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MSHA V. CARBON COUNTY COAL
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SEP 30, 1985

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

v. Docket No. WEST 82-106

CARBON COUNTY COAL COMPANY

BEFORE: Backley, Acting Chairman; Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

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

This case arises out of a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") on August 24, 1981, alleging that Carbon County operated the Carbon No. 1 Mine without an approved ventilation system and methane and dust control plan in violation of 30 C.F.R. $ 75.316. The standard provides in part:

> 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.

Prior to March 1981, Carbon County operated the Carbon No. 1 Mine under a plan approved by the Secretary of Labor. However, in March 1981, when that plan came up for the six-month review as provided by the standard, Carbon County proposed a revision of the plan that MSHA, acting on behalf of the Secretary, found unacceptable. Carbon County proposed

that the volume of air delivered to auxiliary fans used on the mining sections at the Carbon No. 1 Mine be greater than the "installed capacity" of the fans. MSHA, however, insisted that the auxiliary fans be provided with a volume of air greater than their "free discharge capacity." 1/

The parties communicated concerning the two proposals, but could not agree on which provision should be included in the plan. On July 27, 1981, MSHA advised Carbon County that if an acceptable plan was not received by August 12, 1981, approval for the ventilation system and methane and dust control plan then in effect would be revoked and further mining activity would be prohibited. Carbon County continued to insist upon the installed capacity provision, and MSHA revoked the plan in effect at the Carbon No. 1 Mine. When, in the face of MSHA's revocation of its plan, Carbon County continued to operate the mine, MSHA issued a citation asserting that Carbon County was in violation of section 75.316. The citation was followed by an order of withdrawal prohibiting any further mining of coal. After the issuance of the closure order, Carbon County adopted the free discharge capacity provision as part of its ventilation and methane and dust control plan. As a result, the withdrawal order was terminated, the violation of section 75.316 was deemed abated, and the mining of coal was resumed. This civil penalty proceeding ensued.

At the close of pretrial discovery, Carbon County moved for summary decision under Commission Procedural Rule 64. 29 C.F.R. $ 2700.64. 2/ Carbon County argued that it was not in violation of section 75.316 because MSHA had sought to impose the free discharge capacity provision

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1/ "Installed capacity" is the ventilation capacity of an auxiliary fan when the fan is operated with tubing attached to it. Knepp dep. at 19. "Free discharge capacity" is the ventilation capacity of an auxiliary fan when the fan is operated without tubing attached. Knepp dep. at 16. 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.

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 should 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.

as a general provision without regard to particular conditions at the Carbon County No. 1 Mine, violating the principles controlling the ventilation plan approval and adoption process as set forth in Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976). 3/ In an unpublished order, the judge denied Carbon County s motion for summary decision. The judge did not address the issues raised by Carbon County--whether undisputed material facts in the record established that MSHA had insisted upon the free discharge capacity provision without regard to the particular circumstances at the mine and, if so, whether the citation should be vacated. Rather, the judge viewed the controlling issue as relating to the merits of the two proposals and requiring a determination as to which proposal was safer.

Carbon County was granted interlocutory review by the Commission of the judge's order. On review, and following oral argument attended by the parties and by amicus, the American Mining Congress, the Commission concluded that the judge had erred. Carbon County Coal Co., 6 FMSHRC 1123 (May 1984). The Commission held the court's discussion in Zeigler of the legal principles governing the ventilation plan approval and adoption process to be controlling, and stated, "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.... [I]t is incumbent on the judge ... 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." 6 FMSHRC at 1127. The Commission vacated the judge's denial of Carbon County's motion for summary decision and remanded the matter to the judge for reconsideration.

On remand the judge again denied the operator's summary decision motion. He stated that at trial it would be necessary to determine the proper volume of air to be supplied to the auxiliary fans and that this determination would be dictated by his conclusion as to which proposal was safer. The judge added, "the ... language of the Zeigler case should not be allowed to stand in the way of mine safety." 6 FMSHRC 1607, 1610 (July 1984)(ALJ). Carbon County's second petition for interlocutory review followed. 4/

3/ 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 Act. This provision was retained without change as section 303(o) of the 1977 Mine Act.

4/ Carbon County was granted a suspension of the proceedings before the judge pending our decision in this matter.

I.

