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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
March 7, 1980

SECRETARY OF LABOR,	Docket Nos. HOPE 78-627-P
MINE SAFETY AND HEALTH	HOPE 78-672-676-P
ADMINISTRATION (MSHA),	HOPE 78-687-P
	HOPE 78-696-P
v.	HOPE 79-112-P
	HOPE 79-195-P
DAVIS COAL COMPANY	HOPE 79-233-P
	HOPE 79-234-P
	WEVA 79-25
	WEVA 79-130-133

DECISION

We directed review on our own motion on April 23 and October 17,1979, and January 8, 1980, of several decisions of administrative law judges granting motions to approve settlements in these cases. The issue in these civil penalty cases is whether the reasons given for the proposed settlements, and the facts offered in their support, warranted approval of the settlements. The motions set forth information relevant to the six statutory criteria in section 110(i) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., and extensively discussed the detrimental effect tha assessment of the originally proposed penalties would have had on Davis' ability to remain in business. The judges in each case considered the reasons for the proposed settlements and weighed the criteria set forth in Rule 2700.30(c); the reasons for the settlements are also on the public record. We have reviewed the records, and we find no basis to conclude that the administrative law judges erred in approving the settlements. The judges' decisions are, accordingly, affirmed.

Commissioner Lawson dissenting:

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I dissent. The evidence submitted in support of these 1977 Act settlements does not support the token penalties agreed to for the violations involved.

The Secretary concedes that the sole reason for the drastic reduction of the penalties initially proposed is this operator's "dire" financial condition.1/ A review of the facts--undisputed except for those bearing on this operator's financial condition--is

instructive.

Davis Coal Company (Davis) admitted in these cases to 174 violations, 117 of which were either serious or very serious. Nor did this operator contest the fact that in the twenty-four months preceding the first of these violations, it had also accumulated some 156 other violations.

The Secretary's Office of Assessments proposed penalty assessments for the violations now before us in the total amount of $46,237.00. Despite this history, the Secretary agreed between March and October 1979, to settlement of these 174 violations for a total of $5,109.70, or a reduction of nearly 90 percent from the penalties originally proposed. The average amount paid by this operator was thereby reduced to $29.36 per violation. 2/ Moreover, neither the Secretary nor the Judges,below required this operator to come forward with any current financial information to determine what, if any, effect payment of the initially proposed penalties would have had on Davis' ability to continue in business.3/

1/ Davis did not contest the fact that it had violated the Act in each of these 174 instances, the gravity of the violations, or the negligence claimed in any instance. Neither did Davis dispute its history of past violations. This prior history was properly--perhaps even charitably--characterized as "large." (Secretary's Motion to Approve Settlement and Dismiss, HOPE 78-627-P et al (Davis I) served March 19, 1979.)

2/ This compares to an average penalty per violation paid by all operators, for calendar year 1979, of $124.00. (Mine Safety and Health Administration Activity Report (1979)).

3/ Section 110(i) of the Act provides: "The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation."

Scrutiny of Davis' business operations and supposedly "dire" financial condition therefore appears necessary in the context of review of these settlements. The financial data which was submitted by the operator, and accepted by the Secretary, revealed that Davis Coal Company--a corporation owned solely by the president thereof--had only two officers, Winford Davis, president, and Marie Davis, who for 1976 were paid salaries totalling $29,000.00. The corporation made a

net profit of $190,008.00 in 1976.
For 1977, Davis claimed a net loss of $332,548.00. Nevertheless, the corporation's assets increased from January 1, 1976 to December 31, 1977, by more than $900,000.00, from $1,815,722.00 to $2,725,111.00. In 1977 this operator also increased the salaries paid to these same two officers from $29,000.00 to $71,578.00, despite the corporation's 1977 "loss."4/
Further, those 1977 and 1978 "losses"--substantially resulting from "natural disasters,' as noted by the Secretary in its brief of June 15, 1979 (page 6), were more than compensated for by insurance. (Secretary's Motion to Approve Settlement, Exhibit B thereto (Statement Electing to Have Gain Not Recognized), HOPE 78-627-P et al filed March 19, 1979).

