



or other mine notifies the Secretary that he intends to contest the issuance ... of an order issued under section 104 ... the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, ...) and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's ... proposed penalty, or directing other appropriate relief....

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loose coal and coal dust. In its response to the administrative law judge's pre-hearing order, Peabody reiterated this denial. It admitted that some "spillage" had occurred, but specifically denied that the spillage constituted an "accumulation" within the meaning of the standard, as interpreted by the Commission in *Old Ben Coal Co.*, 1 FMSHRC 1954, 1 BNA MSHC 2241, 1979 CCH OSHD ¶24,084 (1979). Before

an evidentiary hearing was scheduled, motions to approve a settlement were filed. The Secretary proposed that the judge approve a penalty settlement in the amount of \$550 for the alleged violation of 30 CFR §75.400; the Secretary in separate motions also proposed settlement for several alleged respirable dust violations involved in the consolidated dockets. 3/

In a document entitled "Decision and Order" issued on March 5, 1980, the judge granted the motions to approve a settlement for the four respirable dust violations, but disapproved the proposed settlement of \$550 for the alleged violation of 30 CFR §75.400. The judge did not find that Peabody admitted or was specifically called upon to deny, that the depths of the spillage were those alleged in the withdrawal order. The judge did not accord the parties an opportunity to be heard, and immediately assessed a penalty of \$1,000. Peabody filed a petition for discretionary review, which we granted on April 14, 1980. 4/

Section 105(d) of the Act, together with section 5(b) of the Administrative Procedure Act, 5 U.S.C. §554(c) (1976), 5/ and the Commission's rules, require that unless a case is settled or the respondent defaults, an administrative law judge must afford the parties an opportunity for a hearing on disputed issues of material fact. Commission Rule 63(b), 29 CFR §2700.63(b); 6/ also cf. Commission Rule 64, 29 CFR §2700.64. 7/ Because Peabody denied that an "accumulation" had

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3/ The coal dust accumulation case (Docket No. LAKE 80-77) is consolidated with four respirable dust cases (Docket Nos. LAKE 80-25, 80-26, 80-27, and 80-36).

4/ Peabody filed on April 18, 1980, a motion to withdraw its petition for discretionary review. We need not rule on that motion because we now grant Peabody all the relief it sought in its motion.

5/ Section 5(b) provides:

The agency shall give all interested parties opportunity for--

- (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
- (2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

6/ Rule 63(b) provides:

Penalty proceedings. When the Judge finds the respondent in default in a civil penalty proceeding, the Judge shall also enter a summary order assessing the proposed penalties as final, and directing that such penalties be paid.

7/ Rule 64 provides in pertinent part:

(a) Filing of motion for summary decision. At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the Judge to render summary decision disposing of all or part of the proceeding.

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occurred, and the judge did not find that the depth of the spillage was admitted. a disputed issue of material fact remained unresolved. Accordingly, the judge erred in not granting the parties an opportunity to be heard on at least that issue. A remand is therefore necessary. 8/

Peabody's petition for discretionary review also raises several questions concerning the judge's order of March 25, 1980, in which the judge denied Peabody's motion for reconsideration. We do not pass upon the merits of these issues, for we find that the judge had no jurisdiction to enter that order. Inasmuch as the judge's decision of March 5 constituted "his final disposition of the proceedings" within the meaning of section 113(d)(1) of the Act, the judge's jurisdiction terminated on that date. Commission Rule 65(c), 29 CFR •2700.65(c).

9/ He therefore had no power to rule on the motion to reconsider.

Secretary on behalf of Pasula v. Consolidation Coal Co., 1 FMSHRC 25, 1 BNA MSHC 2030, 1977 CCH OSHD %23,465 (1979). See also Penn Allegh Coal Co., March 1979 FMSHRC No. 3, 1979 CCH OSHD %23,439 (1979), in which we cautioned that the issuance of multiple opinions "threatens the smooth functioning of the Commission's review process." 10/

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n. 7/ cont.

(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows:

(1) that there is no genuine issue as to any material fact; and  
(2) that the moving party is entitled to summary decision as a matter of law.

8/ We need not pass upon whether other disputed issues of material fact remain. We leave that to the administrative law judge to resolve on remand.

9/ Rule 65(c) provides in pertinent part:

(c) ... The jurisdiction of the judge terminates when his decision has been issued by the Executive Director [of the Commission].

10/ In that order, we stated:

The filing by the judge of multiple opinions impedes the efforts of the aggrieved parties to timely comply with the requirements for petitions, encourages the hasty drafting of inferior petitions, and thus impairs the usefulness of this crucial document to the Commission. Moreover, the judge's action may create confusion as to the status of the issues, the deadlines for filing and granting of petitions and the exercise by the Commission of its power to direct review on its own motion. In short, the judge's action threatens the smooth functioning of the Commission's review process.

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Accordingly, we remand this case to the judge for proceedings consistent with this opinion. We also strike the judge's order of March 25, 1980, denying the motion for reconsideration, and his subsequent orders of April 8 and 15, 1980.

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