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SOL (MSHA) V. R&S 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 82-107
A.C. No. 03-01384-03020

v.

J & B No. 1 Mine

R & S COAL COMPANY, INC.,
RESPONDENT

PARTIAL APPROVAL AND PARTIAL DISAPPROVAL OF SETTLEMENT
ORDER TO SUBMIT INFORMATION

The Solicitor has filed a motion to approve settlements for the two violations involved in this matter. The original assessments for the violations totaled \$56. The proposed settlement totals \$40.

Citation No. 1025373 was issued for failure to provide potable drinking water. I find this a nonserious violation on its face. The Solicitor advises that the operator exhibited a low degree of negligence. The Solicitor proposes a penalty of \$20. Accordingly, I accept the proposed settlement.

Citation No. 1025375 was issued for failure to keep walkways free of extraneous materials. The Solicitor advises that negligence was low and proposes a reduction in penalty from \$28 to \$20. In my opinion, \$20 denotes a lack of gravity. In this instance, the citation states that a stumbling and slipping hazard existed. This violation appears serious on the face of the citation. Therefore, although I have not overlooked the operator's small size and small history, I cannot approve the proposed settlement on the basis of the information submitted to date.

The Solicitor also advises that this citation was not "significant and substantial." It appears that the proposal to settle the citation for \$20 was done 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

~1308

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.

I will not order payment of the settlement amount for Citation No. 1025373 pending final disposition of Citation No. 1025375.

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

~1309

to determine whether the proposed penalty for Citation No. 1025375 is justified and settlement warranted. Otherwise, this case will be assigned and set down for hearing on the merits.

Paul Merlin
Chief Administrative Law Judge