FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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23 JUL 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. CENT 79-354-M A.O. No. 23-00544-05002
v.	:	Pacific Pit & Plant
PENNSYLVANIA GLASS SAND CORPORATION, Respondent	:	

DECISION AND ORDER

Appearances: John O'Donnell, Esq., U.S. Department of Labor, Arlington, Virginia, for the Petitioner; Jeffrey J. Yost, Esq., Berkeley Springs, West Virginia, for the Respondent.

Before: Judge Kennedy

Oral argument in this matter was heard in Courtroom 8 of the United States Courthouse, 3d and Constitution Avenue, Washington, D.C. on Thursday, July 16, 1980. The subject was a motion to recuse the trial judge filed by counsel for Pennsylvania Glass Sand Corporation, a wholly owned subsidiary of the International Telephone and Telegraph Company, a giant multinational corporation. The asserted ground for disqualification was a claimed prejudicial prejudgment of the merits of this proceeding that stemmed from a review by the judge of the facts set forth in the parties' prehearing submissions. The results of this review were stated in the trial judge's order of May 14, 1980 which directed the parties to show cause why in the absence of any dispute of fact or issue of credibility necessitating an evidentiary hearing the violation charged (an alleged inadequacy of the foot brakes on a 20 ton capacity pit truck) should not be settled by the payment of a penalty of $60, instead of the $275 proposed by the government. This in turn was predicated on the judge's finding that while the violation charged was

potentially serious, the brakes were mechanically sound and were rendered inadequate due solely to circumstances beyond the control and without the fault or negligence of the operator.

In a demonstration of professional ineptitude and incompetence previously unsurpassed in the experience of the trial judge, counsel for the operator, Mr. Yost, a member of the bar of the state of West Virginia and a 1972 graduate of the University of West Virginia Law School, admitted on the record in open court he had never read and could not recite either the facts or the holding of the principal precedent relied upon in support of his motion. 1/

As the record shows, the case, Withrow v. Larkin, 421 U.S. 35 (1975), not only does not support the operator's claim, but on the contrary held that pretrial review by an administrative adjudicator of evidence submitted during

1/ This and other professional and ethical lapses committed by Mr. Yost in the course of this proceeding should be of concern not only to the bar of the State of West Virginia but also to the Commission and his supervisor, the General Counsel of Pennsylvania Glass Sand Corporation. The record shows that in his zeal to create the impression the trial judge improperly considered a mine inspector's statement in arriving at the evaluation of May 14, Mr. Yost attempted to conceal the fact that he had been in possession of the statement since December 1979. It may be that Mr. Yost is more to be pitied than censured and should not be singled out for his devotion to the transcendental ethic of the adversary system, namely that winning is not everything, it is the only thing. Certainly the Commission, the bar associations and, if reports are to be believed, the Supreme Court have shown a high tolerance for ethical lapses of equal if not greater magnitude. Schwarzer, Dealing With Incompetent Counsel--The Trial Judge's Role, 93 Harv. L. Rev. 633 (1980); Oakes, Lawyer and Judge: The Ethical Duty of Competency in Final Report, Annual Chief Justice Warren Conference on Advocacy in the United States, 73 (1978). Distinguishing half truths from whole lies is an occupational hazard for the legal profession in general and for most lawyers in particular. Bok, Lying: Moral Choice in Public and Private Life 154-173 (Vantage Books 1978).

the course of a pretrial investigation of the matter is no bar to the adjudicator's participation in a later evidentiary hearing under the fair trial/due process clauses of the constitution; Thus, the Court held:

> * * * The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the [judge] at a later adversary hearing. Without a showing to the contrary, [judges] "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.' United States v. Morgan, 313 U.S. 409, 421 (1941). 421 U.S. at 55.

The Court further held that the fact that an adjudicator on the basis of prehearing submissions issues "formal findings of fact and conclusions of law asserting" there is 'probable cause to believe" a violation of law has occurred is no bar to the judge's conduct of a subsequent adversary hearing in the absence of clear and convincing evidence that "the risk of unfairness is intolerably high." 421 U.S. at 58. The general rule is that,

> The risk of bias or prejudgment in this sequence of functions has not been considered intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position . . . The initial determination of probable cause and the ultimate adjudication have different bases and purposes. The fact that the same [judge] makes them in tandem and that they relate to the same issues does not result in a procedural due process violation. 421 U.S. at 57-58.