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4/ This operator, also expended $10,500.00 for a new boat in 1975, $3,596.00 for a new golf cart in 1976, and $19,203.00 for a new Mercedes Benz in 1976, all purchased by and for the corporation, and one must assume necessary for Davis' mining endeavors. Their precise utility in these mining operations is not, however, explained in this record.
Mr. Winford Davis is also the sole owner of another coal company, Burning Springs Collieries Co., which has the same address as Davis Coal. Burning Springs showed a profit of $36,828.00 in 1976, and $22,800.00 in 1977. Certain real estate is also jointly owned by Davis Coal and Burning Springs, (Exhibit B, supra) and indeed is collateral for a loan obligation of Davis Coal. No investigation was had, nor information secured or requested, as to the financial interrelationship between these corporations.
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This (Davis I) motion for settlement is unfortunately representative of the manner in which these violations were resolved. In that motion the Secretary noted Davis' 156 violations in the 24 months preceding the first violation in the instant dockets, during 83 inspection days, and "...that this represents a large history of previous violations."
In addition to the expenditures previously noted, and despite the fact that the violations settled in Davis I were agreed to on March 23, 1979, no 1978 or later tax returns were then--or ever--submitted--or apparently demanded by the Secretary or Judges to support this operator's plea of poverty. In fact, the only financial data submitted by Davis at that time was an unaudited financial statement for the first nine months of 1978 (dated September 30, 1978) accompanied by an explanation that the financial statements were "not audited" "are incomplete presentations"..."do not include all the disclosures required by generally accepted accounting principles" and

"should not be used by anyone who is not a member of the company's management." (Secretary's Motion to Approve, Exhibit C thereto, HOPE 78-627-P et al filed March 19, 1979).

Davis is nowhere on record, in any exhibit, motion, brief, or pleading before any of the Judges below, or this Commission, with any audited financial statements, which might give at least colorable credibility to the proposed penalties' claimed "effect on the operator's ability to continue in business." (Section 110(i), supra). Indeed, in no instance did the parties submit or the Judge require current financial information to show whether or not Davis could, at the time it was requesting approval of a 90 percent penalty reduction, pay the full penalties proposed and remain in business.

The Secretary in Davis I also uncritically acquiesced in Davis' representation of its financial condition and accepted without question this operator's "unofficial corporate balance sheet," whatever that may be. (Emphasis added). (Exhibit C, supra). In addition, the settlement in those dockets--$2,407.00 versus proposed penalties of $23,935.00--was permitted to be paid in quarterly payments of approximately $600.00 per payment.5/ This settlement was deemed acceptable for an operator with gross receipts (for the first nine months of 1978) of $736,982.00, and then current assets of $1,114,734.00.

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5/The Congress in writing the 1977 Act expressed strong disapproval of the delays which took place in penalty payments under the 1969 Act. "While low penalty assessments constitute one disturbing element of the current civil penalty system, the Committee is equally disturbed by the rather long period of time between citation of the initial violation and the final payment of the penalty associated with that violation." "...The Committee firmly believes that to effectively induce compliance, the penalty must be paid by the operator in reasonably close time proximity to the occurrence of the underlying violation." (S. Rep. at 15, 16; 1977 Legis. Hist. at 603, 604).

No mention was made in the motion to approve that settlement of any deterrent effect of the penalties agreed upon by the Secretary. Nor does the record evidence any consideration by either the Secretary or the Judge of deterrence, despite the legislative history of the Act. That history clearly states that the purpose of civil penalties is to "convinc[e] operators to comply with the Act's requirements." (S. Rep. at 45; 1977 Legis. Hist. at 633).

Nor did the penalty settlements arrived at in Dockets HOPE 79-195-P, 233-P, 234-P (Davis II); WEVA 79-25 (Davis III); or WEVA 79-130-133 (Davis IV) reflect more serious consideration of the place of deterrence in the fixing of penalties under the Act. In

Davis II the Secretary does concede that financial difficulties do not "...automatically require major reduction in proposed penalties"; nevertheless, a 90 percent reduction in the proposed penalties, from $7,355.00 to $735.50, was found acceptable.

Davis III and IV also reflect very major reductions, from $3,263.00 to $326.30, and $11,684.00 to $1,640.00, respectively. The emphasis in those dockets is on assuring Davis' continuing its mining operations, despite (e.g.) in the most recently settled docket (Davis IV), a finding of sixty-nine violations, of which forty-seven were admittedly "serious."

