

CCASE:
MSHA V. NEW JESERY PULVERIZING
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TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
July 2, 1980

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

v. Docket No. YORK 79-94-M

NEW JERSEY PULVERIZING COMPANY

DECISION

On May 16, 1980, the administrative law judge issued a "Decision and Order" requiring the operator to pay penalties "in settlement of" six alleged violations. In a footnote to his decision, the judge declared that his disposition was merely "proposed" and stated that he would reconsider and afford both parties an opportunity to be heard if they so requested. The Secretary filed a petition for discretionary review, claiming that the judge had assessed penalties without giving the Secretary the opportunity to be heard because, under Commission precedent, the judge could not reconsider his decision. The Secretary in effect argues that the penalties assessed by the judge are too low. We granted the Secretary's petition. We now reverse.

On the same day that the judge's decision was issued, we issued a decision in another case disapproving the judge's method of disposition. Peabody Coal Co.. 2 FMSHRC 1035, 1 BNA MSHC 2369, 1980 CCH OSHD 24,468 (1980). That decision is controlling here. 1/ In view of our decision

1/ In Peabody, the judge's decision did not contain a footnote characterizing the disposition as merely proposed. We have therefore considered whether Peabody is distinguishable. We can find no principled distinction. It is quite evident that the judge intended his decision here to serve as his final disposition of the proceedings

and yet to permit him to reconsider. This is precisely what our Peabody decision held was inconsistent with the Commission's rules and precedents.

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in Peabody, and particularly in view of our decision here, we expect that it will not be necessary to continue to remind the judge that he is to decide cases in accordance with the Commission's rules and precedents. We also observe that the judge did not give the parties a reasonable opportunity to propose a settlement of the case. 2/ Finally, in view of New Jersey Pulverizing's letter of June 27, 1980, which asks that this case be disposed of "without the expense to us or the Government of a hearing", we order the judge to afford the parties an opportunity to propose a settlement before any hearing is scheduled or pre-hearing order is issued.

Accordingly, the judge's decision is vacated. The case is remanded to him for further proceedings consistent with this decision.

2/ The Secretary's proposal for a penalty was received on October 29, 1979. When the operator initially failed to file a timely answer, an order to show cause was issued to the operator on April 22, 1980. New Jersey Pulverizing's response to the order was received on May 6, 1980. Ten days later, without further proceedings by the judge or the parties, the judge issued his decision.

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Distribution

Debra L. Feuer, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Boulevard
Arlington, Virginia 22203

Martin E. Tanzer, Esq.
New Jersey Pulverizing Company
390 North Broadway
Jericho, New York 11753

Administrative Law Judge Joseph B. Kennedy
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike - Building 2
Falls Church, Virginia 22041