As noted, the institution of a ventilation and methane and dust control plan through the process of Secretarial approval and operator adoption is mandated by section 303(o) of the Mine Act, 30 U.S.C. $ 863(o), and by mandatory safety standard 30 C.F.R. $ 75.316, which standard essentially reiterates section 303(o). Both the Act and the mandatory safety standard state that the purpose of the approval-adoption process is to provide a plan whose provisions are "suitable to the conditions and the mining system of the coal mine." Once the plan is approved and adopted, the particular provisions of the plan are enforceable at the mine as though they are mandatory safety standards. Zeigler Coal Co., 536 F.2d at 409. 5/

The scheme for the approval and adoption of a mine specific plan supplements the nationally applicable mandatory safety and health rulemaking procedures. The bilateral approval-adoption process inherent in developing mine specific plans results from consultation and negotiation between MSHA and only the specifically affected operator, whereas the nationally applicable standards are the product of notice and comment rulemaking pursuant to section 101 of the Mine Act. 30 U.S.C. $ 811. Further, the scope of a mine specific plan is restricted exclusively to the mine in which the plan will be implemented, whereas a mandatory safety or health standard applies across-the-board to all mines.

The individual nature of a mine specific plan is emphasized in the legislative history of the Mine Act. The Senate Committee on Human Resources, reporting on the bill which, as amended, became the Mine Act, stated:

> [I]n addition to mandatory standards applicable to all operators, operators are also subject to the requirement set out in the various mine by mine compliance plans required by statute or regulation. The requirements of these plans are enforceable as if they were mandatory standards. Such individually tailored plans, with a nucleus of commonly accepted practices, are the best method of regulating such complex and potentially multifaceted problems as ventilation, roof control and the like.

5/ Safety requirements tailored to particular conditions at a specific mine are not restricted to ventilation and methane and dust control plans. Where safety may be enhanced by taking into account particular local conditions the Mine Act provides for further mine specific

plans. For example, 30 C.F.R. $ 75.200, which reiterates section 302(a) of the Mine Act, 30 U.S.C. $ 862(a), requires the Secretary to approve and the operator to adopt "[a] roof control plan ... suitable to the roof conditions and mining system of each coal mine."

S. Rep. No. 181, 95th Cong., 1st Sess. 25 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 613 (1978).

The requirement that the Secretary approve an operator's mine ventilation plan does not mean that an operator has no option but to acquiesce to the Secretary's desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith and for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan provision, review of the dispute may be obtained by the operator's refusal to adopt the disputed provision, thus triggering litigation before the Commission. Penn Allegh Coal Co., 3 FMSHRC 2767, 2773 (December 1981). Carbon County proceeded accordingly in this case. The company negotiated in good faith and for a reasonable period concerning the volume of air to be supplied the auxiliary fans. Carbon County's refusal to acquiesce in the Secretary's demand that the plan contain a free discharge capacity provision led to this civil penalty proceeding. The approval-adoption process protects operators and miners by assuring that particular conditions at a mine are addressed by individualized safety requirements. The court in Zeigler, in a discussion we have found "persuasive and compelling," Carbon County Coal Co., 6 FMSHRC at 1127, described the limits the statute places upon the Secretary regarding the restricted subject matter of a ventilation and methane and dust control plan:

> Section 303(o) specifically states that the plan is to be "suitable to the conditions and the mining system of the coal mine...." The context of the plan requirement, amidst the other provisions of $ 303, which set forth fairly specific standards pertaining to mine ventilation, further suggests that the plan idea was conceived for a quite narrow and specific purpose. It 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 that there is a comprehensive scheme for realization of the statutory goals in the particular instance of each mine.
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> [I]nsofar as those plans are limited to conditions

> and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application.

536 F.2d at 407.

The controlling issue is whether MSHA's insistence upon inclusion of the free discharge capacity provision in Carbon County's plan contravened these principles. Carbon County, 6 FMSHRC at 1127. The administrative law judge insisted on avoiding this determination. We therefore look to the record to determine whether the undisputed material facts establish that the free discharge capacity provision espoused by the Secretary was required because of particular mine specific conditions at the Carbon No. 1 Mine.

II.

The Carbon No. 1 Mine is ventilated by a main mine fan. To assist in the ventilation of the mining sections, 125-horsepower auxiliary exhaust fans are used. An auxiliary exhaust fan ventilates up to 5 working faces. The auxiliary fan is located outby the faces in return air. A fiberglass tube is attached to the fan. This tube connects with up to 5 tubes which extend outby from the faces. In all, less than 500 feet of tubing is attached to the fan. The fan pulls the intake air at the face through the tubing and exhausts it into the return air. In this way the dust which results from the mining process and the gases which are liberated in the face area are removed from the mining section.

It is a principle of physics that in order to work effectively in removing dust and gas from the section the exhaust fan must be supplied with more air than the fan is actually producing. If the fan is supplied with less air than it is producing, the fan will draw air from another source to compensate for the deficiency. That other source may be air which has already passed through the fan into the return. This phenomenon is called "recirculation." The result of recirculation may be that dust and gases, once exhausted through the fan, are returned to the face area.

