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SOL (MSHA) V. ENERGY 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. WEVA 83-63 A. C. No. 46-05793-03505
v.	No. 14 Mine
ENERGY COAL CORPORATION, RESPONDENT	

DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion for a settlement approval for the two citations involved in this matter. The original assessments totaled $148 and the proposed settlements are for $20 apiece.

This 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 Solicitor attaches to his motion copies of modifications to the subject citations deleting the "significant and substantial" description. On this basis he seeks approval of the so-called "single penalty assessment".

The first violation was issued for accumulation of combustible materials, creating fire hazards. The second citation was issued for an unguarded drive chain and sprockets on a wall drill. The inspector indicated that negligence in both cases was moderate and that occurrence was reasonably likely. I am unable to approve the motion for settlements on the basis of the present record. In my opinion, $20 is a nominal penalty which indicates a lack of gravity. From the face of the two citations, and based upon the inspector's statements, it appears that the violations were serious and that the operator was negligent. Under such circumstances, a nominal penalty would not be warranted. See Orders Rejecting Proposed Settlement issued by Administrative Law Judge George A. Koutras in Glen Irvan Corporation, PENN 82-23 (April 4, 1983) and PENN 82-25 (April 6, 1983).

The MSHA "single penalty assessment" regulation is not binding upon the Commission. Indeed, it is not even relevant. Certainly the fact that the operator has agreed to tender

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 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