CCASE:
SOL (MSHA) V. LITTLE SANDY COAL SALES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
March 28, 1985

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

v. Docket No. KENT 83-178-R

LITTLE SANDY COAL SALES, INC.

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982). Edgar Everman, the owner of Little Sandy Coal Sales, Inc. ("Little Sandy"), is proceeding without the assistance of counsel. We granted Mr. Everman's petition for review of a decision by a Commission administrative law judge. 5 FMSHRC 1793 (October 1983) (ALJ). For the reasons stated below, we remand this case for further proceedings.

On March 10, 1983, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") conducted an inspection of the Little Sandy surface facility in Grayson, Kentucky. The inspector issued the company twelve citations for conditions alleged to be in violation of mandatory safety and health standards. Mr. Everman objected to the issuance of the citations on the ground that Little Sandy was not a "mine" subject to Mine Act coverage. For purposes of litigating this threshold question, MSHA selected one of these citations and on March 18, 1983, issued a "no area affected" withdrawal order for failure to abate the cited violation.1/ Subsequently, on April 6, 1983, Mr. Everman filed a notice of contest asserting that Little Sandy was a "retail coal yard" not subject to the Mine Act. The Secretary filed an answer to the notice of contest alleging that Little Sandy was a "mine" within the meaning of the Act.

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1/ The citation charged Little Sandy with a violation of 30 C.F.R. 71.500, a mandatory health standard for surface coal minin operations. Section 71.500 requires operators to provide approved sanitary toilet facilities. The Secretary has indicated that the abatement period for the outstanding unabated citations and order has been extended until after the coverage issue is resolved.

On April 15, 1983, the judge assigned to this case issued a pre-trial order stating that the "only issue appears to be whether Little Sandy ... is a mine within the meaning of the ... Act...." The judge directed the parties to advise him as to whether they could agree to a stipulation of facts relevant to determination of that issue. In response to the judge's pretrial order, counsel for the Secretary of Labor submitted the following description, agreed to by the parties, of the Little Sandy operation:

> This operation is comprised of a scale, scale house, parts and lubricant storage trailer, and a coal processing apparatus consisting of a raw coal hopper, raw coal feeder and belt, a crusher with load out belt and a screening unit thereto. The coal produced therefrom takes approximately three forms:
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> 1. Crusher coal
> 2. Stoker
> 3. Fine coal or "carbon"
>
> The whole plant is situated on a site of approximately 10 acres. The stockpiles area is approximately 3/4 acre in size with the processing apparatus being about 100 feet long, and it is powered by 440v commercial power as well as diesel power for driving the crusher.

On August 10, 1983, the judge issued a notice of hearing informing the parties that the hearing on the merits was scheduled for September 8, 1983, at 10:00 a.m. On August 15, 1983, the judge issued a supplemental notice stating that the hearing would be held in Pikeville, Kentucky, at the previously announced time. On September 7, 1983, the judge arrived in Pikeville for the hearing and received a telephone call from his secretary in his Falls Church, Virginia office. The secretary informed him that Mr. Everman had telephoned to say that he could not attend the hearing due to an illness. Mr. Everman had left with the judge's secretary his home and business numbers, and had indicated that he would be home after 4:00 p.m. that day.

On September 8, 1983, the judge convened the hearing at 10:00 a.m., and waited until 10:20 a.m. for Mr. Everman to appear. The judge then telephoned his secretary and asked that she call Mr. Everman. She called Mr. Everman's office and was told that he was not there but was expected. She also called Mr. Everman's home but received no answer. The judge returned to the hearing and announced that he was not holding Mr. Everman in default, but ruled that by his absence Mr. Everman had waived his right to cross-examine the government's witnesses. 5 FMSHRC at 1793-94; Tr. 2. The judge also

stated that in the event Mr. Everman produced a doctor's certificate indicating that he was too sick to attend the hearing and testify, the judge would permit Mr. Everman to submit a statement with regard to his position in the case. Id. The judge then proceeded with the hearing and heard the Secretary's evidence.

When the judge returned to his office, he received a telephone call from Mr. Everman, who apologized for not attending the hearing. The judge told Mr. Everman that if he would send him a doctor's certificate, the judge would allow Mr. Everman to submit further evidence but would not reopen the hearing to allow Mr. Everman to cross-examine the government witness who had testified at the hearing. On September 26, 1983, Mr. Everman submitted a post-hearing brief, attached to which was a doctor's note stating, "Mr. Everman was unable to attend due to illness."

