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MSHA V. KNOX COUNTY STONE
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 6, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket No. DENV 79-359-PM

v.

KNOX COUNTY STONE COMPANY, INC.

DECISION

This penalty case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. (Supp. III 1979). The question before us is whether the judge abused his discretion by disapproving the parties' proposed penalty settlement and summarily assessing a $500 penalty. For the reasons that follow, we vacate the judge's decision and approve the parties' settlement. Due to information disclosed during this review, we also find it necessary to address the subject of ex parte communications between judges and parties.

On October 12, 1978, an MSHA inspector issued Knox County Stone Company a citation for an alleged violation of 30 CFR $56.11-2, 1/ when he observed a catwalk railing torn loose from its foundations. On February 22, 1979, the Secretary petitioned for assessment of a $40 civil penalty for the alleged catwalk violation. On March 23, 1979, Knox County answered the petition, admitting the violation, contesting the amount of penalty assessed, and requesting a hearing. On April 24, 1979, the judge issued to the parties a notice of hearing and pretrial order requiring in two phased responses extensive information relevant to the six penalty criteria specified in section 110(i) of the Mine Act. By June 11, when the last response was filed, the parties had significantly narrowed the issues. The only major point in dispute between the parties was the appropriate penalty weight to be assigned for operator size. On June 13, 1979, the judge noticed the hearing for June 29, 1979, in Arlington, Virginia.

On June 26, 1979, Knox County filed a Motion to Dismiss Proceeding and to Approve Settlement. The motion stated that $36, rather than the originally proposed $40, would be the appropriate penalty amount, based on an agreed reduction of penalty points for operator size. Also on June 26th, the parties jointly moved for a continuance pending disposition of the dismissal motion and, in the event a hearing was

required, for transfer of the hearing site to Kansas City, Missouri. On June 27,

1/ Section 56.11-2 provides:

Mandatory. Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

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1979, the judge denied the transfer request and continued the hearing. The Secretary subsequently filed a response concurring in Knox County's dismissal motion, including reduction of penalty points for operator size. On July 23, 1979, without having held a hearing, the judge issued his Decision and Order on Motions to Approve Settlement. The judge disapproved the settlement proposal "because on the basis of an independent evaluation and de novo review of the circumstances the presiding judge is not persuaded that the penalty proposed will deter future violations and insure voluntary compliance." Finding that there were no genuine issues of material fact, the judge concluded that "due process [did] not require an evidentiary hearing to resolve [the] dispute." In effect, the judge treated Knox County's settlement approval motion as a summary judgment motion.

On the basis of the parties' pleadings, the pretrial submissions, and the inspector's violation "statement," the judge made the following findings relevant to the six penalty criteria: the violation was admitted; there was no past history of violations; regarding Knox County's size, its annual sales volume was approximately $1,000,000; the judge accepted Knox County's concession that a "low degree of negligence" was involved in the violation; "it [was] not claimed" that the assessment of any penalty found warranted would impair Knox County's ability to continue in business; regarding gravity, the violation was "serious" because according to the "undisputed findings" in the inspector's violation "statement," a fall from the catwalk, while "improbable," would "probably result" in disabling injury if it did occur; and it was conceded by the Secretary that compliance was "rapid." Based on these findings, the judge concluded that $500 was the penalty "appropriate to the size of the respondent and ... best calculated to deter future violations and insure voluntary compliance."

Knox County's Petition for Discretionary Review ("PDR") raises two major issues: (1) whether the judge properly rejected the proposed penalty settlement, and (2) whether his summary assessment of the $500 penalty was proper. The Secretary filed a brief in support of the PDR. Because the judge's summary assessment of the $500 penalty was predicated on his rejection of the proposed $36 penalty, we first consider whether he properly rejected the settlement.

We initially summarize the general principles relevant to this issue. Section 110(k) of the Mine Act 2/ directs the Commission and its judges to protect the public interest by ensuring that all settlements of contested penalties are consistent with the Mine Act's objectives. Co-op Mining Co., 2 FMSHRC 3475, 3475 76 (1980). The judges' front line oversight of the settlement process is an adjudicative function that necessarily involves wide discretion. While the scope of this discretion may elude detailed description, it is not unlimited and at least some of its outer boundaries are clear.

2/ In relevant part, section 110(k) provides:

No proposal penalty which has been contested before the Commission ... shall be compromised, mitigated, or settled except with the approval of the Commission.

