FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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8 AUG 1980

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. YORK 79-94-M A.O. No. 28-00539-05001
v.	:	Bayville Pit & Mill
NEW JERSEY PULVERIZING CO., Respondent	:	

DECISION AND ORDER

In the interest of a just, speedy and inexpensive disposition of this matter, the trial judge issued a provisional order on May 16, 1980, assessing a penalty of $278 for the six violations charged, a reduction of $16 in the amount contested.

As Gellhdrn notes a provisional order issues without a prior hearing but provides that upon request a hearing may be afforded before the order becomes final and effective. Where the operator, as here, admits the violations charged as well as the gravity and negligence but seeks a reevaluation of the amounts assessed, the provisional order offers a practical advantage in that it will become final unless the operator or the Secretary comes forward and shows the necessity for an evidentiary hearing. Provisional orders are a widely used device for avoiding the time and expense involved in the "blind setting" of cases for trial-type hearings at great and unjustified expense to the taxpayers and private interests affected. Experience has shown that most provisional orders are never contested. Gellhorn, Administrative Law and Process in a Nutshell, 155-159 (1972).

Despite the clearly provisional nature of the trial judge's order. the Commission at the behest of the solicitor held it must be treated as final. Secretary v. New Jersey Pulverizing, 2 FMSHRC ___, July 2, 1980. This resulted

from a tortured application of the rule that declares the judge loses jurisdiction over a matter when he issues an order that effects a "final disposition" of the case. Rule 65(c). Exalting form over substance, the Commission declared that once its clerk stamps a date of issuance on a provisional decision it becomes a "final disposition" regardless of its contents. This disregard for procedural flexibility demonstrates a lack of understanding and sophistication in the art of judicial administration. That it was engendered by an ex parte brief by inexperienced lawyers on the solicitor's staff shows a disturbing absence of objectivity on the part of the Commission and its staff. More recently, the Commission, after considering both sides of the issue, concluded that where the terms of an order clearly show its interlocutory, provisional, or tentative nature the mere fact that it bears the "magic" date stamp is insufficient to deprive the trial judge of jurisdiction to complete his action in the matter. Secretary v. Island Creek Coal Company, 2 FMSHRC ___ (July 25, 1980). [Rule 65(a)) requires that the decision of the judge contain an order that finally disposes of the proceedings before it becomes a final disposition.] 1/

The validity of provisional orders, of course, is established by several decisions of'the Supreme Court. Thus, in Phillips v. Commissioner, 283 U.S. 589, 595-596 (1931), Justice Brandeis, speaking for the Court, held that "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate ... Property rights must yield provisionally to governmental need." 2/ This was

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1/ The Commission recently advised the Sixth Circuit that "The phrase 'final disposition of the proceedings' implies much more than an order affecting the rights of parties; it implies that the judge's order must dispose with finality of the entire case, not merely some aspect *of* it." Respondent's Brief, p. 8, Scotia Coal Co. v. FMSHRC, No. 80-3303, filed 7/31/80. Henceforth, if the judge decides his decision and order does not dispose of the entire case or matter with finality he may issue it himself and not through the Executive Director. See, Letter from Acting Chairman Jestrab to trial judge. Copy attached.

2/ The trial judge's order provided that "Should the disposition proposed be unacceptable to the parties, or either of them, they may request a settlement conference or evidentiary
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followed in Bowles v. Willingham, 321 U.S. 503 (1944), where Justice Douglas upheld a procedure designed to "screen out cases in which an oral hearing was not required for the fair adjudication of the issues." Compare, Direct Realty v. Porter, 157 F.2d 434 (Em. Ct. App. 1946). These and other decisions establish that even where due process requires opportunity for a hearing, the opportunity need not be given at the very first possible moment, so long as it occurs before the matter is finally closed. 3/ As Justice Stone put in Opp Cotton Mills v. Administrator, 312 U.S. 126, 152 (1941): "The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." See also, United States v. Illinois Central Railway Co., 291 U.S. 457 (1934), holding due process does not necessitate a hearing in advance of the initiating order, so long as "opportunity was given for a full and fair hearing before the order became operative."

