

CCASE:  
MSHA & UMWA V. CANTERBURY COAL

DDATE:  
19790504

TTEXT:  
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.

May 4, 1979

SECRETARY OF LABOR,	Docket Nos. PITT 78-127
MINE SAFETY AND HEALTH	PITT 78-128
ADMINISTRATION (MSHA),	PITT 78-301-P
	PITT 78-302-P

and

UNITED MINE WORKERS OF AMERICA  
(UMWA),

v.

CANTERBURY COAL COMPANY

ORDER

On January 2, 1979, the Commission granted petitions filed by the Secretary of Labor and the United Mine Workers of America for discretionary review of a decision issued by Administrative Law Judge Joseph B. Kennedy. On March 1, 1979, Judge Kennedy filed a motion for leave to intervene and to file a brief amicus curiae. The Secretary of Labor and the Union opposed the judge's motion and moved to expunge and strike portions of the judge's motion. For the reasons discussed below, the judge's motion is denied, the material the Secretary moved be expunged is stricken and the Union's motion to strike is granted.

Section 113(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 USCA §823(d)(1) (1978), provides:

An administrative law judge appointed by the Commission to hear matters under this Act shall hear, and make a determination upon, any proceeding instituted before the Commission . . . assigned to such administrative law judge . . . and shall make a decision which constitutes his final disposition of the proceedings. [Emphasis added.]

The statutory scheme contemplates that the judge's decision will be his final determination of the issues in the case. Neither the Act nor the Commission's Interim Rules provide for an administrative law judge to assume an adversary role before the Commission. 1/ The judge does not cite any authority for this highly unusual request.

Furthermore, to

---

1/ A review of the Administrative Procedure Act, 5 U.S.C. §551 (1976), from which the basic authority of administrative law judges

arises, also indicates no support for the requested action of the judge.

~336

permit a judge to participate in the review of his decision before the Commission "may leave the impression that he failed to fully consider the case when he issued his first opinion, and that his first opinion did not adequately state the reasons for his decision. It may also unnecessarily detract from the appearance of his impartiality...." 2/ Judge Kennedy's motion for leave to intervene and file a brief *amicus curiae* is denied.

The Secretary of Labor filed a motion to expunge specified portions of the judge's motion that the Secretary claims are "defamatory." Although the motion requests that the material be expunged, the Secretary cites as authority Federal Rule of Civil Procedure 12(f) which provides courts' power to strike matters from pleadings that are "redundant, immaterial, impertinent or scandalous." Accordingly, we treat the Secretary's motion to expunge as a motion to strike

The statements that the Secretary seeks to have stricken purport to be facts, and conclusions drawn from them, that seek to call into question the conduct of counsel for the Secretary and the Union in this case. If the judge seeks to alert counsels' superiors and the Commission to possible misconduct, the appropriate manner in which to voice such concerns is by making a report of circumstances under Interim Rule 5(b), 29 CFR §2700.5(b). 3/ To include allegations of such a serious nature in the context of a motion of this sort unnecessarily deprives those accused of the elementary procedural safeguards provided by §2700.5.

Accordingly, we grant the Secretary's motion to strike the following paragraphs of the judge's motion: numbered paragraphs 1 (first and second sentences), 4, 5, 8, 9, 10(a) and 10(b). 4/

---

2/ *Penn Allegh Coal Co., Inc.*, Docket No. PITT 78-97-P (Direction for Review and Order, Jan. 3, 1979).

3/ See *James Oliver and Wayne Seal*, Docket No. NORT 78-415, (Direction for Review and Order, March 27, 1979); *Kale and Kelly*, Docket No. D-78-1 (November 30, 1978).

4/ The United Mine Workers of America filed a motion to strike paragraph 9 of the judge's motion. The Union's motion is also granted.