CCASE:
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, DC
October 8, 1980

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

v.

Docket No. HOPE 79-113-P

OLGA COAL COMPANY

DECISION

The issue in this case is whether the administrative law judge erred by sua sponte vacating a citation and dismissing a penalty proceeding, without providing the Secretary an opportunity to be heard. We hold that the judge erred, reverse the order of dismissal, and remand the case for further proceedings consistent with this opinion.

On November 7, 1978, the Secretary of Labor filed a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a)(Supp. II 1978). The petition alleged that Olga Coal Company violated the respirable dust regulation at 30 CFR 70.100(b). 1/ Olga filed a timely answer, stating in part that the petition failed to state a claim upon which relief can be granted. The parties thereafter conferred and agreed upon a proposed settlement. On June 5, 1979, the Secretary filed a motion to approve the proposed settlement and dismiss the proceeding. The judge rejected the settlement. Instead, without first seeking argument from the parties, he vacated the citation because of his view that the Act's respirable dust standard is currently unenforceable.

The Commission granted the Secretary's petition for discretionary review on August 7, 1979. The petition challenged the judge's decision on both procedural and substantive grounds: his

dismissal sua sponte without providing an opportunity to be heard, and his conclusion that the respirable dust standard is unenforceable.

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1/ 30 CFR 70.100(b) provides:

> [E]ach operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of such mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air.

We hold that an administrative law judge has the inherent authority to question whether, as a matter a law, a case before him presents a cause of action. 2/ Cf. Literature, Inc. v. Quin, 482 F.2d 372, 374 (1st Cir. 1973); 5 Wright & Miller, Federal Practice and Procedure: Civil, 1357, p. 593 (and cases cited at n.43 thereat). The judge erred, however, in issuing a final ruling on that question without first affording the Secretary an opportunity to present legal arguments supporting the enforceability of the standard. See Literature, Inc., supra. The Administrative Procedure Act requires that parties be afforded the opportunity to submit arguments when time, the nature of the proceedings, and the public interest permit. 5 U.S.C. 554(c). The judge did not comply with this requirement. He failed to advise the parties that he was prepared to dismiss the case on the ground that the respirable dust standard was unenforceable, and did not give the parties an opportunity to be heard on that question. 3/

When we find that the judge erred by failing to allow the parties the opportunity to present arguments, we would normally remand for argument. Events subsequent to the judge's decision have rendered his error harmless, however. In Alabama By-Products Corporation, Docket No. SE 79-110 (October 8, 1980), we held that the respirable dust standard involved here is enforceable. Thus, no purpose would now be served by remanding for argument before the judge on the legal question of whether 30 CFR 70.100(b) is presently enforceable. Accordingly, upon remand the parties and the judge may proceed with further settlement proceedings or adjudication of the merits of the citation and penalty assessment.

Richard V. Backley,

Commissioner

Frank F. Jestrab,

Commissioner

A. E. Lawson,

Commissioner

Marian Pearlman

Nease, Commissioner

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2/ The judge's authority is not altered merely because, as here, a motion to approve a settlement is filed before he raises the question.

3/ Under the Administrative Procedure Act, a party is not always entitled to an evidentiary hearing. The only "hearing" which was denied the Secretary here was an opportunity to file written argument with the judge. See Mezines, Stein, Gruff, Administrative Law, 33,02[1] (1980); Davis, Administrative Law, 10.9 (2d ed. 1978).

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