In conclusion, the Court held, "This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.' 421 U.S. at 56. The Court also cited with approval Professor Davis' statement that the APA "does not and probably should not forbid the combination with judging of . . . [the function of] negotiating settlements " Id. at n. 24. Indeed, as counsel for the Secretary pointed out, the Commission's Rules and the APA specifically recognize the power of the trial judge to propose and hold

settlement conferences. Rule 54(a)(6). The slight "contamination" of the adjudicatory function that results from a trial judge's participation in settlement discussions has never been deemed sufficient to require disqualification. 421 U.S. at 56 n. 24.

This came as somewhat of a shock to Mr. Yost, as I am sure it will to some of his more competent colleagues, many of whom labor under the impression that admissions contained in pleadings and other writings and documents filed in response to a formal pretrial order are not "evidence". As McCormick points out such "judicial admissions" are not hearsay and need not be offered in evidence at an adversary hearing before they may be considered as probative of the facts asserted. McCormick On Evidence, § 265 (1972 ed.). The Act and the Commission's rules of practice clearly provide for pretrial discovery at the instance of the trial judge. Thus, section 113(e) of the Act and Rule 58 empower the trial judge to "compel the attendance and testimony of witnesses and the production of books, papers, documents, or objects and [to] order testimony to be taken by deposition at any stage of the proceedings before [him]." (Emphasis supplied).

There is no merit, therefore, in the claim that a trial judge's pretrial involvement in the development of the facts and formulation of the issues to be tried, or determined without a trial, is an "extrajudicial" activity that creates an appearance of bias or automatically disqualifies him from participation in hearing and deciding the matter. The view that the lawyers are in absolute control of the proceeding, and the trial judge powerless to require the parties to show a need for an evidentiary hearing or to suggest any other procedure for informal adjudication in the interest of a just, speedy and inexpensive disposition of the matter, is a myth that has long since been discredited. Rule 614 of the Federal Rules of Evidence when coupled with the authority conferred by section 113(e) of the Act, is clear legislative recognition of the fact that, unless they choose to be, the law judges are not imprisoned within the case as made by the parties. Evidentiary hearings are for the purpose of resolving genuine issues of credibility, veracity or disputes over material facts, not for discovering whether such issues exist. Nor are they for the purpose of allowing the lawyers to engage in irresponsible and wasteful exercises in amateur or obfuscatory advocacy before a captive audience.

In Mathews v. Eldridge, 424 U.S. 319 (1976), the Supreme Court held that while financial cost alone is not a controlling factor in determining whether due process requires a particular procedural safeguard such as an evidentiary hearing prior to an administrative decision, the government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed in determining the necessity for such a hearing. 424 U.S. at 348. The Court noted:

> At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by cost .. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness .. The judicial model of an evidentiary hearing'is neither a required, nor even the most effective, method of decisionmaking in all circumstances. The essence of due process is the requirement that "a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it." Id.

Here, a conservative estimate of the cost of an evidentiary hearing in St. Louis, Missouri, the point requested by the operator and therefore the situs required under the Commission's rules and decisions, was $2,000 exclusive of the salaries of the participants. Furthermore, a breakdown of this estimate showed the cost allocable to the operator, exclusive of the salaries paid its prospective witnesses, would approximate $700. This cost when weighed against even the proposed penalty of $275 shows how grotesquely disproportionate the cost of evidentiary hearings can be to the deterrent value of the penalty. See also, Cut Slate, Inc., 1 FMSHRC 1039 (1979). Unless penalties are increased to compensate the public for the cost of such unnecessary or improvident hearings, I believe they should be a last, not a first, resort.

