

## **Presenting a Case Before an Administrative Law Judge of The Federal Mine Safety and Health Review Commission - Some Thoughts of Administrative Law Judge Richard W. Manning<sup>1</sup>**

There are a wide variety of circumstances that give rise to litigation in civil penalty cases before the Commission. In some cases, the dispute is primarily factual so that credibility determinations must be made by the judge. In other cases, the dispute primarily revolves around the proper interpretation of a safety standard or a provision of the Mine Act. In addition, cases brought by large mine operators represented by experienced counsel present fundamentally different problems for the judge from cases brought by small operators who are representing themselves.

The Commission has one set of procedural rules to deal with all of these types of cases. These rules are quite flexible so that they can be tailored by the judge to fit different types of cases. The hearings are more formal when experienced counsel represents the mine operator and the Solicitor's Office represents MSHA than in cases with a conference and litigation representative and/or a *pro se* operator. These formal, complicated cases can last several days and involve expert witnesses while other cases only take a few hours because the mine operator simply wants to present his position on a single issue, such as the amount of the penalty.

When presenting a case to an administrative law judge, it is important to understand that the judge has specialized knowledge in mine safety and health issues. The litigant must understand, however, that the judge may not have an understanding of how a particular mine is set up or how it operates. Every mine has its own methods of extracting the ore. I have had more than a few cases involving surface metal-nonmetal mines in which I have to ask a company witness to draw a map of the pit and plant on a piece of paper at the hearing because the company did not introduce an exhibit showing the configuration of the facility. The layout of a pit and plant is often critical in resolving the issues raised and, even if it is not as important, it helps the judge visualize the facility. For example, if MSHA cites an operator of an aggregate mine for an unguarded tail pulley, the location of the pulley as it relates to the layout of the plant may determine whether the violation is of a significant and substantial nature. I have had other cases in which I have had to ask a company witness to tell me what product it mines.

When presenting a case to an administrative law judge it is important to understand that your primary job is to present those facts that you believe establish your case. The facts are the key ingredient of any case. In helping to prepare, you can imagine that the case will be presented to a jury. Indeed, in reality you are presenting your case to a jury – the judge is the jury. The Commission judge who is hearing your

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<sup>1</sup> The thoughts presented in this paper are those of Judge Manning and do not necessarily reflect the thoughts of the Commission or other administrative law judges at the Commission.

case will function as a jury when he or she decides whether to believe the testimony of your witnesses or the other party's witnesses. If the judge relies on the evidence you present at the hearing in rendering a decision, then you have done a good job of presenting your case.

If you are a mine operator and you receive a citation that you believe you might want to contest, it is imperative that you start gathering the facts immediately. If it would be helpful, take measurements and photographs right away. Such photos and measurements are much more persuasive at a hearing than photos or measurements that are taken a week before the hearing at the direction of counsel.

When preparing for a case, make a list all of the facts that you believe you need to present to the judge and then decide how you can best offer evidence to support these facts. Obviously, direct evidence is best. Although hearsay is admissible in Commission proceedings, you want to avoid relying on hearsay evidence whenever possible because the judge is unlikely to accord it as much weight as direct evidence.

If you are a mine operator, you should try to develop a theme or story for your presentation. The judge will want to know why this case is being presented to him or her for decision. You can use an opening statement for this purpose. All of your evidence should then be introduced to present the facts to support your thesis that the citation should be vacated or modified. When thinking about your case, try to put yourself in the judge's shoes. What facts would you want to know if you were being asked to decide the case? Try to be as objective and frank with yourself as possible when thinking about this. I generally find that the simplest answer to a question is usually the correct one. In a factually-contested case, if one party's evidence is confusing and difficult to follow while the other side presents evidence that is coherent and logical, I am more likely to credit the coherent evidence. Try to keep your evidence as clear and easy to follow as possible. I realize that when litigating complex cases involving issues such as ventilation plans, this goal will be difficult to achieve. Nevertheless, I believe that taking these steps is the most important task a litigant faces when preparing for trial before a Commission judge. It is worth putting a lot of time and effort into organizing your case so that it can be easily understood by the presiding judge. You do not want the judge to have to think too hard in order to find in your favor.

I have had experienced attorneys for mine operators actually put obstacles in the way rather than presenting facts in an understandable manner so as to clear a path for me to follow. These are not criminal cases. It is not a good strategy for counsel to make the facts confusing or to cloud the issues in the hope that the judge will find the case difficult to understand and decide in your favor on the basis that the Secretary failed to meet her burden of proof. You want to provide a clear path with flashing neon signs pointing the direction that you want the judge to go. In the end, the judge may not necessarily decide in your favor, but he or she will have understood your case.

When presenting your case at the hearing, do not ask a lot of leading questions. Some attorneys ask leading questions if they think they can get away with it. A witness's

testimony is much more persuasive if he is actually testifying rather than the attorney who is questioning him. If the transcript contains a lot of testimony that is critical to a party's case in which the witness is merely replying "yes" to the attorney's questions, I am less likely to give it as much weight, especially if the testimony of the opposing party's witness is forceful and otherwise believable. I have sometimes left a hearing thinking I will decide for one party only to change my mind after I read the transcript. Of course, you need to prepare your witnesses for hearing, especially if they have never testified before. Make it clear that they are to carefully listen to your questions and to answer them as succinctly as possible and then stop talking. You do not want your witnesses second guessing you or trying to figure out where you are going. The same is true when preparing your witnesses for cross-examination.

