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SOL (MSHA) V. POWER OPERATING
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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. PENN 83-90 A. C. No. 36-04999-03501
v.	Leslie Tipple Mine
POWER OPERATING COMPANY, INC., RESPONDENT	

DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion for a decision and order approving settlement in the amount of $20 for the one violation involved in this matter. The motion is predicated solely 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 which MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. The violation was issued because a suitable background was not provided for the vertical ladder that extended to the feeder platform approximately 9 feet from ground level.

I am unable to approve the motion for settlement on the basis of the present record. In my opinion, $20 is a nominal penalty which indicates a lack of gravity. I note that the inspector has checked Item 21 on the citation form to indicate that the occurrence of the event against which the cited standard directed was unlikely. I also note that he has checked Item 20 to indicate that negligence was low. However, I have been told nothing about the circumstances which led the inspector to reach these conclusions, nor have I been given any information about the other statutory factors which would enable me to make an informed judgment as to the proper penalty amount.

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.

The MSHA regulation in question is not binding upon the Commission. Indeed, 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.

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 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 penalty is justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge