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SOL (MSHA) V. SOUTHERN OHIO COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceeding Docket No. LAKE 80-142 A/O No. 33-02308-03050
v.	Raccoon No. 3 Mine
SOUTHERN OHIO COAL COMPANY, RESPONDENT	

DECISION

After remand from the Court of Appeals and the Commission, this matter is before me on the parties' waiver of hearing and cross motions for summary decision.(FOOTNOTE 1) The dispositive issue is narrow. The operator claims that because the Court of Appeals decision was "clearly erroneous" I have jurisdiction and authority to consider de novo the question of law decided adversely to the mining industry in UMW v. FMSHRC, 671 F.2d 615 (D.C. Cir.), cert. denied, _____ U.S. _____, October 12, 1982. The Secretary and the Union intervenor contend that "law of the case" principles preclude reconsideration of the question adjudicated by the Court of Appeals. I agree.

Applicable Principle

Law of the case principles are designed to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. They are based on the desire to protect both the judiciary and the parties "against the burdens of repeated reargument by indefatigable diehards." Wright-Miller-Cooper, Federal Practice and Procedure 4478.

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Although a common label is used, at least four distinct sets of circumstances are embraced in "law of the case principles." Id. The only one with which we are concerned is the duty of a trial tribunal, including an administrative agency, to honor the final decision of a reviewing court on a question of statutory interpretation.

A decision by an appellate court is considered final for purposes of establishing the law of the case if it represents the completion of all steps in the adjudication of the issue by the court short of any steps needed to effect execution or enforcement of the court's decision. Thus, a ruling is final for purposes of applying the law of the case if it is intended to put at rest a question of statutory interpretation. Wright-Miller-Cooper, supra; Restatement of Judgments (Second) 13 (1982). Consequently, where a federal court of appeals enunciates a rule of law to be applied in the case at bar it not only establishes a precedent for subsequent cases under the doctrine of stare decisis, but the rule of law which other tribunals owing obedience to it must apply to the same issues in subsequent proceedings in that case. 1B Moore's Federal Practice Par. 0.040(1), 0.404(10).

I

The claim that I have discretion to "start afresh" to determine the issue of statutory construction adjudicated by the court of appeals is clearly incorrect. It is "familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid to rest." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 140 (1940).

Even if I disagreed with the court of appeals decision, I am not, as the trial tribunal, at liberty to sit as a reviewing authority on the court's decision or on the wisdom of the Commission's instructions to apply the court's decision in further proceedings in this case. Hayes v. Thompson, 637 F.2d 483, 487 (7th Cir. 1980); Morrow v. Dillard, 580 F.2d 1284, 1289 (5th Cir. 1978); U.S. v. Turtle Mtn. Band of Chippawa Indians, 612 F.2d 517, 520 (Ct. Clms. 1979).

The Supreme Court stated the applicable rule at an early date and has followed it ever since:

> Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must

> carry it into execution, according to the mandate. They cannot vary it or examine it for any other purpose than execution; or vary it or examine it for any other purpose than execution; or give any other or further relief; or review upon any matter decided on appeal for error apparent; nor intermeddle with it, further than to settle so much as has been remanded. Ex parte Sibbald v. United States, 12 Pet. 488, 492 (1838), 9 L. ed 1167.

Accord: Sanford Fork & Tool Company, 160 U.S. 247, 255 (1895); FCC v. Pottsville Broadcasting Co., supra; Briggs v. Pennsylvania Railroad Co., 334 U.S. 304, 306 (1948); Vendo Co. v. Lektro-Vend Corp., 434 U.S. 424, 427-428 (1978).

In this respect, law of the case doctrine mirrors the doctrine of collateral estoppel. See United States v. Moser, 266 U.S. 236, 242 (1924); Montana v. United States, 440 U.S. 147, 162 (1979). [A fact, question or right distinctly adjudged by an appellate court cannot be disputed in subsequent proceedings even though the determination was reached upon an erroneous view or by an erroneous application of the law.] Compare SEC v. Chenery Corp., 332 U.S. 194, 200-201 (1947); FCC v. Pottsville Broadcasting Co., supra, 309 U.S. 145. [On remand Commission is bound to act on, respect and follow the court's determination of a question of law even though agency retains authority, after correcting the legal error, to reach same result if it can show that result is in accord with the court's prior ruling and its legislative mandate.]

