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SOL (MSHA) V. D.L.& P. 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. VA 83-29  
A. C. No. 44-05340-03508

v.

No. 1 Mine

D. L. & P. COAL CO., INC.,  
RESPONDENT

DENIAL OF MOTION TO WITHDRAW PETITION  
DENIAL OF SETTLEMENT  
ORDER TO SUBMIT INFORMATION

The Secretary has moved to withdraw his petition for the assessment of civil penalties for the 11 citations involved in this matter. The Solicitor states that the operator has paid \$20 each for the 11 proposed penalties or a total of \$220. The Solicitor further states that the citations did not cause an imminent danger nor did they significantly and substantially contribute to a coal mine safety or health hazard. He stated that these violations were not reasonably likely to result in a reasonably serious injury or illness and were abated within the time set by the inspector and that in addition the employer demonstrated good faith in abating these violations and has a relatively good history of complying with the requirements of the Act.

The 11 violations were issued for a variety of conditions including ventilation and dust violations, inadequate temporary splices, lack of guarding, improperly installed fire outlets on a water line, permissibility violations, and improperly located battery-charging stations. In my opinion, \$20 is a nominal penalty which indicates a lack of gravity. With respect to these 11 violations, I have been told nothing about gravity, negligence, or any of the other statutory factors sufficient to enable me to make an informed judgment as to proper penalty amounts.

The assessment sheet indicates that the \$20 penalties in this matter are the so-called "single penalty assessments" 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.

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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.

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 to withdraw 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 appropriate penalty amounts for the 11 citations. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin  
Chief Administrative Law Judge