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MSHA V. CAPITOL AGGREGATES
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
WASHINGTON, D.C. 20006
May 23, 1980

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket Nos. DENV 79-163-PM
 DENV 79-240-PM
CAPITOL AGGREGATES, INC.

DECISION

The question in this case is whether the administrative law judge had authority to stay the effect of and reconsider his final decision. We hold that he did not.

On January 8 and 9, 1980, an evidentiary hearing was held before an administrative law judge. At the end of the hearing, the judge ordered the parties to file any post-hearing briefs within thirty days after receipt of the transcript. The transcript was received by the judge on February 8. When, after two months had passed and the parties had still not filed briefs, the judge transmitted his decision to the Executive Director, who promptly issued it on April 14.

The judge was later informed that, although the parties had ordered transcript copies from the reporting company, neither party had received them. On April 22, the judge issued an order purporting to stay the effective date of his April 14 decision until he had received affidavits from the parties and a statement from the reporting company, and, possibly, until he had considered the parties' briefs on the merits. The judge was careful to caution the parties that he may lack the authority to issue such a stay. After receiving affidavits of counsel and a statement from the reporting company, the judge announced that his stay would remain in effect until he had an opportunity to study the briefs on the merits. He then set a briefing

schedule and suggested that the parties direct their arguments to his April 14 decision.

On May 14, the thirtieth day after the issuance of the judge's decision, Capitol Aggregates filed a petition for discretionary review of the judge's decision; the petition was filed to protect its right to discretionary Commission review if the judge lacked the power to stay his decision. On that same day, the Commission directed review of the judge's decision on its own motion; the issues for review included whether the judge had the authority to stay the effect of and reconsider his decision. On May 20, 1980, the Petition for discretionary review, which raises issues concerning the correctness of the judge's April 14 decision, was granted.

The judge's decision of April 14 constituted his "final disposition of the proceedings" within the meaning of section 113(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. II 1978), and Commission Rule 65(a), 29 CFR 2700.65(a). Commission Rule 65(c), 29 CFR 2700.65(c), which codifies Commission case law, states that "[t]he jurisdiction of the judge terminates when his decision has been issued by the Executive Director." The judge therefore had no authority to stay the effect of his decision or to reconsider it. Peabody Coal Co., 2 FMSHRC_____, 1 BNA MSHC_____, 1980 CCH OSHD ____ (No. Lake 80-25, May 16, 1980). Cf. Penn Allegh Coal Co., March 1979 FMSHRC, No. 3, 1979 CCH OSHD 23,439 (1979)(issuance of multiple opinions "threatens the smooth functioning of the Commission's review process"). 1/ The judge's order of April 22, 1980, is therefore vacated.

1/ Rule 65(c) codifies Secretary on behalf of Pasula v. Consolidation Coal Co., 1 FMSHRC 25, 1 BNA 2030, 1979 CCH OSHD %23,465 (1979). In his order of April 22, 1980, the judge questioned the continuing vitality of Pasula. The judge noted that a judge had in another case reconsidered his final decision and that the Commission had not directed review. The judge also interpreted our decision in Valley Camp Coal Co., 1 FMSHRC 791, 1 BNA MSHC 2083 (1979), as holding that the judge there should have, and thus may have, reconsidered his decision.

In view of Rule 65(c)'s clarity, and its obvious purpose of codifying the Pasula precedent, the continuing vitality of Pasula is plain. That a contrary decision of another judge went unreviewed should not have cast doubt on the matter. A failure to direct review of a judge's decision inconsistent with Commission case law does not necessarily indicate that the Commission concurs in that judge's decision. A judge's decision may also go unreviewed because it does not raise an issue deserving plenary Commission review, or raises one in a posture unsuitable for efficient resolution by the Commission. It is partly for this reason that Commission Rule 73 states that "[a]n

unreviewed decision of a judge is not a precedent binding upon the Commission." Finally, Valley Camp does not hold that the judge in that case should have reconsidered his final decision. That decision holds only that adequate cause to excuse a late filing had been shown.

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Our rules and precedents should not be construed to mean that an administrative law judge can do nothing if he discovers that he erred in his decision or that the case should be returned to him for other reasons. The judge may, by a letter placed in the record, inform the Commission of the circumstances and suggest that his decision be directed for review and the case remanded to him. Commission Rule 65(c) also states in some detail the procedure to be followed to correct clerical errors and mistakes in a judge's decision.

Finally, we conclude that, with the case in this posture, Commission review of the other issues should not be undertaken. The judge sought to give the parties an opportunity to file briefs, and Capitol Aggregates evidently wishes to file a brief with the judge. We consider it prudent to permit the administrative law judge to first consider the parties' arguments. In this way, the new decision of the judge may be more sharply focused upon the issues of concern to the parties, and may so squarely resolve them that discretionary review by the Commission may not be sought again.

Accordingly, the judge's decision of April 14 is vacated, and the case is remanded for further proceedings.

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