for each of these violations was \$91 reduced from \$130 and the operator's check indicates that it paid \$91 apiece. Accordingly, I cannot approve the proposed settlements for these violations because the Solicitor's motion is based upon one amount whereas MSHA has accepted payment of a lesser figure.

The proposed settlements for the remaining three violations are for \$20 each. The Solicitor states only that he believes that the Assessment Office correctly determined that a "single penalty assessment" was appropriate and that the inspector did not indicate that the respondent was negligent, the gravity contemplated, or the number of persons affected. The proposed settlements for these three violations is therefore predicated solely upon section 100.4 of the regulations of the Mine Safety and Health Administration, 30 C.F.R. 100.4. This regulation provides for the assessment of a \$20 single penalty for a violation which is not reasonably likely to result in a serious injury or illness. However, the regulation in question is not binding upon the Commission. Indeed,

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it is not even relevant. Moreover, the fact that the operator has tendered payment cannot preclude the Commission from acting in accordance with the governing statute. In my opinion, \$20 is a nominal penalty which indicates a lack of gravity. As already indicated, the Solicitor has told me nothing about gravity, negligence, or any other factors which would enable me to make an informed judgment as to proper penalty amounts for these three citations.

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.

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