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PEABODY COAL v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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Falls Church, Virginia 22041

PEABODY COAL COMPANY, CONTESTANT	CONTEST PROCEEDINGS
v.	Docket No. KENT 91-179-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Citation No. 3419830; 2/11/91 Martwick UG Mine Mine ID 15-14074
	Docket No. KENT 91-185-R Citation No. 3419831; 2/21/91
	Camp No. 2 Mine Mine ID 15-02705

DECISION

Appearances: David R. Joest, Esq., Peabody Coal Company, Henderson, Kentucky, for the Contestant; W. F. Taylor, Esq. Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Respondent.

Before: Judge Melick

These expedited Contest Proceedings were filed by the Peabody Coal Company (Peabody) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the "Act," to challenge two citations issued by the Secretary of Labor alleging violations of the mandatory standard at 30 C.F.R. 75.316 for operating the cited mines without approved ventilation plans. (Footnote 1) The citations were taken to

obtain review of the disapproval by the Federal Mine Safety and Health Administration (MSHA) District Manager of ventilation plans submitted by Peabody. The underlying dispute involves the ventilation of "deep cuts" of up to 34 feet during the roof bolting cycle of the mining process. In particular MSHA is seeking in these ventilation plans a provision requiring that during the roof bolting cycle line brattice will be maintained to the second row of roof bolts located outby the working face and with a minimum of 3000 c.f.m. of air behind the line brattice. A diagram of the proposed requirement is displayed in Contestant's Exhibit Q at pages 23 and 24 and attached hereto as Appendices A and B respectively. These provisions will hereafter be noted as the "roof bolting ventilation requirement".

In challenging the citations at bar Peabody has maintained that the roof bolting ventilation requirement was not mine specific to the particular conditions of the subject mines but was of such a general nature and was applied generally to all mines throughout the MSHA district without consideration of specific mine conditions so as to be subject to the rulemaking process of mandatory safety standards--and was therefore improperly imposed in the ventilation plan approval process.

This issue was decided in a bench decision at bifurcated hearings in these cases and is set forth below with only non-substantives changes:

> JUDGE MELICK: I am prepared to rule on the issue before me now. Let me just give some background of the law as it relates to the ventilation plan approval process.

The institution of a ventilation, methane and dust control plan through the process of Secretarial approval and operator adoption is set forth in Section 303 of the Act and under 30 C.F.R. 316 Section 75.316, which essentially reiterates the provisions of the Act. The purpose of the approval-adoption procedure is to provide a plan whose provisions are effective and suitable to the conditions and mining system of a particular mine. Once a plan is approved and adopted, the provisions of the plan are enforceable at the mine as though they were statutory safety standards. The authority for that proposition is of course Zeigler Coal Company v. Kleppe, 536 F.2d 398, (D.C. Cir, 1976).

The bilateral approval-adoption process which supplements the Acts rulemaking procedures involves consultation and negotiation between MSHA and only the affected operator, whereas generally applicable standards are the product of notice and comment rulemaking pursuant to Section 101 of the Act. The scope of a mine-specific plan is restricted to the mine in which the plan will be implemented, whereas a rulemaking safety or health standard applies across-the-board to all affected mines.

In the Zeigler case, the court held that the approval-adoption procedure is not to be used by the Goverment to impose general requirements of a variety well-suited to all or nearly all coal mines. It upheld the operator's right to contest MSHA's requirement for a plan provision that relates not to the particular circumstances of its mine but, rather, imposes a provision of a general nature which should be addressed and formulated in rulemaking proceedings.

In the Carbon County Coal Company decisions of the Commission, 6 FMSHRC 1123 in 1984, and 7 FMSHRC 1368 in 1985, the Commission found the Zeigler analysis to be "persuasive and compelling" and held that the provisions of 30 C.F.R. Section 75.316 do not permit MSHA to impose, as a condition of approving an operator's ventilation plan, a general rule applicable to all mines.

The specific issue then before me at this time is whether the ventilation plan provisions that are now at issue regarding the ventilation of deep cuts at the Martwick and Camp Number 2 Mines are specific to the particular conditions of the subject mines, or whether those provisions are of such a general nature as to be subject to the rulemaking process of mandatory safety standards and therefore ought not to be imposed through

the ventilation plan approval process. I am persuaded by the evidence in this case presented today that MSHA's insistance upon the inclusion of these particular ventilation requirements, that is the extension of line brattice and a certain minimum ventilating air in areas of deep cuts during the roof bolting cycle at the Martwick and the Camp Number 2 Mines is not a general requirement subject to the rulemaking procedures but rather is mine specific. The testimony of all the MSHA witnesses as well as the testimony of Martiwick mine superintendent, Mr. Jernigan, supports this position.