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The text of section 110(k) requires us to reject the notion lurking in Knox County's brief that Commission judges are bound to endorse all proposed settlements of contested penalties. Co-op Mining Co., supra, However, settlements are not in disfavor under the Mine Act, and a judge is not free to reject them arbitrarily. Our standards for decision and review in settlement cases are consistent with these "outer boundaries."

Commission Rule 30(c), 29 CFR $2700.30(c)(amended 1980), provides that the judge's order "approving a proposed settlement shall set forth the reasons for approval and shall be fully supported by the record.".3/ Similarly, in Davis Coal Co., 2 FMSHRC 619 (1980), the Commission affirmed several settlement approvals where the judges "considered the reasons for the proposed settlements and weighed the [statutory penalty] criteria...." 4/ Although neither Rule 30(c) nor Davis Coal directly addresses the roles of the judge and the Commission where proposed settlements are rejected, the decisional and review standards relevant to settlement approval apply equally to these cases. Rejections, as well as approvals, should be based on principled reasons. Therefore, we held that if a judge's settlement approval or rejection is "fully supported" by the record before him, is consistent with the statutory penalty criteria, and is not otherwise improper, it will not be disturbed. In reviewing such cases, abuses of discretion or plain errors are not immune from reversal. Co-op Mining Co., 2 FMSHRC at 3475-76 (rev'g a judge's approval of a penalty settlement where the record disclosed no underlying violation); Cf. Mettiki Coal Corp., (No. YORK 80 140, October 16, 1981) (rev'g judge's rejection of Secretary's dismissal motion premised on full payment of proposed penalty).

In light of the foregoing general principles, we turn to the propriety of the judge's reJection of the proposed penalty settlement. The judge's rejection of the settlement turned on his determination

that the proposed penalty would not "deter future violations and insure voluntary compliance." The judge did not explain the reasons for this conclusion in any detail. He indicated, however, that a fall from the catwalk, while improbable," would probably result in a disabling injury, and commented that his substituted $500 penalty was "appropriate to the size" of Knox County thereby implying that a $36 penalty was not.

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3/ Rule 30(c) was revised in 1980 to delete the requirement, which was in effect when this case was decided, that the judge "consider" and "discuss" the six statutory penalty criteria in orders approving settlements. As the Federal Register commentary accompanying the amendment makes clear, the only purpose of the revision was "enhance[ment]" of the "flexibility of the judges to approve the settlements...." 45 Fed. Reg. 44,301 302 (1980). The amended rule permits judges to issue simpler and briefer settlement decisions, free from the burden of separately discussing each of the penalty criteria. The amendment does not sanction settlement decisions inconsistent with the statutory penalty criteria.

4/ In the analogous context of reviewing a judge's penalty assessments in a contested case, we refused to disturb penalty assessments "based on the evidence in the record and [on] correct consideration of the statutory criteria ..." Shamrock Coal Co., 1 FMSHRC 469 (1979).

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We conclude that the judge's rejection of the settlement is not "fully supported" by the record and is inconsistent with the penalty criteria. As a threshold matter, the proposed $36 penalty is not offensive in principle. When the Mine Act was enacted, there was a justified congressional concern over the general pattern of low penalties under the 1969 Coal Act. S. Rep. No. 95 181, 95th Cong., 1st Sess. 41-5 (1977), reprinted in Subcommittee on Labor, Comm. on Human Resources, Legislative History of the Federal Mine Safety and Health Act of 1977, at 629-33 (1978). However, this concern was not a prospective condemnation of low penalties or minor compromises in every case that might arise under the new statute. Relatively minor or technical violations of the Mine Act can, and with some frequency, do occur. As the Commission recently stated: "If it is found in a given case that a low penalty is warranted, a low penalty may, of course, be assessed." Tazco, Inc., 3 FMSHRC 1985, 1989 (1981). The record and penalty criteria support the penalty agreed to by the parties.

As the judge recognized, the pleadings and pretrial submissions show that Knox County had no history of violations and engaged in rapid compliance once cited. The inspector's violation "statement," on which the judge based his gravity findings, indicated that the risk

of fall from the catwalk was "improbable." While we do not dispute the judge's findings concerning the other criteria, we think that a $36 penalty is reasonable and appropriate for a rapidly corrected first violation posing only improbable risk of harm. Similarly, we do not view the $4 difference between the originally proposed penalty and the one agreed to in settlement as the kind of excessive compromise criticized by Congress. The judge's conclusion that $36 was insufficient for deterrence purposes is not, as noted, above, explained in detail. In short, we think that rejection of this proposed settlement unnecessarily impugns the settlement process and represents zealous, rather than wise, enforcement of the Mine Act.

