

CCASE:
MSHA V. GREEN RIVER COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 10, 1989

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket No. KENT 88-152

v.

GREEN RIVER COAL COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

By a petition for discretionary review filed May 1, 1989, and supplemented on May 5, 1989, the Secretary seeks review of a decision issued by Commission Administrative Law Judge George A. Koutras on April 24, 1989. The basis for the Secretary's petition is that a prejudicial error of procedure was committed when the judge issued his decision prior to May 3, 1989, the date set by the judge for the filing of post-hearing briefs, and before any such briefs had been received. The petition requests that the case be summarily remanded to the judge for reconsideration of his decision in light of any timely-filed post-hearing briefs of the parties. Concurrently with the filing of her petition for review, the Secretary also filed with the judge a motion for reconsideration of his decision pursuant to Commission Procedural Rule 65(c), 29 C.F.R. § 2700.65(c) providing in part for the correction of "clerical mistakes and errors arising from oversight or omission in decisions, orders or other parts of the record" after a judge's decision has been issued.

On May 8, 1989, Green River Coal Company filed a response to the Secretary's petition requesting that it be denied on three

grounds: that no prejudice to the Secretary occurred since the judge issued his decision without considering the brief of either party; that the petition was premature insofar as the judge had not yet ruled on the Secretary's motion for reconsideration; and that a petition for review based on a technical

~801

error should also indicate that the petitioner can also prevail on the merits. Meanwhile, by an order issued May 4, 1989, the judge denied the Secretary's motion for reconsideration citing among other authority the Commission's decision in *Capitol Aggregates, Inc.*, 2 FMSHRC 1040 (May 1980). */

Having considered the arguments of the parties and the judge's order denying the Secretary's motion for reconsideration, we find that *Capitol Aggregates, Inc.*, is dispositive of this matter. We therefore grant the Secretary's petition for review, vacate the judge's decision of April 24, 1989, and remand the case to the judge for further consideration of his decision in light of the post-hearing briefs filed by the parties.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

*/ In *Capitol Aggregates*, the Commission held that a judge has no authority to stay the effective date of his already issued decision pending the filing of post-hearing briefs by the parties, and remanded that case to the judge for reconsideration of his decision in light of the post-hearing briefs. 2 FMSHRC at 1041-42.

~802

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