CCASE:
SOL (MSHA) V. EASTOVER MINING
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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 83-18 A.C. No. 44-00294-03516
v.	No. 1 Mine
EASTOVER MINING COMPANY, RESPONDENT	

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The Solicitor has submitted a motion to withdraw his petition for the assessment of civil penalty on the ground that the operator has agreed to payment of the proposed penalties in full. The motion must be denied.

This case involves three citations.

The first item is a Section 104(d) order, 00930034, which was subsequently modified to a Section 104(a) citation. According to the Solicitor after MSHA review it was determined that the violation involved no reasonable likelihood of a reasonably serious injury occurring. On this basis the Solicitor proposes a "single penalty assessment" of $20. This penalty amount apparently is predicated 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.

In my opinion, $20 is a nominal penalty which indicates a lack of gravity. It may be that this violation was nonserious, but I have been told nothing by the Solicitor about gravity or negligence or any of the other statutory factors which would enable me to make an informed judgment as to a proper penalty for this violation. The violation which was cited for a failure to lock out and tag a disconnecting device was said by the inspector in a modification to involve no negligence or gravity, but the inspector gave no reasons. I cannot accept this.

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

The Solicitor further advises that a penalty of $136 has been proposed by MSHA for the next item which was a 104(d) order, 00932049, involving a roof violation under 30 C.F.R. 75.200. The Solicitor, however, gives no discussion of the subject condition and, as already pointed out, this is a de novo proceeding in which the original assessment amount is not in any way determinative. The inspector said in a modification that negligence was high and occurrence of the event reasonably likely. The inspector gave no reasons, but even his bare conclusions cast some doubt upon a $136 penalty.

The same is true of the third item which is a section 104(d)(2) order, 00931995, alleging a violation of 30 C.F.R. 75.1725. For this item the Solicitor advises that MSHA has proposed a penalty of $275. However, beyond stating the bare conclusion that the operator exhibited a high

degree of negligence and that the violation was significant and substantial, the Solicitor gives no basis for approval of this amount. I cannot accept bare conclusions which have no supporting rationale.

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 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