CCASE:
SOL (MSHA) V. FEDERAL AMERICAN PARTNERS
DDATE:
19800919
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

| | |
|---|---|
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA),<br>PETITIONER | Civil Penalty Proceeding<br><br>Docket No. WEST 80-197-M<br>A.O. No. 48-00381-05004 |
| v. | American Partners Mill |
| FEDERAL AMERICAN PARTNERS,<br>RESPONDENT | |

DECISION AND ORDER

After the Assessment Office Conference found the amounts initially assessed for the nineteen violations charged were excessive and reduced them almost 50% from $1,046 to $536 the operator filed a notice of contest seeking leverage for a further discount based on the nuisance value of the litigation. This is known as "working the system" and usually results in a further substantial reduction at the Commission level.(FOOTNOTE 1)

Here the conference notes disclose that all mitigating factors were properly considered in initially reducing the penalties. No further factors in mitigation have been offered. Furthermore, an independent evaluation and de novo review of the circumstances show no further reduction is warranted, and that because of the marginal and largely trivial nature

of most of the violations cited(FOOTNOTE 2) a denial of the motion to approve settlement is not justified.

Because of the serious waste of scarce judicial resources and the misallocation of industrial effort involved in processing these de minimis cases, Congress, the Commission or the Secretary should move to establish a less expensive and time consuming procedure for finally adjudicating penalties that either singly or in the aggregate total less than $2,000. As we have learned, an adjudicative remedy that literally drowns in a sea of due process is a luxury this society cannot afford. See Mathews v. Eldridge, 424 U.S. 319, 343, 348 (1976). It is generally accepted that the cost to an operator of fully contesting a violation at the Commission level is $1,500 to $2,000. Since it is the policy of the Secretary not to enforce the safety standards against individual miners and penalties that average $200 or less have little deterrent effect on the operators, a cutoff of $2,000 seems reasonable in terms of the cost to the economy of affording adversary, trial-type hearings in these matters. A study made for the Administrative Conference of the United States has proposed that for cases involving penalties that range from $200 to $2,000 the adjudication be made on the record of the parties' written submissions supplemented if necessary by a conference or informational type hearing that would permit the proffering of witnesses but not the right to confront or cross-examine. See, Diver, Civil Money Penalties, 79 Col. L. Rev. 1436, 1500-1501 (1979).

For these reasons, I conclude the settlement proposed is fair and in accord with the purposes and policy of the Act. Accordingly, it is ORDERED that the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, $536, on or before Friday, October 3, 1980, and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

~FOOTNOTE_ONE
1 Because the file that comes before the trial judge usually does not reflect the reduction effected at the conference level, most of these further reductions are routinely approved because even a 50% reduction is well within the Commission's established zone of reasonableness. In fact, in the Davis cases the Commission approved reductions of 90%. See, Davis Coal Co., 2 FMSHRC 619, 620 (1980).

~FOOTNOTE_TWO
2 Since many of the violations cited relate to no readily recognizable hazard, (e.g., exposed light bulbs) serious consideration should be given to deleteing those standards from the category for which the assessment of a penalty is from the category for which the assessment of a penalty is required.