Of more current and comparative interest, in the context of this Commission's review,is an (unreviewed) decision of January 10, 1980, in which Judge Joseph B. Kennedy approved a settlement of $2,325.00 by this operator for several dockets in which the penalties originally proposed totalled $3,582.00. That settlement, which Davis agreed to--despite a continuing contention by this operator of financial stringency--reflects a reduction of only 33 percent from the penalties originally proposed, Davis Coal Co., Dockets Nos. WEVA 79-358, 359. (Davis V).

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While Section 110(i) of the Act requires the Commission, in assessing civil monetary penalties to "consider...the effect on the operator's ability to continue in business... 6/" all of the settlements now before us, buttressed only by a scant record and slim fiscal documentation, including inter alia the expenditures by Davis for a boat, golf cart, and Mercedes Benz over a period of claimed extreme financial stress, fail to withstand even the most casual examination.

As a minimum, it would appear to be fundamental that the Secretary demand, before accepting pleas of poverty made by this--or any other--operator, direct representations by the operator to the Judge, as well as to the Secretary, detailing its plea of poverty, and sustained by complete and fully audited current financial statements. Second hand verbal assurances from the Secretary to the Judge, as exemplified by these cases, are not persuasive. The burden of proving that the penalties proposed will have an adverse effect on an operator's ability to continue in business is obviously that of the operator. It is anomalous indeed for the Secretary to gratuitously accept that burden--as here appears to be the case--and to me representative of a regressive return to the practice properly found wanting under the 1969 Act.

Even more disturbing is the Secretary's none too subtle suggestion in these cases--and the dockets before Judge Kennedy (supra)--that his agreement to a settlement is in

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6/None of the other criteria enumerated in Section 110(i) are in issue in the cases now before us. The parties do not contend that the criteria to be considered when the Secretary and the operator agree upon penalty settlements are in any way different from the criteria to be applied when penalties are imposed after a hearing and not as a result of agreement.

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effect unreviewable and final, and that there is no objective standard to be applied for evaluating the appropriateness of the penalties agreed upon by him, other than Secretarial discretion.7/ To the contrary, the statute does not afford the Commission or its Judges--much less the Secretary--the luxury of merely rubber stamping the parties' agreement to mutually satisfactory penalties. Indeed, the legislative history of the 1977 Act has made clear the public interest involved in the imposition of penalties mandated by the Act. In constructing the 1977 Act, Congress paid significant attention to penalties, noting its dissatisfaction with the low settlements of penalties under the 1969 Coal Act. Section 110(k)8/ was therefore made a part of the 1977 Act, in order that penalties, mandatory under the 1977 Act, would not be compromised, mitigated or settled except with the approval of the Commission.

As detailed in the Senate Report, the Congress stated:

"In short, the purpose of a civil penalty is to induce those officials responsible for the operation of a mine to comply with the Act and its standards."

"To be successful in the objective of including (inducing) effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance."

"In overseeing the enforcement of the (1969) Coal Act the Committee has found that civil penalty assessments are generally too low, ...the effect of the current enforcement is to eliminate to a considerable extent the inducement to comply with the Act or the standards, which was the intention of the civil penalty system."

7/"In the judgment of the parties and the administrative law judge, as a result of the company's financial condition, a 10 percent penalty will deter Davis from future violations as much as a more substantial penalty would deter another company." (Secretary's Brief on review, served November 13, 1979). (Emphasis added).

8/"No proposed penalty which has been contested before the Commission

under section 105(a) shall be compromised, mitigated or settled except with the approval of the Commission. No penalty assessment which has become a final order of the Commission shall be compromised, mitigated, or settled except with the approval of the court."
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"The Committee strongly feels that the purpose of civil penalties, convincing operators to comply with the Act's requirements, is best served when the process by which these penalties are assessed and collected is carried out in public, where miners and their representatives, as well as the Congress and other interested parties, can fully observe the process.
"To remedy this situation, Section 111(1) provides that a penalty once proposed and contested before the Commission may not be compromised except with the approval of the Commission. ...By imposing these requirements the Committee intends to assure that the abuses involve in the unwarranted lowering of penalties as a result of off-the-record negotiations are avoided. It is intended that the Commission and the Courts will assure that the public interest is adequately protected before approval of any reduction in penalties." [S. Rep. at 41-45, 1977 Legis. Hist. at 629-633; emphasis added.]
The Act's penalty provisions are therefore best summarized as requiring penalties in such amounts as will induce compliance with the Act, by a process in which penalties are subject to the full scrutiny of all interested parties, to assure protection of the public's interest in the imposition of penalties sufficient to deter future violations. In order that this be accomplished, the Commission is required to approve the penalties imposed.
While neither the Act nor the legislative history is as specific as might be wished in guiding the Commission in fulfilling this statutory responsibility, it is impossible when, as here, the record is grossly inadequate. Nor are these dockets unfortunately--unique in their deficiencies.9/

