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SOL (MSHA) V. CARBON COUNTY COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 11, 1984
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. WEST 82-106

CARBON COUNTY COAL COMPANY

ORDER

This civil penalty proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982), is before us on interlocutory review. Carbon County Coal Company seeks review of an order of a Commission administrative law judge denying Carbon County's motion for summary decision. For the reasons that follow, we vacate the judge's order and remand to the judge for reconsideration of Carbon County's motion.

This case arose out of a citation and withdrawal order issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") on August 24 and September 3, 1981, respectively, alleging that Carbon County was operating a mine without an approved ventilation system and methane and dust control plan in violation of 30 C.F.R. $ 75.316. Section 75.316, which mirrors the statutory standard contained in section 303(o) of the Mine Act, 30 U.S.C. $863(o), provides:

A ventilation system and methane and 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.

Carbon County operates the Carbon No. 1 Mine, an underground coal mine located in Hanna, Wyoming. MSHA had approved and Carbon County had adopted a ventilation system and methane and dust control plan dated August 25, 1980, for the Carbon No. 1 Mine. In March 1981, Carbon County submitted a new ventilation plan to MSHA for the 6-month review required by section 75.316. In this new plan, Carbon County proposed changes in several of the provisions contained

in the previously approved August 25, 1980 plan. Negotiations ensued over the proposed changes.
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Although Carbon County and MSHA reached agreement with respect to most of the proposed changes, they could not agree upon the requirement dealing with the amount of air to be made available to auxiliary fans used to ventilate some sections of the mine. In its submission, Carbon County proposed that the volume of air made available to the auxiliary fans be greater than "the maximum rated face ventilation." In correspondence with MSHA Carbon County stated that the latter phrase referred to the "installed capacity" of the auxiliary fans. MSHA would not approve an "installed capacity" requirement and insisted that the auxiliary fans be provided with a volume of air greater than their "free discharge capacity." The previously approved ventilation plan dated August 25, 1980, required that the volume of air made available to the auxiliary fans exceed their "maximum rated capacity." There are indications in the record that MSHA officials may have believed that this term was equivalent to "free discharge capacity," while Carbon County, in its motion for summary decision, asserts that the term referred to "installed capacity." 1/
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 fan." 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

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1/ In essence, "installed capacity" refers to the ventilation capacity of an auxiliary fan when the fan is operated with tubing attached to it. "Free discharge capacity," on the other hand, refers to the ventilation capacity of an auxiliary fan when the fan is operated without tubing attached. The tubing extends from the fan to the face area. The fan pulls the air at the face area through the tubing and exhausts the face air into the return air. In this way dust generated by the mining process and gases liberated in the face area are removed from the mining section.

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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.

Following MSHA's institution of the civil penalty proceeding, Carbon County initiated pretrial discovery. At the close of discovery, Carbon County advised the judge that it intended to move for summary decision under Commission Procedural Rule 64. 2/ In its motion and supporting brief Carbon County argued that MSHA had improperly required it to adopt the disputed provision in violation of the legal principles controlling the ventilation plan adoption and approval process enunciated in Zeigler Coal Company v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976).

In Zeigler, which arose under the 1969 Coal Act, 30 U.S.C. $ 801 et seq. (1976)(amended 1977), the court construed section 303(o) of that Act. This provision was retained without change as section 303(o) of the 1977 Mine Act. The court held that provisions of a ventilation system and methane and dust control plan, approved by the Department of Interior's Mine Enforcement and Safety Administration ("MESA"), MSHA's administrative predecessor, and adopted by the operator were enforceable under the 1969 Coal Act as though they were mandatory standards. 536 F.2d at 402-09. As Carbon County noted, however, in discussing the ventilation plan approval process the court drew a distinction between a negotiated plan requirement "suitable to the conditions and the mining system of the coal mine" and a provision of a general nature, not based on the particular conditions at the mine, which the government sought to impose in the plan but which "should more properly have been formulated as a mandatory standard" in conformity with the rule making requirements of section 101 of the 1969 Coal Act. 536 F.2d at 407. Carbon County contended that MSHA had insisted on inclusion of the general free discharge capacity guideline in its ventilation

plan, mechanically, without regard to the particular conditions at the Carbon No. 1 Mine. Carbon County maintained that MSHA's free discharge capacity guideline was a general provision applicable to all mines, and that before MSHA could lawfully impose that requirement on an operator in the plan approval process the provision should first have been promulgated as a standard pursuant to the rule making requirements of section 101 of the Mine Act. Carbon County also argued that, regardless of the applicability

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2/ 29 C.F.R. $ 2700.64 states in part:

(a) Filing of motion for summary decision. At any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the Judge to render summary decision disposing of all or part of the proceeding.

(b) Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) That there is no genuine issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law.

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of the principles enunciated in Zeigler, MSHA acted in violation of the Mine Act and the Administrative Procedure Act, 5 U.S.C. $ 551 et seq. (1982) (the "APA"). Carbon County asserted that the free discharge capacity requirement was a general legislative rule and that both the Mine Act and the APA required that such a legislative rule be promulgated as a regulation before it could be imposed. Therefore, according to Carbon County, MSHA invalidly insisted upon inclusion of the free discharge capacity requirement in Carbon County's ventilation plan.

In an unpublished order dated February 4, 1983, the Commission's administrative law judge denied Carbon County's motion for summary decision. The judge issued the order without providing the Secretary of Labor adequate opportunity to respond to Carbon County's motion. 3/ The judge did not address the issues raised by Carbon County. Rather, he viewed the question before him as simply requiring a decision as to which proposal for providing air to the auxiliary fans was safer. The judge stated:

I have no doubt that MSHA can properly approve a ventilation plan and then at a later date, and for good reason withdraw that approval. The procedures for withdrawing that approval and the amount of time allowed in this case seem reasonable so the question is: was there a good reason for MSHA to insist that

the ventilation plan include a [free discharge capacity] provision.