I find there is no dispute as to the meaning or scope of the appellate decision; that it is the law of this case; and that under the orders of remand from both the court and the Commission I am compelled to apply the Court of Appeals holding to further proceedings in this case.

II

This is particularly so since the only basis for the extraordinary relief requested is the time-worn assertion that Congressman Perkins's addendum to the Conference Committee Report is dispositive of the issue of liability for walkaround compensation--an assertion which the Court of Appeals thoroughly considered and unequivocally rejected.

It follows that the trial judge in this proceeding has no discretion to effect a de novo review of the correctness or propriety of the appellate decision or of the order of remand, and that any attempt on his part to do so would be an injudicious usurpation of an authority possessed only by the Supreme Court.

Socco's attempt to redact the instructions which accompanied the orders of remand is hardly reassuring. As the record shows, this matter was not remanded to the trial judge to do with as he pleases. Both orders made clear that this was not a simple remand but a "remand for further proceedings consistent with the court's decision in UMWA v. FMSHRC, 671 F.2d 615." Since Socco did not oppose entry of either order of remand or the accompanying instructions, it hardly has standing at this late date to complain of the terms.

I find farfetched the claim that the Court of Appeals acted in excess of its jurisdiction and authority in remanding the matter with directions to dispose of the case in a manner "not inconsistent with its decision" and adjudication in UMWA v. FMSHRC, supra. The Judicial Code as well as the Mine Safety Law and the general equity powers of the federal court provide ample authority for the court's remand order. 28 U.S.C. 2106; 30 U.S.C. 816(a)(1). See Ford Motor Co. v. NLRB, 305 U.S. 364, 372-375 (1939).

Furthermore, section 113(d)(2)(C) of the Act specifically authorizes the Commission to remand a case to the administrative law judge for such "further proceedings as it may direct." The Commission's direction was to dispose of this case in a manner "consistent with the court's order." 4 FMSHRC 856 (1982).

Despite this clear and unequivocal directive, the operator with almost casual insouciance urges the trial judge engage in what is tantamount to an act of civil disobedience. I cannot in all good conscience accept the operator's advocacy of a position so subversive of the judicial process. I firmly decline, therefore, the invitation to emasculate judicial review and flout the deference and respect due the law, the Court and the Commission.

The operator cites no case in which a trial or other inferior tribunal, including an administrative agency, was ever found justified in ignoring the law of the case simply because the agency, without any interim change in the facts or the law, believed the court's adjudication to be erroneous. The leading case to the contrary is City of Cleveland, Ohio v. Federal Power Com'n, 561 F.2d 344, 346 (D.C. Cir. 1977) in which the court held that:

> The decision of a federal appellate court establishes the law binding further action in the litigation by

> another body subject to its authority. The latter is without authority to do anything that is contrary to either the letter or the spirit of the mandate construed in the light of the opinion of the court deciding the case, and the higher tribunal is amply armed to rectify any deviation through the process of mandamus ... These principles, so familiar within the heirarchy of the judicial benches, indulge no exception for review of administrative agencies.

Accord: American Trucking Ass'n v. ICC, 669 F.2d 957 (5th Cir. 1982); Yablonski v. UMWA, 454 F.2d 1036, 1038 (D.C. Cir. 1971); Allegheny General Hospital v. NLRB, 608 F.2d 965, 970 (3rd Cir. 1979).

In Northern Helex Co. v. United States, Chief Judge Friedman had occasion to explore in depth the consequences of a trial judge's "blatant disregard" of his obligation to carry out the mandate of an appellate court. He concluded a trial judge who fails or refuses to comply with the clear mandate of an appellate court commits a serious offense against the judicial code. 634 F.2d 557, 560-561 (Ct. Clms. 1980). Thus, the law of the case is not a mere rule of comity or practice. It establishes the substantive law which lower courts and administrative agencies must apply to the same issues in subsequent proceedings in the same case. Morrow v. Dillard, supra, 580 F.2d 1289; City of Cleveland, Ohio v. FPC, supra; Medford v. Gardner, 383 F.2d 748, 758-759 (6th Cir. 1967).