Counsel contended, and he said the Commission agrees, that because the 1977 Mine Safety Law says an operator and the Secretary are to be afforded the "opportunity" for an "on the record" hearing as provided under section 5 of the APA, 5 U.S.C. § 554, a confrontational type hearing is a jurisdictional prerequisite to a penalty assessment

unless both counsel agree to settle or that there are no disputed issues of material fact. Peabody Coal Company, 2 FMSHRC 1035 (1980). I believe this is a substantially fair reading of Peabody, but note the Commission beat a hasty retreat from the rigidity of Peabody in New Jersey Pulverizing, 2 FMSHRC ___, July 2, 1980. In the latter case the Commission denied the Secretary's punitive, unilateral demand for an evidentiary hearing in the face of opposition from both the trial judge and the operator. Although the Commission's decision does not mention it, the judge's reduction in the amount of the penalty in dispute was only $16. I believe the trial judges and the Commission must be alert to prevent use of the evidentiary hearing by either the solicitor or the operator to coerce the trial judge into rubber stamping' improvident settlement proposals. Whenever, and for whatever reason, the Commission tilts the scales of procedural fairness, it risks doing itself and the cause of administrative justice a serious disservice.

Furthermore, for the reasons set forth in my decision after remand in Peabody, 2 FMSHRC ___, July 11, 1980, I emphatically do not agree with the operator's claim that "an administrative law judge does not have the authority to require parties to show there is a genuine issue of material fact or question of credibility before he must grant them an evidentiary hearing."

The idea that fundamental due process accords a party' the right, if he chooses to exercise it, to have every item of evidence submitted via a witness in open court subject to full cross-examination has never been the rule in administrative proceedings. In Richardson v. Perales, 402 U.S. 389 (1971), the Supreme Court held the APA mandates cross-examination only to the extent that it "may be required for a full and true disclosure of the facts" and does not preclude a requirement for the submission of all or part of the evidence in written form, 402 U.S. at 409. Certainly, if such evidence is admissible as part of the "on the record" hearing, it must be admissible as part of the prehearing record particularly when it is received subject to the parties' right to show a need for cross-examination.

Directly in point on the claim that the APA and the Mine Safety Act mandate an opportunity to cross-examine before any item of information may be treated as "evidence" is United-States v. Florida East Coast Railway Co., 410 U.S. 224 (1973). There the Court was confronted with the necessity of defining the meaning of the term "hearing" as used in the ICC Act. The Court found:

> The term "hearing" in its legal context undoubtedly has a host of meanings. Its meaning undoubtedly will vary depending on whether it is used in the context of a rulemaking type proceeding or in the context of a proceeding devoted to the adjudication of particular disputed facts. . . . [W]e think that reference to [the Administrative Procedure Act] in which Congress devoted itself exclusively to questions such as the nature and scope of hearings, is a satisfactory basis for determining what is meant by the term "hearing" used in another statute. Turning to [the APA], we are convinced that the term "hearing" as used therein does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker.
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> * * * even where the statute requires that [the proceeding] take place "on the record after opportunity for an agency hearing," thus triggering the applicability of § 556, subsection d provides that the agency may proceed by the submission of all or part of the evidence in written form if a party will not be "prejudiced thereby". Again the Act makes it plain that a specific statutory mandate that the proceedings take place on the record after hearing may be satisfied in some circumstances by evidentiary submission in written form only.
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> We think this treatment of the term "hearing" in the Administrative Procedure Act affords a sufficient basis for concluding that the requirement for a hearing ... did not by its own force require the Commission either to hear oral testimony, to permit cross-examination of Commission witnesses, or to hear oral argument. .. 410 U.S. 240-241.

Since Florida East Coast establishes that a statutory requirement for an APA "hearing" may be satisfied without a trial it simply is not true that valid adjudicative actions cannot be taken under the Mine Safety Act in the absence of an oral hearing at which the parties are afforded the opportunity to cross-examine witnesses. For this reason, the trial judge has repeatedly suggested that under its de novo

authority to "assess" penalties (section 110(i)) and to "approve" proposals to "compromise, mitigate, or settle" penalties (section 110(k)), the Commission encourage the use of informal adjudicatory procedures involving written submissions to effect a just, speedy and inexpensive disposition of cases where the amounts involved do not warrant the convening of a trial-type hearing or there is no genuine dispute of material adjudicative fact.

