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SOL (MSHA) V. APEX 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

v.

APEX MINING, INC.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. KENT 83-59
A.C. No. 15-13538-03501

No. 3 Strip

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The Solicitor has filed a motion to withdraw the petition for assessment of civil penalty for the one violation involved in the above-captioned proceeding. He moves, in the alternative, for an order approving settlement for the original assessment of \$20.

The Solicitor, noting that the operator paid the assessed penalty in full without filing an answer, submits merely "that no further proceeding in this case is necessary and that the withdrawal of the petition for assessment of civil penalty . . . is a satisfactory and appropriate resolution of this controversy." He relies upon the Commission's decision in *Mettiki Coal Corporation*, 3 FMSHRC 2277 (October 1981), in support of his position.

The Solicitor's motion to withdraw, alone, is not supported by *Mettiki*. In that case the parties submitted a settlement motion for \$7900. The Administrative Law Judge denied the settlement. Thereafter the Solicitor filed a motion to withdraw the petition for penalty assessment because the operator tendered full payment of the originally proposed penalties of \$10,000 for the seven violations at issue. The Judge interpreted the Solicitor's motion as one for approval of settlement and denied the motion. The Commission held the Judge erred in treating the Solicitor's motion as one for settlement approval. According to the Commission the Solicitor sought withdrawal of the proposed penalties and dismissal. The Commission further held that

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the posture and circumstances of that case dictated a finding that the Judge abused his discretion in denying dismissal. The Commission said it arrived at its conclusion on the basis of the record which indicated that full payment of the \$10,000 penalties was a satisfactory and appropriate resolution. The Commission concluded by stating:

This is not to say, however, that the Commission or its judges may not deny a party's motion to withdraw a pleading where the record discloses that resolution of the matter pending would best be served by the Commission's settlement procedures or by an evidentiary hearing. This situation is not presented in this case.

In accordance with *Mettiki*, a penalty petition may be withdrawn due to full payment of the original assessment where the record reflects that full payment is a satisfactory and appropriate resolution. Therefore, in cases such as this the Solicitor must submit information to demonstrate that full payment of the originally assessed amount is a satisfactory and appropriate resolution of the matter, thereby justifying withdrawal of the penalty petition. In the instant matter, I find that the citation provides sufficient evidence that full payment is an appropriate resolution.

Citation No. 2005364 was issued for a violation of 30 C.F.R. 50.30 because the operator failed to file a quarterly employment and injury report with MSHA. This violation is non-serious on the face of the citation because there was no safety or health hazard created by the cited condition.

In light of the above, I conclude that payment of a \$20 penalty is a settlement for this non-serious violation consistent with the purposes of the Act. I do not however, understand the Solicitor's statement that the operator was not negligent. Moreover, the Solicitor should have given information about the rest of the six statutory criteria. The non-seriousness of the violation however, justifies the penalty. And in view of the small amount, the public interest would not be served by prolonging this matter further.

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ORDER

The operator having already paid, it is hereby ORDERED that this case is DISMISSED.

Paul Merlin
Chief Administrative Law Judge