

DATES: These revised rules will take effect on October 1, 1995. After September 30, 1996, § 2200.203(a) will no longer be in effect unless extended by the Commission by publication of a final rule in the **Federal Register**.

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SUPPLEMENTARY INFORMATION:

Development of the Final Rules

On May 1, 1995, the Occupational Safety and Health Review Commission published in the **Federal Register** a proposal to revise its rules governing simplified proceedings and to institute a pilot E-Z Trial program (60 FR 21058). The notice explained the procedures followed by the Commission in developing its proposal and the basis and purpose of the proposed rules. The notice included a request for public comment.

In response, a number of organizations who would be affected by the revised rules filed comments with the E-Z Commission. The Office of the Solicitor of Labor, which represents the Secretary of Labor in all adjudicative proceedings before the Commission, filed comments on behalf of the Secretary of Labor. The following organizations, listed alphabetically, presented comments on the proposed revision to the rules: the Administrative Conference of the United States; the American Dental Association; Bell Atlantic Network Services, Inc.; General Building Contractors Association, Inc.; Gibson, Dunn & Crutcher; Jackson, Murdo, Grant & McFarland, P.C.; McDermott, Will & Emery; Morgan, Lewis & Bockius; the National Funeral Directors Association; the National Stone Association; Rader, Campbell, Fisher & Pyke; and Schottenstein, Zox & Dunn. The Commission gratefully acknowledges receipt of these comments and assures all commentators that their concerns about the proposed changes were fully considered, even though some are not specifically discussed here.

In developing the final rules set forth in this document, the Commission considered not only the concerns of the commentators, but also those of other interested parties. The Chairman and representatives of the Commission met with AFL-CIO affiliate unions on March 16, 1995, with members of the Solicitor's office on May 16, 1995, and on May 18, 1995, conducted two focus group sessions in Philadelphia,

Pennsylvania, with attorneys, non-attorney representatives, and employers.

After careful consideration of all comments received, the Commission issues these E-Z Trial rules, amending its rules for simplified proceedings in order to promote more effective and efficient proceedings before the Commission's Judges while maintaining fairness to all its participants.

Eligibility for E-Z Trial

The Commission received several suggestions addressing § 2200.202, which sets forth which cases should be eligible for E-Z Trial. Several commentators noted that the importance and complexity of a case are often dependent on the required abatement, not the proposed penalty. One commentator suggested raising the \$7500 penalty limitation, and including only those cases where the employer agrees that the cost of abatement would be \$7500 or less. The Commission found this suggestion interesting because, as these commentators suggested, the higher the cost of abatement, the more complicated the issues in the case are likely to be. After considering the issue, however, the Commission has determined that the suggestion is not viable. While it is sometimes clear from the nature of the citation that the cost of abatement would be either substantial or relatively minor, the effect of the cost of abatement on the complexity of the case usually cannot be determined at the outset of the proceeding when the case file contains little more than the citation and notice of contest. Therefore, an instruction to the Chief Judge to exclude abatement over a certain dollar value would not be practicable. Similarly, it would be difficult to carry out one commentator's suggestion that only cases involving factual issues and not legal issues be directed for E-Z Trial. Certainly such cases would be most suitable for E-Z Trial. However, the Commission believes that such a separation of cases would be difficult, if not impossible, to perform, given the potential for legal issues arising in any case. We would expect that in most cases where the Chief Judge determines that the abatement called for in the citation would be expensive or the legal issues presented in the case are difficult, he would determine that the case is too complex to be a candidate for E-Z Trial.

The Commission has concluded that the \$7500 limit originally proposed is too low. Upon examination of the Commission's case load, we are unable to discern a significant difference in complexity between cases with proposed penalties ranging from \$7500 to \$10,000. By considering cases for E-

Z Trial with proposed penalties of not more than \$10,000, the Chief Judge would have an expanded number of cases to choose from during this pilot project. Therefore, the Commission will instruct the Chief Judge to consider cases for E-Z Trial where the proposed penalties do not exceed \$10,000 rather than \$7500.

The Secretary suggested that the criteria used for Simplified Proceedings be adopted for E-Z Trial and that any case involving air contaminants (Subpart Z of Part 1910) be disqualified. The Secretary also suggested that cases which would appear to involve affirmative defenses should not be eligible for E-Z Trial because such cases usually require discovery and often become complicated. A commentator suggested that the specific requirements for E-Z Trial eligibility be set forth in the rule. The Commission agrees that the eligibility criteria be included in the rule. The Commission continues to believe, however, that during this pilot project, it should maintain the flexibility to apply broad eligibility criteria. Accordingly, the Commission expects that cases appropriate for E-Z Trial would generally include those with one or more of the following characteristics: (1) Relatively few citation items, (2) an aggregate proposed penalty of not more than \$10,000, (3) no allegation of willfulness, (4) a hearing that is expected to take less than two days, or (5) a small employer whether appearing *pro se* or represented by counsel.

Procedures for Commencing and Discontinuing E-Z Trial

Many commentators objected to the language in § 2200.203(a) authorizing the Chief Judge to assign cases to E-Z Trial without either party's request or consent. Similarly, there was widespread belief that once selected for E-Z Trial, it would be very difficult to return the case to conventional proceedings. Generally, these commentators expressed concern over being forced into a proceeding that limited the availability of certain procedures, particularly discovery. One commentator even suggested that there be a "presumption of correctness" for employers wanting to opt out of E-Z Trial, and that the Judge be required to find "overwhelming and compelling reasons why the case should be simplified."

As we note, *infra*, the concern over the loss of discovery is overstated. Our paramount concern is always the conduct of a fair proceeding. The Commission does not intend to eliminate discovery. The rules