The choice is not between swatting flies with a sledge hammer or rubberstamping improvident settlement proposals, but the use of traditional pretrial techniques to screen out cases that do not merit the time and expense of a trial-type hearing and to dispose of such cases on written submissions or at settlement conferences. See e.g. Republic Steel Corp., 2 F'MSHRC 666 (March 7, 1980); Jones & Laughlin Steel, 2 FMSHRC 678 (March 11, 1980); Consolidation Coal Co., 2 FMSHRC 725 (March 19, 1980); Consolidation Coal Co., 2 FMSHRC 1084 (May 9, 1980); U.S. Steel Corporation, 2 FMSHRC 1115 (May 20, 1980); Missouri Gravel Co., 2 FMSHRC 1124 (May 22, 1980); Call & Ramsey Co., 2 FMSHRC 1237 (May 14, 1980); Beckley Coal Co. and Kanawha Coal Co., 2 FMSHRC 1658 (June 27, 1980); Missouri Gravel Co., 2 FMSHRC ____ (July 8, 1980).

Just as war is too important to be left to the generals so also justice is too important to be left to the self-serving interests of the lawyers. Professor Maurice Rosenberg, in his Jackson Lecture before the National College of State Trial Judges! has effectively shown that formal rules, actual practices,' and most procedural innovations in recent times have reflected a gain in judges' power and activity "at the expense of the lawyers' role as the mover and director of litigation." Nothing, he believes, will slacken the trend toward judicial activism. M. Rosenberg, The Adversary Process in the Year 2000, 1 Prospectus, 5, 15-18 (1968).

That judicial activism is necessary if we are to have a rule of law rather than a rule of lawyers is underscored by the following comments by Chief Judge Irving Kaufman of the Second Circuit:

> * * * our current emphasis on early judicial intervention is ... the culmination of the efforts of many of our greatest legal thinkers to induce the judges to ... take an active part in the control of litigation ... Contrary to what most of us have accepted as gospel, a purely adversary system, uncontrolled by the judiciary! is not an automatic guarantee that justice will be done.

The Philosophy of Effective Judicial Supervision Over Litigation, 29 F.R.D. 207, 208, 211 (1962).

In 1906, Roscoe Pound shocked the lawyers of that time by speaking derisively of the cherished adversary system as the "sporting theory of justice" and documented its inefficiencies and intricacies. He also advocated the removal of certain matters from the courts to administrative tribunals where they could be subjected to disposition in a more efficient, if less adversary, fashion. Pound's attack on the adversary system was vigorously rejected by the bar and his ideas did not receive the unqualified endorsement of the ABA until 1976 when the Chief Justice adopted them as his own. At that time, in his appearance before The National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, the Chief Justice offered solutions to the stultifying delays and staggering expense of modern litigation that centered around more judicial control of the adversary process. Burger, Agenda for 2000 A.D.--A Need for Systematic Anticipation, 70 F.R.D. 83 (1976).

After this enlightenment, Mr. Yost, persuaded his position was based on an almost total misunderstanding of the relevant facts and applicable law, elected to withdraw his motion to recuse 2/ and to move for approval of a settlement in the amount of $60.00--the amount proposed in the show cause order of May 14, 1980. Mr. O'Donnell, counsel for the Secretary concurred, whereupon the trial judge granted both motions from the bench and ordered the matter dismissed.

The premises considered, it is ORDERED that the bench decision be, and hereby is, ADOPTED and CONFIRMED as the

2/ This made it unnecessary to decide whether the motion was filed in good faith or was frivolous and filed for the purpose of causing vexatious delay and harrassment of the administrative process. I also pass the question whether an adjudicatory agency has the power to tax attorney fees and costs against a party who has litigated in bad faith or may assess those expenses against counsel who willfully abuse the administrative process. See, Roadway Express, Inc. v. Piper, et al., ___ U.S. ___, slip op. 11-14, decided June 23, 1980.

final disposition of this matter and upon payment of the settlement agreed upon, $60.00, on or before July 30, 1980, the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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