Other considerations show the Commission's finding that a trial-type hearing 4/ or motion to approve settlement is

(footnote 2 continued)

hearing to develop additional facts in mitigation or aggravation of the penalties found appropriate on the present record. Any decision after hearing will be based on a preponderance of the reliable, probative and substantial evidence appearing in the record as a whole."

3/ This has long been the rule with respect to the validity of summary closure orders. See, Sink v. Morton, 529 F.2d 601, 604 (4th Cir. 1976).

4/ The APA provides that a hearing involving claims for money may be had on written materials only. 5 U.S.C. 556(d). Since there is no constitutional mandate requiring use of the adversary process in administrative proceedings, informal adjudication may be substituted for an oral evidentiary hearing in the absence of a showing of prejudice. Friendly, Some Kind of Hearing, 123 U. of Pennsylvania L. R. 1267, 1290-1291 (1975).

a condition precedent to a provisional reduction in a penalty is clearly erroneous. The Department of Labor obviously has no "property" interest in the amount of a proposed penalty, or entitlement to a hearing before such a penalty is provisionally assessed. Section 109(a)(3) of the Coal Act from which section 105(d) of the Mine Act proceeds provided that "only ... the person charged with a violation" is entitled to "an opportunity for a public hearing" before a penalty is finally assessed. There is nothing in the two Acts or their legislative history that confers on the Department of Labor a right to a hearing as a condition precedent to a provisional reduction in a penalty, particularly where the operator has waived a hearing and there is no dispute as to the material facts.

Because the Department of Labor has no "property" interest in the amount of a proposed penalty a provisional reduction in that penalty results in no deprivation of a right or entitlement cognizable under or protected by the due process clause of the constitution or the APA. Where the operator concedes the adjudicative facts, there is no basis for a claim that any interest of the government will be prejudiced by the absence of an oral evidentiary hearing.

It is well settled that the due process clause itself does not "create" any protected right or interest. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944). Rather, such rights and interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as the Mine Safety Law or the APA. Section 7(c) of the APA, 5 U.S.C. § 556(d), which is incorporated into the Mine Safety Law, affords the Department of Labor an opportunity for a hearing that is certainly no broader than that afforded the operator. In fact, there is every reason to believe the Department's claimed "right" to an oral hearing can never be as broad as the operator's because the Mine Safety Law does not affect any constitutionally protected interest in "liberty" or "property" possessed by the Department of Labor. Therefore, the rule that affords an adjudicator the flexibility to screen out cases that do not require a trial-type hearing by means of a provisional order applies not only to the operators but with even greater force to the Department of Labor whose only legitimate interest is in seeing that justice is done by the most expeditious procedure consistent with fairness.

Where, as here, the facts are undisputed, the determination of the amount of the penalty warranted is a matter

of discretion, not a finding of fact 5/ and therefore not subject to any requirement for a trial-type hearing. Davis, Administrative Law Treatise, § 12:2 (2d ed. 1980). Consequently, any supposed disagreement by the Department of Labor with the provisional reduction as a basis for the Commission's ruling was wholly gratuituous. Resort to issues that are without foundation in fact or law may be countenanced in the advocate but are singularly inappropriate to the function of a Commission that ostensibly sits to clarify not obfuscate the law.

Fortunately all that is behind us, at least for the present. After remand, the regional solicitor, who advised he was never in disagreement with the penalty proposed in the trial judge's provisional order of May 16, 1980, moved for approval of that amount. Since the operator had previously accepted and paid the amount proposed by the trial judge, the matter of approving the settlement is moot.

Accordingly, it is ORDERED that the motion to approve settlement while moot be, and hereby is, GRANTED and the captioned matter DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

5/ Brennan v. OSHRC, 487 F.2d 438, 442 (8th Cir. 1973); Co-Op Mining Company, 2 FMSHRC 784, 785 (1980); Peabody Coal Company, BARB 76-117, July 1, 1980, 2 FMSHRC ___; Island Creek Coal Company, BARB 76-297-P, July 9, 1980, 2 ___.

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