In 1971, MESA, MSHA's predecessor, issued national guidelines to all of its districts concerning provisions which should be included in ventilation plans. The guideline pertaining to exhaust fans requires that "[f]ans operating exhausting shall be installed in the return air current ... and the volume of ... intake air current available at the entrance of the place ... to be ventilated with exhaust fans shall be greater than the free discharge capacity of the fan." Exhibit 3 at 9. The guideline is intended to prevent recirculation.

In 1977, MSHA District 9 issued its own guidelines "to assist [operators] in formulating an acceptable ventilation ... plan." Exhibit 6. 6/ The guidelines were drafted by District 9 personnel

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6/ MSHA divides its division of Coal Mine Health and Safety into 10 administrative districts. District 9 encompasses the Rocky Mountains area and includes the coal producing states of North Dakota, Montana, Wyoming, Colorado, New Mexico, Arizona, Utah, Washington and Alaska. There are approximately 48 underground coal mines operating in District 9, including the Carbon No. 1 Mine.

most part reiterated the national guidelines. Differences with the national guidelines were the result of mining conditions unique to District 9. The 1977 District 9 guideline with respect to the volume of air to be supplied to exhaust fans was identical to the national guideline. Exhibit 6 at 10. In 1981 District 9 revised its guideline. However, the provision relating to the air supplied to exhaust fans and thus to the prevention of recirculation remained essentially the same. It states:

> Fans operated exhausting shall be installed in the return air current from the place to be ventilated by the fan, and the 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.

Exhibit 7 at 4.

In the discovery phase of this litigation, Carbon County deposed the MSHA officials who played a role in rejecting Carbon County's installed capacity proposal and who insisted upon the free discharge capacity provision. The depositions establish that Carbon County's revised ventilation plan was reviewed by Mining Engineer John Widows, by Ventilation Specialist Ival VanHorne, and by Supervisory Mining Engineer Bill Knepp. The plan was given then to Engineering Coordinator Harold Dolan and Dolan forwarded the plan to District Manager John Barton. It was District Manager Barton who ultimately rejected Carbon County's plan on behalf of MSHA and the Secretary of Labor.

We find that the record conclusively establishes that MSHA's insistence upon the free discharge capacity provision and MSHA's rejection of Carbon County's proposal to provide a volume of air equal to the installed capacity of the fans was the result of a rote application of the District 9 free discharge capacity guideline and was not based upon particular conditions at the Carbon No. 1 Mine. Ventilation Specialist VanHorne stated that there was "no leeway" with regard to requiring the free discharge capacity provision in a ventilation and methane and dust control plan and that he considered no factors other than the guideline when reviewing the proposed plan. VanHorne dep. 18-19, 85. Engineering Coordinator Dolan said that he knew of no plan in District 9 which did not have the free discharge capacity requirement and that he would not recommend approval of a plan unless it contained that provision. Dolan dep. at 63-64. Dolan termed the guideline "a bottom line requirement" and stated that although one plan had "gotten through" without it, that plan later

was rescinded. Dolan dep. at 106.

District Manager Barton stated that he was free to disregard the guideline "the guidelines don't dictate to me" -- and that the quantity of air required in a ventilation and methane and dust control plan was determined by "our observation and information about the specific mining conditions at the mine." Barton further stated, however, "1 view the principle that you must provide at least an amount of air equal to the

free discharge caPacity as necessary. We may ask for more. We will never Permit less." Barton dep. at 17. 18-19. When questioned about the circumstances at Carbon County's mine which gave rise to MSHA's insistence upon the free discharge capacity provision, Barton replied, "In my opinion, that was the minimum acceptable level that we could give. That was the most liberal allowance ... that I would make." He was asked whether free discharge capacity was the minimum volume of air that he would allow at all mines, and he replied that it was. Barton dep. at 58. "Particular circumstances" which lead MSHA to insist upon the free discharge capacity provision at the Carbon No. 1 mine were not detailed by Barton.

A recurring theme in the statements of VanHorne, Knepp, Dolan and Barton was that District 9 insisted upon the guideline because of the fear that the tubing attached to the fan might break, or be closed off, or be disconnected, and that in such case the volume of air at installed capacity would not be adequate to prevent recirculation. Despite these concerns, there is no indication in the depositions and the exhibits that any specific breaks, folds, or disconnects in the tubing at the Carbon No. 1 Mine were considered. Nor does the record indicate that Carbon County's proposals for maintaining the tubing to reduce the chances for such occurrences was given fair consideration. Dolan stated that he did not know what the general frequency of tube breaks was, that he did not know if the fiberglass tubing used by Carbon County was more likely to break than other types of tubing, and that he had no specific knowledge about the tubing in Carbon County's mine or the frequency with which it might break. Dolan dep. at 96. Barton stated that miners often damaged ventilation controls like tubing, but he also stated that he did not know if the fiberglass tubing used by Carbon County was frequently damaged because, "I am not present in the mine to see what is occurring every day, nor do I review all the citations that come through the office." Barton dep. at 36. Also, although Barton indicated that in general he believed miners could not be relied upon to maintain the tubing, he stated that he had no knowledge of Carbon County's practices with respect to broken tubing or its practices with respect to the inspection of tubing at the mine. Barton dep. at 28-29, 32, 46.

