

Improving the Efficient Adjudication of Penalty Proceedings Some Thoughts of Administrative Law Judge Richard W. Manning¹

The Federal Mine Safety and Health Review Commission (the “Commission”) is taking several steps to advance the handling of the burgeoning caseload. Most of these cases involve civil penalties proposed by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) against mine operators. The Commission is in the process of hiring more judges, law clerks, and staff so that the cases can be adjudicated in a timely manner. As discussed below, additional steps are being taken or may be considered in the future to improve the efficiency of the adjudication process.

A. Some Steps Being Taken by the Commission to Advance Settlements

The vast majority of civil penalty cases settle. In Fiscal Year 2009, the settlement rate was 93%. So far in Fiscal Year 2010, the settlement rate has been about 96%. The Commission has taken a number of administrative steps to move civil penalty cases along more quickly. First, the Commission hired temporary contractors to assist in getting cases assigned to individual judges. Second, the chief judge is holding all pre-penalty contest cases until penalty cases are filed, unless the mine operator asks for an expedited hearing. Once the penalty cases are ready for assignment, the cases are all consolidated and assigned to a judge. This procedure saves time and simplifies the process.

In addition, the Commission will be implementing an interim procedural rule to advance the settlement process. Under section 110(k) of the Mine Act, 30 U.S.C. 820(k), a proposed civil penalty that has been contested before the Commission may be settled only with the approval of the Commission. Under the Commission’s current practice, a party submits to a Commission administrative law judge a motion to approve a penalty settlement that includes for each violation the amount of the penalty proposed by the Secretary of Labor, the amount of the penalty agreed to in settlement, and facts in support of the penalty agreed to by the parties. Procedural Rule 31(b). A Commission judge considers the motion and evaluates the penalty agreed to by the parties based on the criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). If the judge concludes that the settlement is consistent with the statutory criteria, the judge issues an order approving the settlement and setting forth the reasons for approval.

The Commission will be issuing an interim rule in the near future, with notice and comment to follow, that will provide for the electronic filing of settlement proposals, except for discrimination proceedings arising under section 105(c) of the Mine Act, 30 U.S.C. 815(c), or proceedings against individuals pursuant to section 110(c) of the Mine Act, 30 U.S.C. § 820(c). First, the interim rule will require that a party filing a motion to approve a penalty settlement submit a proposed order approving settlement along with the motion. Second, it will require that the filing party submit the motion and proposed order electronically. The basic requirements for content of a motion to approve

¹ 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.

settlement will still apply in that a moving party must include in the motion to approve settlement a list of the citations and orders involved, the amount of the proposed penalty for each citation, the amount of the penalty agreed to in settlement for each citation, and facts that support the penalty agreed to by the parties. The interim rule will include a new requirement that the party filing the motion must certify that the opposing party has reviewed the motion and has authorized the filing party to represent that the opposing party consents to the granting of the motion and the entry of the proposed order approving settlement.

The content of orders approving settlement will vary depending upon the particular facts and circumstances of each case. The Commission will make sample forms for proposed orders approving settlement available on the Commission's website (<http://www.fmshrc.gov>).

In all penalty proceedings, except discrimination and section 110(c) proceedings, parties will file any settlement motion electronically by attaching electronic copies of the motion and proposed order to an email. The email addresses to which settlement motions must be sent and instructions for filing will be set forth on the Commission's website. The Commission expects that the electronic submission of such settlement motions with proposed orders will significantly reduce the length of time it takes for the Commission to dispose of settlement motions.

Any signature line set forth within a motion to approve settlement submitted electronically will be required to include the notation "/s/" followed by the typewritten name of the party or representative of the party filing the document. The Commission shall consider such a representation of the signature to be the original signature of the representative for all purposes unless the party representative shows that such representation of the signature was unauthorized. *See* Procedural Rule 6. Although the interim rule requires electronic filing, the Commission may allow a party to file non-electronically with the permission of the judge.

The interim rule will require that a copy of a motion and proposed order be served on the opposing party as expeditiously as possible. Some parties may not have the capability of being served the motion and proposed order by email, facsimile transmission, or commercial delivery. Under such circumstances, the filing party may serve the motion and proposed order on the opposing party by mail.

B. Some Steps That the Commission Could Take to Advance Settlements

Under current practice, the parties may settle a case or group of cases with or without the assistance of a judge or other Commission official. The procedural rules of the Occupational Safety and Health Review Commission ("OSHRC") set forth circumstances under which a case is assigned to a judge for settlement proceedings before a hearing is scheduled. *See* 29 C.F.R. § 2200.120(b) (a copy of these rules is attached). If the aggregate amount of penalties sought by the Secretary of Labor is \$100,000 or greater in a case or group of cases, OSHRC's chief administrative law judge

assigns the case to an administrative law judge for the purpose of holding a settlement conference. The judge can hold the settlement conference by telephone but most settlement conferences are held in person over a one-to-two day period. OSHRC judges require that the party's representative "be accompanied by an official of the party having full settlement authority on behalf of the party." 29 C.F.R. § 2200.120(d)(2).

