

CCASE:
MSHA V. HINKLE CONTRACTING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 4, 1990

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

v. Docket No. KENT 90-5-M

HINKLE CONTRACTING CORPORATION

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

ORDER

BY THE COMMISSION:

By a petition for discretionary review filed March 23, 1990, Hinkle Contracting Corp. (Hinkle) seeks review of a decision issued by Commission Administrative Law Judge Gary Melick on March 9, 1990. 1/ The basis for Hinkle's petition is that a prejudicial error of procedure was committed when the judge issued his decision prior to receipt of Hinkle's brief. The petition requests that the judge's decision and order of March 9, 1990 be set aside and that Hinkle be allowed two weeks to file a brief in response to the Secretary's post-hearing brief.

In support of its petition Hinkle avers that at the end of the hearing in this case held before Judge Melick on January 30, 1990, counsel for the Secretary requested an opportunity to file a post-hearing brief and that in granting that request the judge advised Hinkle that its brief in response would have to be filed two weeks after receipt of the Secretary's brief. Hinkle further avers that by letter dated March 9, 1990, the Secretary transmitted its brief to Hinkle. In the meantime, the judge issued his decision on the matter on March 9, 1990, without benefit of Hinkle's brief in response to the Secretary.

1/ Respondent Hinkle's March 23, 1990 filing is in the nature of a motion to set aside Judge Melick's March 9, 1990 decision and order and is directed to the judge himself. By operation of Commission Procedural Rule 2700.65(c), 29 CFR 2700.65(c), a judge's jurisdiction terminates when his decision is issued by the Commission's Executive Director, as was the case here. The Commission is therefore treating Hinkle's motion as a petition for discretionary review pursuant to Commission Procedural Rule 2700.70. 29 CFR 2700.70. See Capitol Aggregates Inc., 2 FMSHRC 1040 (May 1980).

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By letter of March 27, 1990, the judge acknowledged the inadvertent issuance of his March 9, 1990 decision without consideration of the brief of either party and suggested that the Commission might wish to consider a remand of the proceedings for such consideration. On March 30, 1990 the Secretary filed a response in this matter agreeing that under the circumstances the judge's decision should be vacated and the case remanded to the judge for further consideration of the parties' post-hearing briefs.

Having considered the parties' and the judge's positions, we find that our decision in *Green River Coal Co.*, 11 FMSHRC 800 (May 1989) is dispositive of this matter. We therefore grant Hinkle's petition for discretionary review, vacate the judge's March 9, 1990 decision and order, and remand the case to the judge for further consideration in light of the parties' post-hearing briefs. Respondent Hinkle shall have two weeks from the date of this order to file its post-hearing brief with the judge.

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