

CCASE:
SOL (MSHA) v. PENN COAL
DDATE:
19811216
TTEXT:

~2810

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

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

PENN ALLEGH COAL CO., INC.,
RESPONDENT

Civil Penalty Proceedings

Docket No. PENN 81-154
A.O. No. 36-02581-03043

Docket No. PENN 81-183
A.O. No. 36-02581-03044

Allegheny No. 2 Mine

ORDER

Counsel for the Secretary has filed a motion for approval of a settlement agreement in the amount of \$1400, 48% of the amount originally assessed for the seven citations at issue. As grounds for this reduction the Secretary cites the respondent's allegedly mistaken reliance on the April 7, 1978 decision of the Administrative Law Judge declaring the cited standard null, void and unenforceable. That decision has been reversed by the Commission.(FOOTNOTE.1) In addition, the respondent is now participating in a program to retrofit its equipment with cabs or canopies.

In light of the recent Commission decision holding that the defense of diminution of safety is unavailable where the operator has not filed a prior petition for modification, regardless of the danger enforcement of the standard may present to the miners,(FOOTNOTE2) the defense raised by the operator has been foreclosed. While it appears that the Commission was without authority or jurisdiction to consider the issue it found dispositive, namely the claimed unavailability of the "diminution

~2811

of safety" defense in an enforcement proceeding, there is no necessity to pursue the consequences of that further in this proceeding.(FOOTNOTE.3)

Accordingly, it is ORDERED that for good cause shown the motion to approve settlement be, and hereby is, GRANTED. It is FURTHER ORDERED that the operator pay the penalty agreed upon, \$1400.00, on or before Monday, January 4, 1982.

Joseph B. Kennedy
Administrative Law Judge

AAAAAAAAAAAAAAAAAAAAAAAAAAAA

~FOOTNOTE_ONE

Secretary of Labor v. Penn Allegh Coal Co., Inc., 3 FMSHRC 1392 (June 29, 1981). See also, Secretary of Labor v. Sewell Coal Co., 3 FMSHRC 1402 (June 29, 1981).

~FOOTNOTE_TWO

Id. at 1398-99.

~FOOTNOTE_THREE

Under the Mine Safety Law the Commission does not have de novo review powers. Section 113(d)(2)(iii)(A) and (B) of the Act precludes review of any issue not raised before the administrative law judge or covered by the Order Directing Review. In Labor v. Penn Allegh, supra, the record shows and the Commission's decision admits that the issue concerning the "diminution of safety" defense was raised by the Commission sua sponte and that neither the trial judge nor the parties were afforded an opportunity to pass on the matter. Compare, Brown & Root, Inc. v. Marshall, ___ F.2d ___, 1981 OSHD Par. 25,741, p. 32110 (5th Cir. 1981); McGowan v. Marshall, 604 F.2d 885, 889 (5th Cir. 1979).