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SOL (MSHA) V. THURBER 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. CENT 83-24  
A.C. No. 41-02867-03502

v.

Thurber Coal Mine

THURBER COAL COMPANY,  
RESPONDENT

DENIAL OF SETTLEMENT

ORDER TO SUBMIT INFORMATION

The parties have filed a motion to approve settlement for the seven violations involved in this matter. The proposed settlement is for the originally assessed amount. Six violations were assessed at \$68 apiece and one violation was assessed at \$20.

The motion for settlement contains no discussion or analysis regarding the factual circumstances of the alleged violations. No information is given regarding gravity or negligence. The inspector checked various boxes on the citation forms indicating his opinion regarding levels of negligence and gravity but as I have indicated in other cases I cannot rely upon these "checks" as a basis for settlement approval when the Solicitor does not explain what the checks mean. I recognize that the Solicitor's motion sets forth that in the 24 months prior to the inspection the operator was inspected 29 times and received 14 assessed violations. The motion further advises that payment of the proposed penalties will not impair the operator's ability to continue in business. However, in addition to being given insufficient advice about gravity and negligence, no information is given by the Solicitor regarding size and good faith abatement. I am unable to determine whether the proposed settlement amounts are appropriate.

With respect to the one proposed settlement amount of \$20, I further make the following observations. This proposed settlement is a "single penalty assessment" apparently

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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 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.

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.

Finally, the fact of payment by the operator is not determinative of the Commission's duties and obligations in this matter.

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ORDER

In light of the foregoing, it is Ordered that the Solicitor's motion for settlement 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 settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin  
Chief Administrative Law Judge