The judge issues a discovery order and schedules the settlement conference. All statements made and information presented at the settlement conferences are kept strictly confidential. The settlement judge meets with the parties together and can meet with them privately in an attempt to facilitate settlement. The judge may "suggest privately to each attorney or other representative of a party what concessions his or her client should consider and assess privately with each attorney or other representative the reasonableness of the party's case or settlement position." 29 C.F.R. § 2200.120(c)(4). If the case does not settle within 60 days of assignment to a settlement judge, the settlement judge so notifies the chief administrative law judge and the case is assigned to a different judge for hearing. In the alternative, the chief judge can grant the parties an additional 30 days to attempt to settle the case.

The experience of OSHRC judges has varied. Some OSHRC judges are very assertive and basically tell the parties that they are not leaving the settlement conference until the case settles. Other judges use the settlement conference to encourage the parties to discuss the issues and to try to bring the parties together when possible. Discovery will not have been fully completed at the time of the conference. The parties often represent to the judge that they will be able to prove a particular fact, but the judge is not in a position to know if that is really true. That fact makes it difficult for the judge to suggest settlement terms. About half of the cases referred to a settlement judge at OSHRC are settled. If the parties have already staked their positions, the case usually does not settle and the case proceeds to hearing.

The Commission has not adopted a rule similar to OSHRC's rule. Do you think that such a rule would be helpful? There are currently before Commission judges large groups of cases involving the same mine operator. These cases are typically assigned to several judges. One approach could be to assign all of the cases for a particular operator to a single judge. The judge could then attempt to facilitate a global settlement of all the cases by phone or during a calendar call. Any cases that do not settle could then be set for a single hearing term.

C. Some Steps That the Commission Could Take to Simplify Hearings

Many of the cases that do proceed to hearing involve small mine operators or disputes of fact rather than complex issues of law. The procedural rules of OSHRC set forth circumstances under which a case is set for simplified proceedings rather than a conventional hearing. *See* 29 C.F.R. § 2200.200 (a copy of these rules is attached). Under simplified proceedings, a complaint and answer are not required. Instead, the parties frame the issues during a conference call held by the judge. At OSHRC, the chief judge refers a case for a simplified proceeding if the case has one or more of the

following characteristics: (1) relatively few citations, (2) an aggregate penalty of not more than \$20,000, (3) no allegations of willfulness [unwarrantable failure in our cases], (4) not involving a fatality, (5) a hearing that is expected to take less than 2 days, or (5) a small employer whether appearing *pro se* or represented by counsel. 29 C.F.R. § 2200.202(a). A party may ask that a case be moved out of simplified proceedings and the judge may also do so on his own motion.

If a case is heard under OSHRC's simplified proceedings, each party must disclose certain prescribed information and documents to the other party, but otherwise there is usually no discovery. After these documents have been exchanged, the judge holds a prehearing conference to discuss the case and narrow the issues. The hearing is held as soon as practicable after the prehearing conference. Post-hearing briefs are generally not permitted. The judge issues a bench decision or a written decision within 45 days after the hearing.

OSHRC's rules of procedure for conventional hearings are more formal than the Commission's rules. For example, OSHRC has incorporated the Federal Rules of Evidence into its rules. 29 C.F.R. § 2200.71. Thus, different rules for simplified proceedings were necessary. At OSHRC, simplified proceedings have reduced the cost of litigation for the parties, especially for respondents. In addition, OSHRC reports that in 2009, the average time between the assignment of a case to a judge and the decision after hearing was 251 days in a conventional case, while for cases handled under its simplified proceeding rule, that figure was about 199 days. Many of these cases also settle, of course, but the time saving is not nearly so great.

Should the Commission adopt a procedural rule that provides for simplified proceedings? It may be possible for Commission judges to hold simplified proceedings under our existing rules. The Commission's discovery rules may need to be modified to clearly provide judges with the authority to limit or cut off discovery. 29 C.F.R. § 2700.56. The Commission could institute a procedural rule requiring the parties to exchange certain information and documents at the onset of the case. The Commission could also eliminate the need for the respondent to file an answer in penalty cases. The respondent could delineate its defenses during an initial conference call. The Commission's procedural rules are more flexible than OSHRC's so many of the benefits of simplified proceedings may be capable of being implemented without the need for separate procedural rules for simplified proceedings.

Requests for expedited hearing have increased at the Commission in the last few years. In fiscal years 2007 and 2008, the Commission received about 45 requests for expedited consideration each year. In fiscal year 2009, the figure rose to 91. In the first five months of this fiscal year, the Commission has received 61 requests for expedition. If such requests continue at this rate, the Commission will receive about 146 requests for expedited hearing this fiscal year. Some of the suggested procedures set forth above for simplified cases may also be useful in expediting other cases by limiting discovery and cutting down on unnecessary pleadings and other filings.