Consequently, once a case has been decided on appeal, the rule adopted is to be applied, right or wrong, absent exceptional circumstances, in the ultimate disposition of the lawsuit. Schwartz v. NMS Industries, Inc., 575 F.2d 553, 554 (5th Cir. 1978). The exceptional circumstances are that (1) the evidence on a subsequent trial is substantially different, (2) controlling authority has since made a contrary decision on the law applicable to the issues previously adjudicated, or (3) the decision was clearly erroneous and its application would work a manifest injustice. White v. Murtha, 377 F.2d 428, 432 (5th Cir. 1967); EEOC v. Intern. Longshoremen's Ass'n, 623 F.2d 1054, 1058 (5th Cir. 1980, cert. denied, 451 U.S. 917 (1981).

The operator does not contend that exceptions 1 or 2 apply or that failure to reconsider the question of 103(f) coverage in this proceeding will result in any manifest

injustice.(FOOTNOTE 2) With respect to the third exception, I find mere doubt that the decision of the Court of Appeals was correct is no basis for concluding that the decision was clearly erroneous. In the absence of a clear, as distinguished from an arguable or debatable, conviction of legal error by the Court itself, law of the case principles preclude reopening an adjudicated question of law merely because of doubt as to the correctness of the original decision. Zdanok v. Glidden Co., 327 F.2d 944, 952-953 (2d Cir.), cert. denied, 377 U.S. 934 (1964); U.S. v. Turtle Mtn. Band of Chippewa Indians, supra, 612 F.2d 521. Consequently, the appellate tribunal itself will decline to reconsider its prior decision in the same case, unless there is a strong showing of clear error such as failure to consider a controlling precedent by the Supreme Court. Morrow v. Dillard, supra, 580 F.2d 1292.

III

The claim that clerical errors in the original citation or the 10 week delay in its issuance are fatal to its validity is without merit.

The operator originally chose to waive an evidentiary hearing and to submit its contest on a motion to dismiss or for summary decision. Until after remand, it never claimed there was any issue of fact that depended upon the fading memories of witnesses. Further, it has failed to disclose what those facts might be. As the operator has conceded this is not a case that involved a complex factual pattern or that required evaluation of the credibility of witnesses or the resolution of direct or tangential conflicts in oral or documentary evidence.

The fact that the operator chose not to challenge the citation until 16 weeks after the penalty was proposed rather than 30 days after issuance is indicative of the fact that its recently alleged concern with delay and "reasonable promptness" is more an argument of expedience than enlightment. I find the operator has failed to show that its right to a fair hearing on the issues it chose to contest was in any way prejudiced by the delay in issuance of the citation.

Finally, of course, I note that the legislative history of section 104(a) states that "issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action." H. Rpt. 95-181, 95th Cong., 1st Sess. 30 (1977).

Findings

The premises considered I find the violation charged did, in fact, occur. After considering the statutory criteria in mitigation including the operator's good faith reliance on Congressman Perkins's addendum to the Conference Report, I conclude the amount of the penalty warranted is $150.

Order

Accordingly, it is ORDERED that the citation contested be, and hereby is AFFIRMED. It is FURTHER ORDERED that for the violation found the operator pay a penalty of $150 on or before Friday, April 8, 1983 and that subject to payment the captioned matter be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

FOOTNOTES START HERE-

1 The chronology of events leading to remand of the matter to the original trial judge, his recusal, and reassignment of the matter to this judge is set forth in the parties briefs and the record after remand.

2 To reconsider in this case would put this operator in a preferred position since the Court of Appeals decision has, pursuant to the Commission's orders of remand, been applied to all other operators similarly situated as a result of the Court's reversal of the Commission's Helen Mining decision, 1 FMSHRC 1796 (1979). Further, in three other proceedings arising subsequent to this one Socco and its affiliated corporations seek to relitigate in other circuits the question decided by the Court of Appeals in this case. Other operators are proceeding along parallel lines in what appears to be massive resistence by the industry to the Court of Appeals decision.