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9/ See for example, Bethlehem Steel Corp., PENN 79-100-M, and Itmann Coal Co., HOPE 79-188-P, in which the history of previous violations of the operator neither appear in the case records nor in the (respective) motions of the Secretary seeking settlement approvals. In King Coal Co., KENT 79-196, 197, the record is silent as to whether the nineteen citations therein are being settled for particular individual amounts, in full, at a fixed percentage, or without penalty.
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If the record predicates necessary to our penalty approval role are absent from the record below, clearly neither we nor our Judges can meet our statutory responsibilities. It would not seem unduly difficult or burdensome for the Secretary to detail the factual bases on which approval for penalty settlements are founded.10/ Absent this information, meaningful review and evaluation of penalties cannot be had, nor their "appropriateness" determined as required by the Act.11/ The basic test is therefore whether the penalty will deter future violations, and is consequently "appropriate." In making that determination, the only statutory source providing criteria for review of approval of penalties is Section 110(i) of the Act and the six factors enumerated therein. It is to these that the Commission, and its Judges, must turn in considering penalty proceedings under the Act. To the extent that the Act is silent, or imprecise, resort, must be had to the legislative history.

There is no doubt that the Congress has directed the Commission toward a more active role in overseeing the penalty settlement process than was the case under the 1969 Act. It was unwilling to entrust to the Secretary alone the protection of the public interest in penalty settlements. (Section 110(k), S. Rep. at 45; 1977 Legis. Hist. at 633, supra).

10/Indeed, I strongly suspect some of our Judges are at least as troubled as I by the current dearth of data presented to them in penalty proceedings. Kaiser Aluminum & Chemical Corp, CENT 79-46-M, Republic Steel Corp., PITT 78-424-P, Blue Rock Industries, WILK 79-170-PM, and see Davis Coal, WEVA 79-358, 359.

11/See also the Commission's permanent Rules of Procedure (effective July 30, 1979) (Rule 2700.30(c). "...Any order by the Judge approving a proposed settlement shall be fully supported by the record. In this regard, due consideration and discussion thereof, shall be given to the six statutory criteria set forth in Section 110(i) of the Act." (Emphasis added).

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Indeed, where a tribunal before which a case is pending is required to approve a settlement to protect either the public interest or some special private interest, some active inquiry is usual. See 9 Wright and Miller, Federal Practice and Procedure: Civil •2363 at 153, 160 (discussing F.R. Civ.P. 41(a)(1)).

The Supreme Court in a bankruptcy reorganization settlement has also held that the statutory requirement that reorganization plans be "fair and equitable" applies to approvals of settlements of reorganization matters as well as to litigated reorganizations. To satisfy this requirement, the bankruptcy judge must apprise himself of all facts necessary for an intelligent and objective opinion of

the probabilities of ultimate success should the claim be litigated, as well as the expense, complexity and duration of any litigation. "Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation", and, as emphasized by the Court:

"[i]t is essential, however, that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law." [Protective Committee of Independent Shareholders of TMT Trailer Ferry, Inc. v. Anderson. 390 U.S. 414, 424, 434 (1967).]

These decisions strongly suggest that the Judges and this Commission do not meet the mandate of our Act by merely pro forma acceptance of the parties verbal, unconsidered and thinly supported agreement to mutually acceptable amounts, arrived at without satisfying the six statutory criteria set forth in Section 110(i). Whatever the Commission's role may be, it--and its Judges--must at least have before them for purposes of meaningful evaluation or appellate approval of penalties, factually supportive case history. The mandate of the Act is not met by general decisional declarations, otherwise unsupported, that "I find no reason to challenge MSHA's position." or, "There is no indication that either party was coerced or fraudently induced into the accord."12/

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12/ Rex Alton and Company, LAKE 79-28-M; Ranger Fuel Corp., HOPE 78-743-P.

