CCASE:
MSHA V. PENN ALLEGH COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
December 18, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket No. PENN 81-6-R

v.

PENN ALLEGH COAL COMPANY

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. (Supp. III 1979). The proceeding involves the validity of a section 104(b) withdrawal order and the underlying citation issued to Penn Allegh Coal Company for an alleged failure to comply with a provision in its dust-control plan. For the reasons discussed below, we affirm the judge's decision. 1/

The citation alleges a violation of 30 CFR $75.316, which implements section 303(o), 30 U.S.C. $813(o), of the Act. Section 75.316 states in part:

A ... dust-control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form.... Such plan shall be reviewed by the operator and the Secretary at least every 6 months. (Emphasis added.)

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1/ Chairman Collyer assumed office after this case had been considered at a Commission decisional meeting and took no part in the decision. A new Commissioner possesses legal authority to participate in pending cases, but such participation is discretionary and is not required for the Commission to take official action. The other Commissioners reached agreement on the disposition of the case prior to Chairman Collyer's assumption of office, and participation by Chairman Collyer would therefore not affect the outcome. In the interest of efficient decision-making, Chairman Collyer elects not to participate in this case. Former Commissioner Nease participated in considering this case and voted to affirm the judge's decision, but resigned from the Commission before the decision was ready for signature.

The dust control plan at issue required Penn Allegh to maintain a minimum water pressure of 150 psi (pounds per square inch) in all continuous mining machines. This provision of the plan dated January 12, 1977, was in effect since some time prior to March 1978. The purpose of this requirement is to insure that an adequate amount of water is dispensed from the machines' sprays thereby diminishing respirable dust. The plan, however, was unclear in two respects: it did not specify the location at which the water pressure was to be measured, and did not indicate whether the reading was to be taken while the machine was operating ("flow condition") or while the machine was turned off ("static condition").

Despite these ambiguities, no controversy apparently arose until April 1980, when an inspector issued two citations for alleged failure to meet the 150 psi requirement. 2/ The inspector measured the pressure near the shutoff valve under flow conditions. Penn Allegh abated the citation under protest claiming the plan called for, and previous measurements had been taken under, static conditions. 3/ In light of the April citations, Penn Allegh sought to amend the plan to require 70 psi-flow. MSHA indicated it would tentatively approve the modification while it conducted a brief dust survey; it would grant final approval only if the survey showed that respirable dust remained at an acceptable level. However, Penn Allegh declined to submit to the survey claiming, among other things, that it was not "technically and scientifically sound." As a result, MSHA notified Penn Allegh that a 150 psi-flow requirement would remain in effect.

In late July 1980, Penn Allegh submitted its scheduled 6-month dust plan review. It changed the 150 psi requirement of the plan to require either 150 psi static or 70 psi flow. An MSHA District 2 mining engineer John Karp, approved the revision on September 22, 1980. This official had seen MSHA's letter offering to conduct a survey and had mistakenly assumed that the survey had been conducted and the change made in accordance with the survey results.

MSHA first noticed its mistaken approval in October 1980, when an inspector preparing for a dust-compliance inspection discovered the change. On Thursday, October 2, 1980, MSHA officials informed Penn Allegh by telephone and a follow-up letter mailed the same day that 150 psi-flow would be the enforced provision. On the following Monday morning, an inspector issued the citation at issue in the present case after he measured a water pressure of 80 psi flow near the shut-off valve. He returned the next morning to see if the condition had been abated. He measured the machine's water pressure at 110 psi flow. When

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2/ These April citations are pending in a different proceeding before an administrative law judge. Docket Nos PENN-80-208-R and 80-209-R.

We note that Penn Allegh abated and did not contest a previous citation issued on January 29, 1980, alleging a violation of the 150 psi water pressure requirement. However, this citation did not specify whether the pressure was measured under flow or static conditions and therefore it does not help resolve the ambiguity.

3/ Both parties agreed that regardless of the measurement method, the water pressure was to be measured at a location near the machines' shutoff valves.

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Penn Allegh informed him that no action would be taken to bring the machine into compliance with MSHA's interpretation of the plan (150 psi-flow) he issued the $104(b) withdrawal order which is also contested on review.