Accordingly, we reverse the judge's rejection of the proposed penalty in the settlement motion. Ordinarily, we would remand a case in this posture for further proceedings. However, because this case involves a small penalty sum and has been on the Commission's docket for some time, and because we believe that the $36 penalty proposed penalty is appropriate, we hereby approve the parties' settlement motion. Cf. Consolo v. FMC, 383 U.S. 607, 621 (1965) (approving disposition at the appellate level, rather than the ordinary course at remand, where a case has been pending for sometime and the relevant legal principles are "not hard to apply").

While the preceding disposition dictates reversal of the judge's summarily assessed $500 penalty, we also note that the judge's treatment of Knox County's settlement motion was a form of sua sponte summary judgment, an extraordinary procedure not authorized by our rules. In Missouri Gravel Coal Co. (No. LAKE 80-83-M, November 4, 1981) we disapproved of sua sponte summary judgment in general, and we reject the judge's use of it here as well. As we recently observed, "if a judge disagrees with a stipulated penalty amount in a settlement, he is free to reject the settlement and direct the matter for hearing." Tazco, Inc., 3 FMSHRC at
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1898. Accordingly, we also vacate the judge's summary assessment of the $500 penalty. 5/

In sum, for the foregoing reasons, we vacate the judge's rejection of the parties' settlement motion and his summary assessment of a $500 penalty, and approve the parties' motion for a $36 penalty in settlement of the case. 6/ As we noted at the outset, this case also requires us to discuss ex parte communications. Although the following discussion is necessitated by information disclosed during review, we emphasize that it is extrinsic to the matters on review.

In support of contentions that the judge was biased and had prejudged the case (issues not necessary to resolve at this point (see n. 6)), Knox County alleged in its PDR that on June 20 and July 3, 1979, its principal counsel had telephone conversations with

the judge regarding the case. That counsel's affidavit concerning the conversations was attached to the petition. The alleged conversations occurred prior to the judge's decision--the first after the judge's notice of hearing and last pre-trial submission but prior to the motion to approve settlement, and the second after the settlement motion. Knox County stated that the conversations were "initiated" by he judge or "persons in his office." On September 6, shortly after the Commission directed this case for review, the judge filed his own affidavit with the Commission. The judge stated that he had read Knox County's counsel's affidavit, and acknowledged that he had spoken with him on June 20. The affidavits contained partly conflicting accounts of the substance of the conversations.

5/ Of course, where settlement is rejected and the case is directed for hearing, if the parties believe that the facts are not in dispute, they can move the judge for summary judgment (Commission Rule 64, 29 CFR $2700.64) and present argument on the appropriate penalty size.

6/ Our disposition of the case remedies Knox County's other complaints regarding the judge's decision and renders discussion of them unnecessary.

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Apart from the two affidavits, no record of these conversations was placed on the public record of the proceedings.

These affidavits concur on one point: the attorney and the judge appear to have discussed the case off the public record and without the presence of the Secretary, the other party to the proceeding. We will not direct a separate disciplinary proceeding to determine whether these apparent facts make out a prohibited ex parte communication. The parties have at least brought the matter to our attention, the conversations occurred over two years ago, and we have not previously addressed the subject of ex parte communications. However, because the subject of ex parte communications has arisen and because we believe that the prohibitions against ex parte communications are vital to the integrity of the Commission's processes, we take this occasion to provide future guidance for Commission judges and those who practice before the Commission.

Our procedural rules have always prohibited ex parte communications, although there have been permutations in language and organization as rule revisions have occurred. Rule 82, the present rule on ex parte communications, provides:

(a) Generally. There shall be no ex parte communication with respect to the merits of any case not concluded, between the Commission, including any member, Judge, officer, or agent of the Commission who is employed in the