* * *

I am not concerned with the guidelines or who drafted them. I am concerned with what would happen if a break in the tubing occurred at various places where the available intake air does not exceed the ... free discharge capacity of the auxiliary fan. Until the parties provide me with that information, I will not be able to decide whether MSHA's demands would create a safer mine.

Ruling on Motion at 1-2.

We conclude that the judge's ruling was erroneous. Entry of summary decision is warranted when "the entire record ... shows: (1) that there is no issue as to any material fact; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. $ 2700.64(b). Carbon County presented to the judge those facts,

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3/ The judge ruled before the 15 days permitted under our procedural rules for response to a motion served by mail had elapsed, and despite the fact that the Secretary had requested, and the company not objected to, additional time within which to respond. See 29 C.F.R. $$ 2700.8(b), .9, & .10(b).

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obtained through the discovery process, which it believed to be undisputed and material. Carbon County also presented legal theories as to why, given those facts, it was entitled to a decision as a matter of law. The judge did not rule on Carbon County's legal challenges to the plan approval procedure nor did he determine whether, in light of these arguments, there were undisputed material facts in the record which entitled Carbon County to a decision in its favor. The judge's bare statement that, "I am not concerned with the guidelines or who drafted them," is, to say the least, ambiguous. Because the judge provided no explanation of this statement, we cannot regard it as a persuasive indication that he did consider, or rule on, the operator's legal challenges.

The court's exposition in Zeigler of the general legal principles controlling the ventilation plan approval and adoption process was premised on the same statutory standard presently applicable under the Mine Act. 30 U.S.C. $ 863(o). We find the court's discussion persuasive and compelling, and hold that the general principles enunciated in Zeigler apply to the ventilation plan approval and adoption process under the Mine Act. See Zeigler, 536 F.2d at 407.

Therefore, if MSHA's insistence in this case upon inclusion of the free discharge capacity provision in Carbon County's plan contravened the principles of Zeigler, the citation and withdrawal order issued to Carbon County cannot stand. As noted above, however, the judge did not rule on this question. We conclude that, in the interests of proper judicial administration, it is incumbent on the judge, as the trier of fact, to first consider and rule on Carbon County's arguments in its summary decision motion concerning the application of Zeigler to the facts at hand. Furthermore, before making his ruling, the judge shall afford the Secretary of Labor the opportunity to respond fully to Carbon County's motion. 4/

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4/ We note that counsel for the Secretary of Labor has argued on interlocutory review that the free discharge capacity provision is merely an MSHA "policy statement" or "interpretation" of the mandatory standard prohibiting recirculation of air, 30 C.F.R. $ 75.302-4(a), and that as such it does not run afoul of Zeigler, the Mine Act, or the APA. Counsel for the Secretary also has argued that the ventilation system proposed by Carbon County was rejected not because of MSHA's inflexible insistence upon the guideline but because MSHA's District Manager did not believe Carbon County's proposal was safe.

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Accordingly, we vacate the judge's denial of Carbon County's motion for summary decision and remand the matter for further proceedings consistent with this decision.

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Commissioner Lawson concurring in part:

The majority has correctly concluded that the judge erred by failing to address the legal argument presented by Carbon County's motion for summary judgment and in ruling without permitting response by the Secretary. Accordingly, I concur in remanding this case to the judge for reconsideration of the summary judgment motion or the taking of additional evidence as may be appropriate.

The legal issue presented by Carbon County is one of first impression before the Commission. It is improper at this stage of the proceedings for this Commission to determine in the abstract, without the benefit of a complete record, whether the general principles discussed in Zeigler, supra, unnecessary to that holding and therefore dicta, should be adopted by this Commission. Furthermore, I note that this case appears to raise issues that the Zeigler court specifically declined to discuss, 536 F.2d at 410 n. 57, as well as factual and legal matters which distinguish it from the general principles there discussed. l/ Under these circumstances, the majority's holding in this Order may be dicta as well. Accordingly, I concur in the remand but intimate no view at this

time as to whether Zeigler is "persuasive and compelling" (slip op. at 5) or even apposite to this case.

A. E. Lawson,
Commissioner

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1/ The Secretary has maintained on interlocutory review that the guideline is no more than a general statement of MSHA policy on approval of ventilation plans, and is to be distinguished from a legislative rule. In his view, the ventilation system proposed by Carbon County was rejected not because of any guideline, but because the Secretary did not believe it provided a safe ventilation system at the particular mine in question. The Secretary further asserts, with reference to specific deposition testimony, that the guideline does not bind the district manager, who is responsible for the approval or rejection of plans, and that the district manager's insistence upon "free discharge capacity" ventilation was required by conditions at this particular mine: the size and length of the tubing, the capacities of the main and auxiliary fans at the mine, previous history of air recirculation problems at this mine, and/or the previous history of violations resulting from a failure to maintain the ventilation system. In short, the Secretary is of the view that MSHA did not approve Carbon County's revised plan because MSHA's district manager had reasonable grounds to believe that Carbon County's proposed plan language would not meet the requirements of section 303(o) of the Act and the validly promulgated mandatory standards contained in Subpart D of 30 C.F.R. Part 75, and that an evidentiary hearing is required to resolve this disagreement. See $$ 303(a) & (c)(1) of the Act, 30 U.S.C. $$ 863(a) & (c)(1); 30 C.F.R. $$ 75.300, 75.302(a), 75.302-4(a), 75.302-4(g).

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