The judge affirmed the citation and withdrawal order. 4/ He construed the plan's "150 psi" term to mean 150 psi measured under flow conditions. Turning to the revision, the judge found that MSHA made a good faith mistake in its approval. He found that MSHA validly repudiated its approval of the revision and concluded that the original plan's 150 psi-flow provision was the enforceable water pressure. Accordingly, the judge upheld the citation and withdrawal order.

We first address the meaning of "150 psi" as the term is used in the plan. The 150 psi water pressure provision is listed on page 6(a) of the dust plan. Originally the page was one of several standard form sheets provided by MSHA for use in submitting a plan. The latent ambiguity occurs because the column headed PSI, under which the 150 requirement is listed, does not specify whether the measure is to be taken under static or flow conditions. The parties' arguments are largely conflicting assertions. Penn Allegh asserts the 150 psi requirement was to be measured under static conditions. Conversely, MSHA contends the water pressure was to be measured under flow conditions.

The strongest evidence indicating that measurement under flow conditions was required is MSHA's District 2 policy of measuring all continuous miner water pressures under flow conditions. MSHA's coal mine technical health specialist, Robert Davis, who reviewed all dust-control plans in District 2, testified that he had always instructed inspectors to measure water pressure under flow conditions. He stated he knew of no District 2 dust plans that called for measurement under static conditions. He concluded that MSHA had adopted the policy because a static measure failed to accurately indicate the water volume at the sprays to suppress dust. His testimony was corroborated by three other MSHA witnesses.

Balanced against this evidence of District 2's practice of measuring under flow conditions is the testimony of Penn Allegh's chief

engineer, Alfred Reisz. He stated that when he drafted and submitted Plan A, using the form sheets which MESA (MSHA's predecessor) provided, he contemplated a static measure taken at a location near the shut-off valve. He assumed that since the form did not have a space for the location or condition of measure he did not need to specify them. 5/

4/ The judge's decision is reported at 2 FMSHRC 3072 (1980).

5/ Additionally, Penn Allegh produced evidence indicating that because District 2 measured the water pressure at the shut off valve, a flow measure was not a better indicator of the water available at the sprays for dust suppression. After the water enters the continuous miner, it continues through the machine performing a cooling function. It passes through two devices, a pressure regulator and a booster pump. These devices coupled with the circuitous path it takes, change the water pressure so that the entering pressure does not bear any relation to the existing pressure at the sprays. Penn Allegh's explanation of the inner workings of the machine supports a conclusion that a flow measure taken at the shut-off valve might not be more logical than a static measure taken at the same location. However, the relative merits of the locations at which pressure could be measured is not before us.

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The statute and the standard require the parties to agree on a dust control plan in the interest of miner safety. Therefore, after a plan has been implemented (having gone through the adoption/approval process) it should not be presumed lightly that terms in the plan do not have an agreed-upon meaning. See Ideal Mutual Ins. Co. v. CDI Construction Inc., 640 F.2d 654, 658 n.7 (5th Cir. 1981). We find the record contains substantial evidence to support the judge's finding that the plan encompassed a flow measure. We believe that the evidence of consistent enforcement supports the conclusion that a flow measure was intended in Penn Allegh's dust plan. We note that in light of the very purpose of the provision, i. e., suppression of dust during the operation of continuous miners, measurement under flow conditions, rather than measurement with the shut-off valve closed, seems eminently appropriate (but see n. 4). We further hold that to the extent the judge's conclusion reflects a credibility determination, i.e., accepting the testimony of MSHA's witnesses as to the meaning of the term, rather than Penn Allegh's, that credibility determination should be given deference.

With the proper interpretation of the plan established, we address the effects of the revision. We believe the fact that the citation and withdrawal order were issued against the backdrop of an ongoing dispute is important. Penn Allegh had sought to amend its plan before it submitted its plan for the 6-month review under section 75.316. However, this early modification attempt failed when Penn

Allegh declined to permit a dust survey that MSHA indicated was a prerequisite to lowering the required water pressure. MSHA official Robert Davis, both by letter and in conversation with Penn Allegh's chief engineer, made it clear that it was not MSHA's policy to modify a plan provision without first conducting a survey. Nevertheless, Penn Allegh submitted its six month review plan without submitting to the survey and without calling attention to the change made in the existing plan. In this regard, we believe that Penn Allegh could have been more open in its discussions with MSHA concerning the plan at this point.