The direct examination of your witnesses should resemble a conversation. Maintain eye contact with your witness as much as possible. You should know what you want to cover with each witness, but you should not disrupt the flow of the conversation to jump to the next question on your list of questions if the conversation is naturally leading you to other questions you want to ask. Keeping the flow of conversation going makes the testimony more interesting to the judge and it is also more powerful. You can always go back to that other point you want to make. Make sure that your witnesses are not using different names to refer to the same person. If a witness keeps referring to a miner as "junior," for example, make sure that you clear up who that person is. When you think you have finished direct examination of a witness, ask the judge if you can have a moment to review your notes to make sure that you covered everything. You weaken your case if the examination is overly scripted. It is especially important for counsel to listen carefully to the witness's answers. I have had cases where the witness says something that is unexpected but counsel does not notice because he or she is thinking about the next question to be asked. The witness's answer should naturally lead to the next question. When you are changing topics, let the witness and judge know so that they are prepared. In addition, you do not need five witnesses to testify to the same facts. Keep your case succinct and forceful by keeping it as simple and short as possible.

Maps, drawings, electrical schematics, and photographs are very helpful in hearings. It is best to have these prepared before the hearing rather than asking a witness to draw an electrical circuit, for example, while sitting in the witness box. If you want to use a large copy of an exhibit that can be easily seen and drawn on at the hearing, have it on paper that can be folded up. This copy should be a duplicate of the same exhibit that is on normal-sized paper. Do not mount large exhibits because they cannot be easily transported and it is likely that they will have to be cut into pieces. Counsel for the Secretary can use the inspector's notes at the hearing so that the inspector can refer to them to remember measurements he took or to obtain other technical information he may have forgotten. Introducing these notes simply to support his testimony is not very helpful. I will usually admit these notes into evidence as an official MSHA document, but I do not pay any attention to them unless they are used for a specific purpose by the witness. Do not use these notes to guide you through direct examination. This same advice applies to notes that the operator wishes to introduce.

The Secretary often seeks to introduce MSHA accident reports and transcribed miner interviews as evidence at hearing. I often admit them into evidence as official government documents. The Secretary must understand that they are not really evidence that can be used to prove the truth of the matters asserted therein. The Secretary's accident reports simply document the investigation that MSHA conducted and the conclusions it reached. These reports can be helpful as background information but the Secretary should not rely on them to establish her case. Transcribed interviews taken of miners by MSHA investigators are especially problematic. I have had cases in which counsel for the Secretary has attempted to use these interviews as if they were direct testimony presented at the hearing. This deprives counsel for the operator an opportunity to cross-examine the witness. As a consequence, I often do not give them much weight. Another problem is that many of the questions asked of miner witnesses are designed to figure out how to prevent such accidents in the future. The questions are asked in a manner that is eliciting information from the individual along the lines of, "if you knew then what you know now, what would you have done differently?" The questions are not necessarily preceded by such a statement, but that is often implied in the questioning. These kinds of questions can be very helpful in accident investigations, but they are not very useful in litigation involving the validity of a citation or withdrawal order. Using all or part of an interview transcript of a miner who is no longer available must be approached on a case-by-case basis and it would depend on the questions asked of the witness. Statements of miners that are written out by a miner can generally be admitted into evidence, but again it is best if the miner actually testifies at the hearing. The weight I would give such a statement would depend on the circumstances.

Mine operators who represent themselves in civil penalty cases face several obstacles. (Mine operators should think twice about represent themselves in discrimination proceedings.). Unless they are knowledgeable, these representatives often have a difficult time distinguishing between factual evidence and their own unsubstantiated opinions. They often are unprepared for the rigors of a trial. For example, a gravel pit owner may say that the cited unguarded tail pulley does not present a hazard, but he has not thought about how to prove this with objective facts. His testimony is simply that the tail pulley has been in that condition for a long time, nobody has ever been injured by the pulley, and his employees are all his friends so he would never expose them to a hazard. In these types of cases, a judge simply has to be very patient and guide the operator through the proceeding as much as possible, without becoming his advocate. These operators often do not understand that the Mine Act imposes strict liability on mine operators and that there may be a violation of a safety standard even if a serious hazard is not created by the condition. They also do not understand that the safety standards are designed to prevent injury to a miner who happens to be exhibiting ordinary human carelessness at the time.

In the vast majority of hearings, the case is won or lost based on the direct evidence presented by the parties. I have found that mine safety and health cases rarely turn on evidence presented during cross-examination. You can cross-examine witnesses, of course, but you must have an objective in mind. Do not ask open ended questions. I have had cases where the operator's cross-examination actually strengthened the

Secretary's case. That occurred because the operator's counsel simply rehashed the inspector's direct testimony, which gave the inspector the opportunity to clarify a few points he wanted to make.

In conclusion, remember that you are creating a landscape painting for the judge with the facts you present at the hearing. The judge can only consider the facts that are on the painting. The key to a successful trial is to carefully gather the facts and then present them to the judge in a coherent and understandable manner.