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SOL (MSHA) V. CARBON 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: WEST 83-106 A/O No: 48-01186-03031
v.	
CARBON COUNTY COAL COMPANY, RESPONDENT	Carbon Mine

RULING ON MOTION AFTER REMAND FROM THE COMMISSION
AND RECONSIDERATION

The Commission has remanded this case to me for reconsideration of Respondent's Motion for Summary Decision. The Commission did not give instructions as to what I should do subsequent to reconsideration of the motion. I am therefore, going to treat the matter as though I were ruling on it for the first time. For the reasons stated hereinafter, I will DENY respondent's motion for summary judgement and will anticipate going to trial in this case. (FOOTNOTE a1) If the respondent feels it to be worth while, it can again petition the Commission for interlocutory review and if the petition is granted I will again stay with the proceedings.

The holding in Zeigler Coal Company vs. Kleppe, 536 Fed.2d. 398 (D.C.Cir.1976) is that the violation of a non-controversial ventilation plan is the equivalent of a violation of a mandatory standard. The terms of the ventilation plan involved in that case were not in dispute. The Court went on however, to discuss hypothetical plans which might contain controversial requirements. The Court said for example at Page 406-407:

> The statute makes clear that the ventilation plan is not formulated by the Secretary, but is "adopted by the operator." While the plan must be approved by the Secretary's representative who may

> on that account have some significant leverage in determining its contents, it does not follow that he has anything close to unrestrained power to impose terms. For even where the agency representative is adamant in his insistence that certain conditions be included, the operator retains the option to refuse to adopt the plan in the form required. Were the statute not clear enough on its face, the IBMA's recent decision in Bishop Coal Company establishes beyond doubt that adoption of the plan by the operator is an essential prerequisite to the enforcement of any of its terms.
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> The agency's recourse to such a refusal to adopt a particular plan appears to be invocation of the civil and criminal penalties of section 109, which require an opportunity for public hearing and, ultimately, appeal to the courts. At such a hearing, the operator may offer argument as to why certain terms sought to be included are not proper subjects for coverage in the plan. Because we believe that the statute offers sound basis for narrowly circumscribing the subject matter of ventilation plans, we conclude that this opportunity for review is a substantial safeguard against significant circumvention of the section 101 procedures.

The last paragraph quoted above describes a situation very similar to what occurred in the instant Carbon County case. The procedire in the instant case is succintly described on pages 2 and 3 of the Commission's decision as follows:

> The Carbon No. 1 Mine is located in MSHA Coal Mine Safety and Health District 9, headquartered in Denver, Colorado. District 9 had published "guidelines" regarding the contents of ventilation system and methane and dust control plans. The District 9 guideline regarding the amount of air to be made available to auxiliary exhaust fans stated "]T[he volume of intake air delivered to the fan prior to the fan being started shall be greater than the free discharge capacity of the can." The District 9 guideline essentially restated MSHA's national guideline regarding the amount of air to be made available to exhaust fans. The national guideline stated in part: "]T]he volume of positive intake air current available . . . shall be greater than the free discharge capacity of the fan." The legal effect of the District 9 guideline, and of MSHA's possible reliance upon it during the plan review process, are at issue in this case.

> By August 1981, negotiations over the free discharge capacity requirement reached an impasse, and the parties were unable to agree on a plan requirement governing the amount of air to be made available to the auxiliary fans. In a letter dated August 21, 1981, MSHA revoked its approval of Carbon County's plan dated August 25, 1980, and stated that it would not approve Carbon County's plan unless the plan contained the free discharge capacity provision. After MSHA's revocation of approval of Carbon County's plan, Carbon County failed to submit a plan containing the provision sought by MSHA and continued to operate the mine. As a result, MSHA issued a citation and withdrawal order to Carbon County, under sections 104(a) and (b) of the Mine Act, respectively, for operating without an approved ventilation plan. The violation was abated when MSHA approved, and Carbon County adopted, a plan which contained the free discharge capacity requirement. MSHA then sought a civil penalty for the alleged violation.

On Page 407, the Zeigler court stated that the ventilation plan "was not to be used to impose general requirements of a variety well suited to all or nearly all coal mines, but rather to assure there is a comprehensive scheme for realization of the statutory goals in the particular instance of each mine." This is the language principally relied on by respondent. As I understand respondent's position, inasmuch as MSHA is following a guideline which contains a requirement that is not a mandatory standard, it must be following that guideline universally in apparent violation of the language in the Zeigler opinion. As to the guidelines themselves MSHA has habitually instructed its district offices and inspectors by the various Cook, and Crawford memorandums as well as by the inspection manuals. This Commission has never felt that it or the operators were bound by such guidelines and many of them have been either set aside or ignored by the Commission and its judges. If this case ever comes to trial I may decide that the guideline in question is invalid and that the proper amount of air to be supplied at the face must exceed the capacity of the exhaust fan if the tubing fails at the worst possible place. In all likelihood such a requirement would not be "suited to all or nearly all coal mines" and would not contradict the court's dicta. In fact any quantity of air that I might decide upon, unless I uphold the MSHA guideline in its entirety, would probably not be a quantity of air suited to all or nearly all mines. But if on the other hand, I find, as a matter of engineering fact, that in order to avoid recirculation as prohibited by a mandatory standard, it is necessary to have the air at the face exceed the free

discharge capacity of the exhaust fan in any mine, then the guideline should apply to all mines and the fact that the provision is not a specific mandatory standard and the quoted language of the Ziegler case should not be allowed to stand in the way of mine safety.

I find that there are unresolved factual issues necessary for the resolution of this case and that a summary decision is not appropriate. The Motion is accordingly DENIED.

Charles C. Moore, Jr.
Administrative Law Judge

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~FOOTNOTE_ONE
a1. Certain language in the Commission's opinion indicates to me that the Commission wanted me to grant the Motion for Summary Judgement in favor of Carbon County Coal. But the Commission had before it all the facts that I have before me and if it wanted the motion granted it could have done so itself or it could have ordered me to grant it.