The relevant MSHA witnesses detailed a number of specific criteria that were in fact, and presumably will continue to be, examined on a mine-by-mine basis to resolve whether or not these particular requirements are going to be needed in a ventilation plan. I find Mr. Jernigan's corroborating testimony particularly compelling in this case that he was told by Mr. Casteel [MSHA Chief of Engineering Services] and Mr. Stanley [MSHA Ventilation Specialist] that the reason for the new requirements implemented at the Martwick Mine was its high methane liberation and that mines with deep cuts were being examined on a mine-by-mine basis. This conclusion that this is a mine specific requirement is further supported by the evidence that two mines within MSHA District 10 having comparatively low methane liberation have not been required to incorporate in their plans the new provisions that have been required at the Martwick and Camp No. 2 Mines in these cases, and they apparently will not be required to incorporate those provisions in their current plans now under review.

So within the framework of that evidence I have no difficulty concluding that the provisions at issue here are mine specific and not generally applicable to all mines either in MSHA District 10 or generally applicable to all other mines. I would comment with respect to the number of operator witnesses who testified of having no recollection or having a different construction or other interpretation of what may have been said at the MSHA-Peabody meetings but I discount that testimony in light of Mr. Jernigan's testimony in particular. Apparently there may have been semantical problems, maybe people heard what they wanted to hear and did not hear what was actually spoken. There may not have been as clear an understanding during these meetings but I have no difficulty concluding as I have concluded.

> Now, I would like the parties to meet further to try to
> Now, I would like the parties to meet further to try to resolve this problem either tonight and/or before commencing trial tommorrow. I don't believe that, particularly based upon the preliminary discussions this morning and what counsel came back to me with, that Peabody has really been seriously forthcoming with negotiations on resolution of this problem. Maybe now based upon this preliminary ruling a more serious consideration can be given to this. I will certainly consider that in evaluating whether there have been good faith negotiations which will be the next issue to be reached tomorrow morning. So I would ask counsel to get together and arrange for continuing discussions. We will commence back here at least initially in this courtroom. We may get another courtroom with better ventilation, but we'll initially meet here at 9 o'clock tomorrow morning. So that concludes today's proceedings.

Under the Carbon County Coal Company, 7 FMSHRC 1367 (1985), decision, MSHA and the mine operator are under a duty to "negotiate in good faith and for a reasonable period concerning a disputed provision" in a ventilation plan. The Secretary maintains in this regard that not only did Peabody fail to negotiate in good faith but that Peabody failed to negotiate at all.

It is clear from this record that Peabody has maintained from the beginning of this controversy that the proposed changes could not be imposed by the ventilation plan approval process without an applicable mandatory standard. I believe that this position was based upon good faith reliance on a decision of a Commission Administrative Law Judge holding that similar proposed provisions in a ventilation plan were, under the circumstances of that case, not proven to be mine specific but rather were shown to have been generally applicable and were therefore subject to the rulemaking process of mandatory standards. See Peabody Coal Company v. Secretary, 10 FMSHRC 12 (1988).

However good faith reliance on a colorable legal position must be distinguished from good faith negotiations. From the record in this case thus far it is apparent that Peabody has been relying upon this position as a basis for not negotiating regarding the specific underlying safety issue. It is therefore clearly premature for the Commission to intervene in the approval-adoption process. See Carbon County Coal Company, supra.; Secretary of Labor v. Penn Allegh Coal Company 3 FMSHRC 2767 (1981); and Bishop

Coal Company, 5 IBMA 231, 1 MSHC 1367 (1975). The citations at bar must accordingly be affirmed and the Contests of those citations dismissed.

Gary Melick
Administrative Law Judge

Footnote statrs here:-

1. Citation No. 3419830 reads as follows:

The mine is presently operating without an approved ventilation. [sic] Plans which were submitted December 28, 1990, January 10, 1991, and February 7, 1991, were considered to be not suitable for approval. Written notification from the District Manager of MSHA.

District 10 was mailed to the operator stating the changes needed in the plan. These were mailed January 10, 1991, and January 30, 1991, as of this of time a suitable plan has not been submitted.

Citation No. 3419831 reads as follows:

The mine is presently operating without an approved ventilation plan. Plans which were submitted November 31, 1990, January 4, 1991, February 1, 1991 and February 19, 1991, were considered to be not suitable for approval. Written notification from the District Manager of MSHA District 10 was mailed to the operator stating the changes needed in the plan. These were mailed December 1990, January 14, 1991. February 2, 1991, and telephone conversations were held with the operator agents as meeting concerning the plan was held in the MSHA office February 19, 1990.

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APPENDIX A

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APPENDIX B