decisional process, and any of the parties or
intervenors, representatives, or other interested
persons.
(b) Procedure in case of violation.
(1) In the event an ex parte communication
in violation of this section occurs, the
Commission or the Judge may make such orders
or take such action as fairness requires.
Upon notice and hearing, the Commission may
take disciplinary action against any person
who knowingly and willfully makes or causes
to be made a prohibited ex parte communication.
(2) All ex parte communications in violation of
this section shall be placed on the public record
of the proceeding.
(c) Inquiries. Any inquiries concerning filing
requirements. the status of cases before the Commissioners,
or docket information shall be directed to the Office of
the Executive Director of the Commission ....
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Moreover, apart from our own rules, section 557(d) of the APA
also prohibits ex parte communications. As part of the Government in
the Sunshine Act, Congress amended section 557 in 1976 to add a new
subsection (d) set forth in the accompanying note. 7/ Section 557(d)
7/ $557(d) provides in relevant part:
(1) In any agency proceeding which is subject to subsection (a)
of this section, except to the extent required for the
disposition of ex parte matters as authorized by law -
(A) no interested person outside the agency shall make or
knowingly cause to be made to any member of the body comprising
the agency, administrative law judge, or other employee who is or
may reasonably be expected to be involved in the decisional
process of the proceeding, an ex parte communication relevant to
the merits of the proceeding;
(B) no member of the body composing the agency, administrative
law judge, or other employee who is or may reasonably be
expected to be involved in the decisional process of the
proceeding, shall make or knowingly cause to be made to an
interested person outside the agency an ex parte communication
relevant to the merits of the proceeding;
(C) a member of the body comprising the agency, administrative
law judge, or other employee who is or may reasonably be
expected to be involved in the decisional process of such
proceeding who receives, or who makes or knowingly causes to
be made, a communication prohibited by this subsection shall

place on the public record of the proceeding:
(i) all such written communications;
(ii) memoranda stating the substance of all such oral communications;
and
(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;
(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and
(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.
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applies to the Commission's adjudicative proceedings, including penalty proceedings conducted pursuant to section 105(d) of the Mine Act.
As a comparison of Rule 82 and section 557(d) shows, both rules prohibit ex parte communication between a judge and a party regarding the merits of a pending case and also require that ex parte communications be placed on the public record. Our rules do not expressly define "ex parte communication." However, section 551(14), APA, defines the term as follows:
"[E]x parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding . . .
At the very least, we think 'merits of a case" embraces discussion of a case's issues and how those issues should or will be resolved. 8/
The rules against ex parte communications serve important goals essential to the integrity and fairness of Commission proceedings. As Congress explained in enacting section 557(d):
The purpose of the provisions in the bill prohibiting ex parte communications is to insure that agency decisions

required to be made on a public record are not influenced by private, off-the-record communications from those personally interested in the outcome.

* * * *

In order to ensure both fairness and soundness to adjudication . . . ., the . . . [APA] require[s] a hearing and decision on the record. Such hearings give all parties an opportunity to participate and to rebut each other's presentations. Such proceedings cannot be fair or soundly decided, however, when persons outside the agency are allowed to communicate with the decision maker in private and others are denied the opportunity to respond.

1976 U.S. Code Legis. Hist. 2184, 2227. See also Raz Inland Navigation Co., Inc. v. ICC, 625 F.2d 258, 260 (9th Cir. 1980).

The implications of the purposes mentioned by Congress are obvious: improper ex parte contacts may deny a party "his due process right to a disinterested and impartial tribunal." Rinehart v. Brewer, 561 F.2d, 132 (8th Cir. 1977). Diminishing public confidence in the affected tribunal is the likely and unacceptable result.

These considerations are mirrored by the canons of judicial and professional conduct. Canon 3A(4), Code of Judicial Conduct, provides in relevant part:

8/ Congress intended the phrase "merits of the proceeding," in sections 551(14) and 557(d) to be broadly construed. See H. Rep. No. 94-880, Parts I & 11, 94th Cong., 2d. Sess. 20 (Part 1), 20 (Part II) (1976), reprinted i 1976[3] U.S. Code Cong. & Ad. News 2202. 2229 ["1976 U.S. Code Legis. Hist."].

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A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.

Violation of this canon may so taint a proceeding as to mandate reversal. See Price Bros. Co. v. Philadelphia Gear Corp., 629 F.2d 444, 447 (6th Cir. 1980); Kennedy v. Great Atlantic & Pacific Tea Co., 551 F.2d 593, 596-99 (5th Cir. 1977). 9/ Similarly, Disciplinary Rule 7-110(b) under Canon 7, Code of Professional Responsibility, prohibits a lawyer from engaging in ex parte communications with a judge during an adversary proceeding. The gravity of a violation by an attorney is underscored by sections 556(e) and 557(d)(1)(D), APA, which permit agencies to remedy a violation by means as extreme as dismissal.

We recognize that innocent or de minimis ex parte communications

can, and do, occur. When ex parte communications occur, however, they shall be placed on the public record in accordance with appropriate procedure.

In short, although as discussed above, it is not necessary to direct a disciplinary hearing in this case, we expect that the rules on ex parte communications will be respected in both letter and spirit and that judges and lawyers will avoid even the appearance of impropriety in these matters.

9/ We note that a judge may not indirectly engage in such communications through contacts by his clerks or other employees with outside parties. Price Brothers, supra, 629 F.2d at 447; Kennedy, supra, 551 F.2d at 596.

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