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SOL (MSHA) V. MAGMA COPPER
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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. WEST 82-208-M
A.C. No. 02-00151-05501

v.

San Manuel Mine

MAGMA COPPER COMPANY,
RESPONDENT

DENIAL OF MOTION TO WITHDRAW

ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to withdraw based on full payment of the original assessment of the one violation involved in this matter. The citation was assessed at \$20.

The Solicitor, however, has given me no basis to approve the proposed settlement. There is no analysis of why \$20 is an appropriate penalty for the violation. The Solicitor merely states that the operator has paid the originally assessed amount and has filed for a modification of the cited standard. The citation is for failure to properly bush insulated wires extending out of three junction boxes. I cannot find a lack of gravity on the face of the subject citation. I have not overlooked the statements in the motion to withdraw that the only issue presented is whether a strain relief clamp is the equivalent of the bushing requirement in the standard and that the operator has filed a petition for modification on this question. However, I have not been specifically told whether a clamp was used here and if it was, whether such use rendered the violation nonserious.

It appears from the assessment sheet that the one violation which was assessed at \$20 was done so as the result of the so-called "single penalty assessment" which is set forth in 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 MSHA believes is not reasonably likely to result in a reasonably serious injury or illness. This regulation is not binding upon the Commission and is not a basis upon which I could approve a settlement.

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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 this proceeding. 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 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 withdrawal based upon an appropriate payment warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge