

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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8 JUL 1980

SECRETARY OF LABOR, : Civil Penalty Proceeding
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 80-83-M
Petitioner : A.O. No. 11-01176-05002
 :
v. : Barry Plant No. 8 Dredge Mill
 :
MISSOURI GRAVEL COMPANY, :
Respondent :

DECISION AND ORDER

Respondent having failed to contest my tentative finding that there is no genuine dispute as to any of the facts material to the five failure to guard violations cited, 30 C.F.R. 56.14-1, I conclude an evidentiary hearing is unnecessary to resolve the matters in contest.

As Professor Gellhorn has noted:

A hearing to take evidence as is done in a trial at law is an obviously silly waste of time if facts are not in dispute ... The courts ... enter summary judgments when the factual allegations of a party have not been materially controverted by his opponent. Trial hearings may permissibly be omitted in administrative proceedings at least as readily as in their judicial counterparts, when the only things to be determined are the legal consequences of uncontested facts. See e.g., Weinberger v. Hynson, Westcott & Dunning, Inc., 412 U.S. 609 (1973); Baxter v. Davis, 450 F.2d 459 (1st Cir. 1971), cert. denied 405 U.S. 999 (1972); Citizens for Allegan County, Inc. v. Federal Power Commission, 414 F.2d 1125 (D.C. Cir. 1969); Compare Fuentes v. Shevin, 407 U.S. 67, 87 (1972); Kirby v. Shaw, 358 F.2d 446 (9th Cir. 1966).

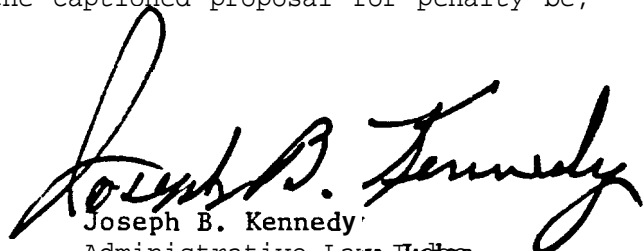
In Recommendation No. 20, the Administrative Conference of the United States proposed that "each agency having a substantial caseload of formal adjudications ... adopt procedures providing for summary judgment or decision" in order to avoid delays in

the administrative process "by eliminating unnecessary **evidentiary** hearings where no genuine issue of material facts exists."
1 Recommendations and Reports of the Administrative Conference of the United States 36 (1968-1970). For discussion consult E. Gellhorn and W. F. Robinson, Jr., Summary Judgment in **Administrative** Adjudication, 84 Harv. L. Rev. 612 (1971). The authors state at pages 616-617: 'Just as summary judgment is not in conflict with the right to trial by jury **because it** is available only when there is nothing for the jury to decide, (No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined. Ex parte Peterson, 253 U.S. 300, 310 (1920) (Brandeis, J)), a rule allowing summary decision in administrative adjudications would not improperly deny the right to a hearing since it would allow the hearing examiner or agency to dispense with an evidentiary hearing only if the absence of hearing could not affect the decision."

Gellhorn and Byse, Cases and Materials on Administrative Law (6th Ed.) at 584.

Apparently accepting this, petitioner claims only that the physical conditions described in its pretrial submissions, including the detailed sketches and photographs of the areas involved, establish "as a matter of law" that the violations charged occurred, even though the exposure to injury was "sporadic and infrequent." It is claimed that any conceivable exposure is per se a violation of the standard. I do not agree. My assessment of the undisputed physical facts is that each of the five conditions cited is by reason of its physical location and/or existing guarding incapable of causing injury to any employee acting in a normally prudent manner. In other words, I conclude the undisputed facts show each of the locations cited is so inaccessible it is highly improbable that in the course of his work duties any normally prudent employee is likely to come into contact with these moving machinery parts. See, Massey Sand and Rock Co., **DENV 78-567-PM**, 1 FMSHRC 545, 556 (June 18, 1979) petition for discretionary review denied (July 27, 1979); Central Pre-Mix Concrete Co., **DENV 79-220-PM**, 1 FMSHRC 1424, 1430-1431 (September 26, 1979); FMC Corporation, WEST 79-168-M, 2 FMSHRC _____ (June 3, 1980) (Slip Op. at 6). As my tentative decision indicates, I do not construe the standard to require guarding against all possible contingencies, including acts of thoughtlessness and foolhardiness.

Accordingly, it is ORDERED that the tentative decision of May 21, 1980, as supplemented herein, be, and hereby is, ADOPTED AND CONFIRMED as the final decision in this matter and the captioned proposal for penalty be, and hereby is, DISMISSED.


Joseph B. Kennedy
Administrative Law Judge

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