In contrast, the judge found that MSHA made a good faith mistake. The MSHA mining engineer who approved the revision freely admitted his error. He stated that in his review, he interpreted MSHA's letter offering tentative approval of 70 psi-flow reduction as conditioned on the results of a dust survey. He was unaware of and not involved in the ongoing water pressure dispute. He assumed the survey had been successfully concluded and therefore that the reduction was permissible. He admitted that if he had examined Penn Allegh's file more carefully he would have noted that the survey had not been conducted and, in accordance with MSHA's survey policy, would have disapproved the change. In the light of the circumstances, we affirm the judge's findings that the mistake was made in good faith, and that MSHA could repudiate the 70-psi revision. 6/

6/ We note that the present situation, where a revision of a plan is approved by mistake, is an infrequent occurrence. It is to be distinguished from the situation where during a review, MSHA decides that a dust plan provision must be revised. In the latter situation, MSHA would have to notify Penn Allegh of its view that a revision is necessary, provide a reasonable time for adopting and filing a revised plan, and, if a satisfactory solution is not reached, citations would be issued. See discussion infra.

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The final question concerns the ramifications of the Secretary's revocation. After rescinding its mistaken approval of the revision, MSHA unilaterally informed Penn Allegh that the former 150 psi-flow requirement was to be followed. The heart of Penn Allegh's argument is that MSHA thereby attempted to enforce a provision that Penn Allegh had not adopted. This, Penn Allegh asserts, violates section 75.316's adoption/approval scheme as interpreted in Bishop Coal Co., 5 IBMA 231 (1975), and Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir., 1976).

In Bishop, MESA attempted to impose a requirement for rib supports in an operator's roof control plan. 7/ The operator's previous plan contained no rib support provision. It was added to the plan by a MESA official who, after preliminary discussions, obtained the

operator's signature on a blank page of the plan and later added the rib support requirement ex parte. In reviewing withdrawal orders issued by MESA, the Board expounded on the adoption/approval process, stating first:

> [MESA] is required, in our view, to notify the operator in writing of a disapproval of, or the need for changes in, a roof control plan proposal adopted and filed by such operator for approval, and must include in such notice a concise, general statement of the reasons for such action.

(Emphasis in the original) 5 IBMA at 243. The Board continued to discuss the parties' responsibilities:

> [I]f a[n operator's] proposal has a legitimate objective, but is in need of change, the District Manager under the subject regulation, must specify in writing the nature of the changes and afford the opportunity to discuss and negotiate over such changes. It is of course implicit that the District Manager also specify a reasonable time within which to adopt and file an amended proposal for approval ... in notifying an operator in writing of the deficiencies of its proposal and suggested changes, a District Manager must be sufficiently specific to adequately apprise an operator of what they are. When outlining changes, a District Manager does have the leeway to suggest draft language or deletions from the proposal at hand, but he cannot impose them by fiat upon an operator who refuses to "adopt" such changes. It is after all the operator who must determine whether to adopt suggested or negotiated changes or to litigate in the face of enforcement actions by MESA which are bound to follow an impasse with the District Manager.

(Footnotes omitted; emphasis added) 5 IBMA at 244.

In Zeigler Coal Co. v. Kleppe, the operator contested MESA's issuance of a withdrawal order on the basis that the ventilation plan requirements that MESA sought to enforce were not enforceable mandatory standards even though the operator had adopted the questioned provision. The operator contended that, if the plan's requirements were deemed to be enforceable mandatory standards, arbitrary enforcement would result

7/ Although Bishop dealt with roof control plans under the 1969 Coal Act, a similar "approval by the Secretary" and "adoption by the operator" process was mandated.

because the plan was not subject to the consultative procedures in either section 101 of the Mine Act or section 553 of the Administrative Procedure Act. The D.C. Circuit rejected the operator's argument and held that the plan's requirements were enforceable as if they were mandatory standards. The Court adopted

the Board's rationale in Bishop and found the operator was adequately protected from the imposition of requirements unilaterally created by the Secretary because a plan had to be adopted by the operator. The Court stated:

> The statute makes clear that the ventilation plan is not formulated by the Secretary, but is "adopted by the operator." While the plan must also 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....
>
> The agency's recourse to such a refusal to adopt a particular plan appears to be invocation of the civil and criminal penalties of $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 $101 procedures.