Another basis offered by the Secretary for rejecting the installed capacity proposal and for insisting upon the free discharge capacity provision consisted of vague references to prior instances of recirculation of air at the mine. But the cause or causes for the recirculation and the particular circumstances surrounding these asserted instances of recirculation were not specified. Dolan, MSHA's

engineering coordinator, stated that he did not know if the instances of recirculation in the past had anything to do with the quantity of air reaching the auxiliary fans. Dolan dep. at 48, 112. Barton also stated that he had no knowledge of the specifics of recirculation problems at the mine and did not know if any of the mine's recirculation problems related to the amount of air

provided to auxiliary fans. Barton dep. at 31. When asked whether Carbon County's installed capacity proposal was rejected because the mine had a history of recirculation, Barton did not reply specifically. Rather, he stated, "it was rejected because it did not meet the minimum requirements for a good ventilation system to protect the lives of miners in the mine." Barton dep. at 26.

It bears emphasis that the proper focus at this stage of the proceeding is not upon the merits of the proposals--whether the disputed provision is in fact necessary to prevent recirculation at the Carbon No. 1 Mine and whether the disputed provision is one which must be applied to all mines if recirculation is to be prevented--but rather upon the basis for MSHA's insistence that the free discharge capacity provision is required at the subject mine. Because we conclude that the uncontroverted material facts establish that MSHA's decision to impose the free discharge capacity provision was not based upon particular circumstances at the Carbon No. 1 Mine, but rather was imposed as a general rule applicable to all mines, we hold, for the reasons stated in Zeigler and enunciated here, that MSHA's insistence upon the free discharge capacity provision, MSHA's revocation of Carbon County's ventilation plan, and MSHA's subsequent citation of Carbon County for a violation of section 75.316 were not in accord with applicable Mine Act procedure.

This does not mean that the free discharge capacity provision may not be applied at the Carbon No. 1 Mine. If negotiations on the ventilation plan resume, MSHA may determine, and may be able to establish, that particular conditions at the mine warrant the inclusion of the free discharge capacity provision in the ventilation plan. Also, if MSHA believes the free discharge capacity provision to be of universal application, the Secretary may proceed to rulemaking under section 101 of the Mine Act and promulgate the free discharge capacity provision as a nationally applicable mandatory safety standard.

Accordingly, the order of the administrative law judge denying Carbon County's motion for summary decision is vacated, as is the citation alleging a violation of section 75.316. Summary decision is entered on behalf of Carbon County and the proceeding is dismissed. 7/

Richard V. Backley, Acting Chairman

James A. Lastowka, Commissioner

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7/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. $ 823(c), we have designated ourselves as a panel of three members to exercise the power of the Commission.

Commissioner Nelson, concurring:

While I am in complete agreement with my colleagues that Carbon County is entitled to summary decision, I am persuaded to reach that result as much by consideration of the practical aspects of this case as I am by the legal analysis displayed in the opinion. I find the procedural track record of this case to be noteworthy. More than three and one-half years have elapsed since the Secretary of Labor initiated this action by filing with the Commission a petition for assessment of a civil penalty, yet this proceeding has not proceeded beyond the discovery stage. This is the second time that this matter has come before us on interlocutory review and, despite our clear instructions to the trial judge in our remand order following the first interlocutory review, no progress has been made in bringing this case to its conclusion. Finally, the administrative law judge to whom the case was assigned originally, and who twice heard Carbon County's motion for summary decision, has retired. Were we to conclude that further proceedings in this matter are required, a remand necessarily would be to a new judge, one unfamiliar with the extensive record. Given the record evidence in favor of Carbon County and given our previous adoption of the D.C. Circuit's decision in Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (1976), I believe that it is time to bring this litigation to a merciful end.

Accordingly, for the reasons appearing in the opinion and for the reasons set forth above, I concur in the awarding of summary decision to Carbon County and in the dismissal of this proceeding.

L. Clair Nelson, Commissioner

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Distribution

Barry F. Wisor, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Robert E. Vagley, Esq.
Preston, Thorgrimson, Ellis & Holman
1735 New York Ave., N.W., Suite 500
Washington, D.C. 20006

Michael F. Duffy, Esq.
American Mining Congress
1920 N Street, N.W., Suite 300
Washington, D.C. 20036