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SOL (MSHA) V. CRESCENT HILLS 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. PENN 82-326
A. C. No. 36-03554-03501

v.

Crescent Mine

CRESCENT HILLS COAL COMPANY,
INC.,
RESPONDENT

DENIAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlements for the 12 violations involved in this case. Based upon the present record, I am unable to approve the motion.

Nine of the violations carry proposed penalty settlements ranging from \$74 to \$158. The Solicitor does not discuss these violations individually. Rather in a summary paragraph he states that all of them were serious, that the operator's negligence ranged from ordinary to moderately high, and that all were abated within the time set by the inspectors. I have been given no information about the operator's size, prior history and ability to continue in business. The proposed settlements may be appropriate but since I do not have complete information, I cannot act in accordance with all statutory criteria set forth in section 110(i) of the Act. I recognize that the proposed settlements are for the originally assessed amounts but this is not determinative. The Solicitor must furnish the required information.

The Solicitor proposes settlements for the remaining three violations in the amounts of \$20 apiece. These proposed settlements are 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 is not reasonably likely to result in a reasonably serious injury or illness.

I am unable to approve the motion for the \$20 settlements. In my opinion, \$20 is a nominal penalty which indicates a lack of gravity. With respect to these three violations, I have been told nothing about gravity, negligence, or any other factors which would enable me to make an informed judgment as to proper penalty amounts for these items. The MSHA regulation in question is not binding upon the Commission. Indeed, it

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is not event 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 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