(Footnotes omitted; emphasis added) 536 F.2d at 406-407.

Penn Allegh asserts that MSHA's return to the original plan's requirement breached two duties imposed by the Bishop rationale. First, MSHA failed to negotiate and discuss the reimposition of the original plan with Penn Allegh. The Secretary merely informed Penn Allegh that 150 psi flow would be the enforced provision. Second, MSHA failed to give Penn Allegh a reasonable time within which it could adopt and file an amended plan. MSHA issued the citation on the second working day after the inspector's telephone call. MSHA counters that Penn Allegh misperceives the negotiation process. The Secretary argues that after MSHA rescinded the revision that had been inadvertently approved, "[t]he duty to initiate straightforward, above board renegotiation belong[ed] to the party seeking the revision." MSHA argues that Penn Allegh precluded the possibility of negotiation because of its absolute and unreasonable refusal to submit to the dust survey or to offer other adequate assurance that the dust level would remain acceptable.

> The important role that ventilation and dust control plans play in the overall statutory scheme cannot be overstated. Congressional recognition of the urgent need for adequate ventilation and dust

control in the nation's coal mines is clear!y reflected in the legislative
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history, as well as in section 303(o)'s requirement that such plans were to be adopted in the first ninety days following the passage of the 1969 Coal Act. See also Zeigler Coal Co., supra, 536 F.2d at 408-409. Under section 303(o) and 30 CFR $75.316, after initial implementation the plans can be reviewed and revised. We hold that ventilation and dust control plans are continuous in nature; a plan does not expire at the end of a six month period simply because the parties have failed to finally resolve a suggested revision. In the present case, in light of our previous conclusion that the Secretary validly rescinded the mistaken approval of Penn Allegh's revision to the original plan, we conclude that the original plan remained in effect. This leaves the parties with the ability, in fact the duty, to negotiate in good faith over a resolution of the "flow-static" measurement controversy. At the same time it affords miners the protections of the plan previously adopted by Penn Allegh and approved by the Secretary. 8/

The only remaining issue is the timing of MSHA's issuance of the involved citation and order. On Thursday, October 2, 1980, MSHA informed Penn Allegh by telephone and by a letter that 150 psi-flow would be the enforced water pressure rather than Penn Allegh's 70 psi provision. On Monday, October 6th, the citation was issued after the inspector obtained a reading of 80 psi-flow. On the following day a reading of 110 psi-flow was obtained and the 104(b) order was issued. Although the citation and orders were issued very soon after MSHA discovered its error and informed Penn Allegh that it no longer deemed the revision to be in effect, we believe that any questions as to notice and fairness to Penn Allegh are allayed by Penn Allegh's insistence that it would comply with the revision, or no plan at all. Thus, the timing of the issuance of the citation and order is of little significance.

In sum, we conclude that substantial evidence supports the judge's conclusion that the dust control plan required a water pressure of 150 psi measured under flow conditions; MSHA validly rescinded its mistaken approval of Penn Allegh's revision of this requirement; and the 150 psi provision validly was enforced against Penn Allegh. For these reasons, we affirm the judge's decision.

Richard V. Backley,
Commissioner
Frank F. Jestrab,
Commissioner
A. E. Lawson,
Commissioner

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8/ The requirement of good faith negotiations by both parties eliminates any fear that an operator must forever labor under a provision that has been adopted and approved. If an operator believes a revision is warranted, has engaged in a reasonable period of good faith negotiation, and believes the Secretary has acted in bad faith in refusing to approve the revision, he can obtain review of the Secretary's action by refusing to comply with the disputed provision, thus triggering litigation before the Commission. The present case does not present this situation due to the apparent lack of good faith negotiation by Penn Allegh over the desired revision.

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Distribution

Ronald S. Cusano, Esq.
Rose, Schmidt, Dixon, Hasley, Whyte & Hardesty
900 Oliver Building
Pittsburgh, PA 15222

Linda Leasure, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Harrison Combs, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge Forrest Stewart
FMSHRC
5203 Leesburg Pike, lOth Floor
Falls Church, Virginia 22041