A fortiori, similar conclusory generalizations not set forth in decisions but appearing only in motions made to the Judge below, are even less compelling or entitled to acceptance, particularly in view of the strong public interest in open and public penalty assessments, so forcefully endorsed by the Congress. (S. Rep. at 45; Legis. Hist. at 633, supra).

Lastly, when contentions made are unsupported by the record, particularly with reference to those Section 110(i) criteria most readily secured and accessible for documentation and inclusion in the decision of the Judge (e.g., the operator's history of previous violations; or financial data--as here--claimed as buttressing for the possible effect on the operator's ability to continue in business), no justification is apparent for the Secretary's failure to assemble the necessary facts for incorporation by the Judge in his decision fixing penalties.

In the instant cases, I would therefore find the absence of audited financial data to constitute a failure of proof, and insufficient under the Act to justify the settlements accepted by the Secretary. Whether further documentation might indeed verify that the settlements here agreed to are appropriate--because of "the effect on the operator's ability to continue in business"--on the record presented, I am unable to determine. Nor do I believe the Judges below were able to determine whether the penalties imposed would serve as deterrents to future violations. This operator's large history of prior violations, and erratic financial and operational record, provide no basis for confidence that the penalties agreed to will serve the statutory purpose of deterring future violations.

An even broader but no less compelling consideration should motivate all toward the procedures suggested. As these and other decisions make evident, penalty proceedings below are treated with widely varying touches. In many instances, the judges have been most assiduous and demanding when assessing or approving penalties, to make certain that the six statutory criteria are supported by the record and fully discussed. (FMSHRC Rules of Procedure (Rule 2700.30(c), supra). In other instances we have, in my judgment, fallen short.

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In the belief that consistency and predictability in the application of the law, and our Act is both desirable--and necessary--and I am convinced, needed by those subject to its strictures, I believe that the Secretary, the Judges, and the Commission fail to meet their respective responsibilities if inconsistencies in the imposition of penalties are perpetuated. Mechanistic application of the law is not the goal, but certainty and predictability is crucial to any evenhanded application of the law. There must be no discrimination in favor of or against similarly situated litigants. Counsel's decisions, however well intentioned, should not be determinative in the fixing of penalties under this Act. The Congress, as I read the Act and its legislative history, has clearly expressed itself to the contrary.

The considerations involved were well expressed by Judge Kennedy in his Order to Furnish Information of December 14, 1979, and Decision and Order Approving Settlement of January 10, 1980, (Davis V, supra):

"The Regional Solicitor claims that in reviewing a proposed settlement the advisability of a reduction in proposed penalties because of adverse business impact need not take into account or be balanced against the affirmative interest in perpetuating only safe mining operations.1/ The logical extension of this position seems to be that mine safety is a consideration secondary to mine productivity and that

the enforcement policy in effect is "all the safety consistent with production" and not "all the production consistent with safety."

1/"While the Act requires that adverse business impact be "considered", it does not require that it be given controlling weight or that it cannot be outweighed by the countervailing interest in continuing only those mining operations that promote mine safety."

" ..the question as I see it, is whether in view of the pattern of unwarrantable failure violations disclosed the Davis mine is not a disaster waiting to happen, and, if so, whether it is in the public interest to encourage its continued operation by even a token reduction in the amount of the penalties warranted by its past operations."

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"While Congress, directed that the impact of penalties on an operator's ability to continue in business be considered, it obviously did not intend to encourage the continued production of coal in a mine in such dire financial straits that the operator cannot provide a minimal safe workplace environment. In other words, I believe there comes a time when the seriousness of violations cannot be minimized, trivialized or tacitly condoned in the interest of preserving stockholder equity or marginal productive capacity...."

"I am fully sympathetic to this relatively small operator's financial plight, but I am also charged with considering the socioeconomic impact of a disaster at this mine on the lives and well being of its miners and their families. I am also persuaded that the spectre of unemployment is more easily confronted than the awesome finality of the undertaker."

I too am deeply troubled by those matters which disturbed Judge Kennedy. The way to avoid penalties being imposed which are unfair or inequitable must be by requiring rigorous adherence to the statute by all concerned, with full public disclosure of the penalty imposition process, and a record which fully reflects the place of deterrence in the statutory scheme of the Act. I would therefore reverse and remand for the purpose of requiring that there be strict compliance with the criteria enumerated in Section 110(i) of the Act, before any settlement of these dockets is approved.

A. E. Lawson, Commissioner

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