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MSHA & UMWA V. CANTERBURY COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
September 21, 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

DECISION

These cases arise under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. $801 et seq. (1976) (amended 1977). On January 2, 1979, the Commission granted petitions for discretionary review filed by the United Mine Workers of America (Union) and the Secretary of Labor. For the reasons that follow, we reverse the judge's decision and remand for a hearing de novo before a different administrative law judge.

In this proceeding petitions for assessment of civil penalty filed by the Secretary were consolidated with applications for review filed by Canterbury. Procedurally, all of these cases were affected by the judge's disposition of a notice of violation issued to Canterbury on September 23, 1977, under section 104(c) of the Act. 1/ This notice,

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1/ Section 104(c) provides in pertinent part:

If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any notice given to the operator under this Act. If, during the same inspection or any subsequent inspection

of such mine within ninety days after the issuance of such notice, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation

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which concerns a "cutter" or a tear in the roof of an underground mine, provided the basis for the issuance of two subsequent section 104(c) withdrawal orders, 2/ concerning alleged violations related to pillar recovery and coal accumulations.

Canterbury filed a motion for summary disposition regarding the 104(c) withdrawal orders. In the motion Canterbury argued, among other things, that the underlying cutter notice was invalid. The administrative law judge denied the motion without prejudice to renew, and ordered the Secretary and Union to present their evidence regarding the underlying cutter notice. The Secretary and Union then presented that evidence at a hearing. At the conclusion of their presentation the judge granted a motion by Canterbury for dismissal of the cutter notice for failure to make a prima facie case. 3/ The judge's decision from the bench was reduced to writing on April 21, 1978.

The issues raised by the petitions for discretionary review focus almost exclusively on the judge's conduct of the hearing on the cutter notice. On review the Secretary and Union argue that they were denied a fair hearing on that issue because the judge "took the case away from counsel by the frequency and timing of his questions."

At the outset, we acknowledge the considerable leeway afforded administrative law judges in regulating the course of a hearing and in developing a complete and adequate record. The Manual for Administrative Law Judges, published by the Administrative Conference of the United States, states:

The Judge may question the witness initially if it is likely to forestall extensive examination by others. He should interrupt when the witness and counsel are at cross purposes, when the record may not reflect with clarity what the witness intends to convey, or when for some other reason assistance is needed to assure orderly development of the subject matter. At the close of cross or direct, the Judge may question the witness to clarify any confusion or ambiguous testimony or to develop additional facts. 4/ Id

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to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, ... to be withdrawn from, and to be prohibited from

entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

2/ The cutter notice is the subject of PITT 78-301-P; the withdrawal orders are the subject of PITT 78-302-P, PITT 78-127 and 128.

3/ In addition, the alleged pillar recovery violation was dismissed on the ground that no triable issue of fact was shown to exist and that Canterbury was entitled to summary disposition as a matter of law.

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See also 2 Davis, Administrative Law $10.02, at 8-9 (1958).

But an examiner should avoid encroaching on the domain of counsel.... Excessive or improper participation of examiners may, of course, amount to denial of fair hearing." Id. at 9. See also Cupples Co. Mfrs. v. NLRB, 106 F.2d 100, 113 (8th Cir. 1939).

In the present case, the inherent authority of judges to participate in hearings is not in question. Rather, the Secretary and Union argue that the judge interjected himself into the cutter notice proceedings so often and so extensively that they were denied the opportunity to develop their case. We agree. A reading of the entire record establishes that the judge's questioning encroached on the domain of counsel; he did not permit the parties an opportunity to develop their evidence in their own way. By numerous interruptions and questions, the judge dominated the examination of every witness. See Modern Methods, Inc. 12 Ad.L. Dec.2d 57, 60 (FTC, 1962); Better Monkey Grip Co., 5 Ad.L. Dec. 2d 452 (NLRB, 1955).

The record reflects that the judge rarely waited until the close of direct or cross examination before he questioned witnesses. A clear example of the judge's overzealous participation took place during the Secretary's attempt to question his chief witness, Inspector McNece. The record reflects the following pattern of questioning:

QUESTIONER NUMBER OF QUESTIONS
Secretary.....1
Court.....5
Secretary.....1
Court.....1
Secretary.....1
Court.....125
Secretary.....6
Court.....20
Secretary.....2
Court.....64
Secretary.....1
Court.....16
(Tr. 181-234).

This pattern of unbalanced questioning continued throughout the

entire hearing. It is also difficult to characterize the judge's questions as an effort to clarify the record. Rather, we find the judge attempted to develop the evidence on his own, and that his intrusive questioning hindered rather than advanced the development of a complete record. The extensive number of questions asked by the judge further reflects his undue interference in the proceedings. Although we do not profess to establish numerical guidelines, the record reflects that the judge asked 970 questions while the attorneys for the Secretary, Union, and Canterbury asked a combined total of only 334. The claim that the judge "took the case away from counsel" is amply demonstrated by the record.

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For these reasons, we find that the judge's conduct during the course of the hearing on the cutter notice constituted an abuse of his discretion. In making this finding, we have relied on the entire record, which discloses a lack of proper judicial restraint by the administrative law judge. The effect was to substantially hinder the parties in the presentation of their evidence and deny them their right to a fair and impartial hearing. 5/ Accordingly, we vacate the decision of the judge and remand the case for assignment by the Chief Administrative Law Judge for a de novo hearing before a different administrative law judge. 6/

In vacating the decision of the judge, we have by necessity vacated all findings made by the judge, including those involving the credibility of witnesses, conduct of counsel, and the summary disposition of the alleged pillar recovery violation. As to the latter, we note that the record reflects that a genuine issue of material fact was raised in the affidavits concerning the mining sequence and its conformance to the roof control plan during the pillar recovery operations. Under these circumstances, summary disposition was not proper. United States v. Diebold, 369 U.S. 654, 655 (1962). 7/

5/ See 5 U.S.C. $556(b) and (d).

6/ See Nicodemus v. Chrysler Corp., 596 F.2d 152 (6th Cir. 1979); Reserve Mining Co., v. Lord, 529 1.2d 181 (8th Cir. 1976); United States ex rel. Wilson v. Coughlin., 422 F.2d 100, 110 (7th Cir. 1973); and In re United States, 286 F.2d 556, 565 (1st Cir. 1961).

7/ In light of our disposition, it is unnecessary to reach the other issues and arguments raised by the parties.