In his decision, the judge recited the events leading up to Mr. Everman's absence from the hearing. 5 FMSHRC at 1793. The judge adhered to his ruling at the hearing that "Mr. Everman [was not] in total default but ... by failure to appear he ... waived his right to cross-examine the government witnes[s]." 5 FMSHRC at 1794. The judge further indicated that the note from Mr. Everman's doctor was inadequate to justify his failure to appear. Id. The judge did consider, however, the arguments in Mr. Everman's posthearing brief concerning whether Little Sandy is subject to Mine Act coverage.

With regard to the coverage issue, the judge summarized Little Sandy's contentions, especially its claim that its surface facility closely resembled the operation held by the Commission not to be a "mine" under the Mine Act in Oliver M. Elam, Jr. Company, 4 FMSHRC 5 (January 1982). The judge rejected Little Sandy s position that Elam was controlling, and distinguished that case from the present proceeding on several grounds. 5 FMSHRC at 1794-95. The judge cited the Commission's decision in Alexander Brothers, Inc., 4 FMSHRC 541 (April 1982), as dispositive of the coverage issue and concluded that the Little Sandy facility was a "mine" within the scope of the Act. 5 FMSHRC at 1795.

On review, Little Sandy, in part, maintains that under the circumstances the judge erred in not permitting it to participate in the hearing by presenting evidence and cross-examining the Secretary's witness in a continued or reopened hearing. We find merit to this objection.

Commission Procedural Rule 60(b), 29 C.F.R. 2700.60(b), provides:

> A party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

The rights embodied in Rule 60(b) are integral to the basic due process accorded a party in litigation under the Mine Act. Of course, we are mindful that there is no absolute constitutional requirement of confrontation in a federal administrative proceeding. See, e.g., Central Freight Lines, Inc. v. United States, 669 F.2d 1063, 1068 (5th Cir. 1982). Indeed, our Rule 60(b) is modeled on section 7(c) of the Administrative Procedure Act, 5 U.S.C. 556(d), and both provisions confer on

parties the right to conduct only such cross-examination "as may be required for a full and true disclosure of the facts." Due process in an administrative forum "calls for such procedural protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. 319, 334 (1976). See also Secretary of Labor on behalf of Gooslin v. Kentucky Carbon Corp., 3 FMSHRC 1707, 1711 (July 1981). Nevertheless, the importance of cross-examination is sufficiently basic that we are not prepared to approve its outright denial in proceedings before our judges for less than compelling reasons.

We recognize that the judge and the Secretary suffered inconvenience (and the government sustained expense) as a result of Mr. Everman's failure to appear on schedule. Mr. Everman, however, informed the judge that he would be unable to attend due to illness. Mr. Everman provided the judge's secretary with telephone numbers at which he could be reached that day, in addition to indicating the time at which he would be home. On this record, we discern in these actions a good-faith effort by Mr. Everman to contact the judge and to minimize the inconvenience his absence would cause. It does not appear that the judge attempted to contact Mr. Everman on September 7, 1983, after he had received this message through his secretary. It was only the next morning, after commencement of the hearing, that the judge had his secretary call Mr. Everman's home and office numbers in an effort to reach him. Having been unsuccessful in contacting Mr. Everman, the judge determined that by his absence Mr. Everman had waived his right to cross-examine the Secretary's witnesses. Following the hearing, Mr. Everman telephoned the judge and apologized for his absence. He also complied with the judge's request to provide a signed doctor's note to the effect that he had been unable to attend the hearing due to an illness. Although the doctor's note could have provided more detail, nothing on this record indicates that Mr. Everman's claim of illness was not bona fide.

We also must assign weight to the fact that this proceeding was intended to be a test case to determine whether Little Sandy's facility is covered by the Mine Act. On review, Mr. Everman argues, in essence, that other facilities in Kentucky, allegedly similar to his own, are not regulated by MSHA and that he wishes to explore this line of inquiry through cross-examination and the calling of other witnesses. The Secretary has not argued that a continued or reopened hearing would have prejudiced his case. In these circumstances, Little Sandy should be given an appropriate opportunity to develop a complete record to support its position that it is not covered by the Mine Act.

Accordingly, we vacate the judge's decision and remand this matter for proceedings consistent with this decision. Little Sandy is to be allowed to cross-examine the Secretary's witness and to submit additional evidence on the issue of Mine Act coverage involved in this case.2/

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2/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

~318
Distribution

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