

Energy and Mineral Law Foundation
Special Institute on
Mine Safety and Health Law
March 23-24, 2010
Washington, DC

MSHA's Plan Process: The Technical Citation Tango

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Introduction

MSHA's plan approval process is commonly used to create requirements for mine operators without the use of notice and comment rulemaking under Section 101(a) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 811(a). In the coal sector, requirements for the adoption of plans are entrenched within the regulatory program, and indeed the number of plans requiring MSHA approval is growing. In the metal/nonmetal sector, where plan approval is not as prevalent as it is in coal, approval of quasi-plans to terminate closure orders is on the rise, in part because of the increased use of orders issued under Section 103(k) of the Act. 30 U.S.C. § 813(k).

Among the current standards that require the operator to develop and adopt, and the Secretary to approve, mine operating plans are the following:

Coal

- 30 C.F.R. § 75.220 – roof control;
- 30 C.F.R. § 75.335 – seal design applications and seal installation;
- 30 C.F.R. § 75.370 – ventilation;
- 30 C.F.R. § 75.1501 – emergency evacuation;
- 30 C.F.R. § 75.1506 and 1507 – firefighting and refuge alternatives;
- 30 C.F.R. § 75.1721 – opening or reopening of a mine;
- 30 C.F.R. § 77.216 – water, sediment or slurry impoundments;

- 30 C.F.R. § 77.1000-1 – surface coal mine ground control to be submitted;
- 30 C.F.R. § 77.1101 – escape and evacuation plan;
- 30 C.F.R. § 77.1900 – shaft and slope sinking;

Coal and Noncoal

- 30 C.F.R. §§ 46 and 48 – training;
- 30 C.F.R. § 62.150 – hearing conservation programs;

The concept of the use of a plan itself presents something of a conundrum under the Act. According to the Act’s legislative history, ventilation and roof control plans in coal address critical areas of regulation. Congress explained as follows:

Such individually tailored plans, with a nucleus of commonly accepted practices, are the method of regulating such complex and potentially multifaceted problems as ventilation, roof control and the like.

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

Congress believed that mine operators should have flexibility in providing safety on a site-specific basis because of the inherent differences among mining operations. Leg. Hist. at 613. Thus, the mine plan system was created so that

operators would develop and adopt, and the Secretary approve, a site-specific operating plan suitable to the conditions and mining systems of a particular mine. See, e.g., 30 U.S.C. § 863(o); 30 C.F.R. § 75.316.

There is an inherent tension between the development of a plan by an operator and approval by MSHA. This is compounded by an impetus toward uniformity throughout MSHA as an agency and the establishment of “guidelines” for its plan reviewers and for operators. This has resulted in “templates” assembled by MSHA and internal guidelines or policy that apply across the board, just like mandatory standards. An additional element of difficulty is that there are eleven coal District Managers who might take different approaches that frustrate operators with their inconsistencies.

In the coal sector, the plans that are the most problematic are those that require each operator to develop plans that address ventilation and roof control. The plans, including any revisions, must be approved by MSHA and must be reviewed by the operator and MSHA at least every six months. See 30 C.F.R. §§ 75.220, 75.223, and 75.370. Congress expanded this process to Emergency Response Plans (“ERP”) under the MINER Act and these areas also have been problematic. See 30 U.S.C. § 876; 30 C.F.R. § 75.1507.

The need to adopt and periodically revise ventilation, roof control plans and ERPs and obtain MSHA approval of them has often resulted in contentious

relations between coal mine operators and MSHA. This process theoretically is a negotiation and involves a dialogue between the operator and MSHA. In reality, however, there is often vigorous and acrimonious disagreement between the mine operator and MSHA about the specific contents of the plans. This has been exacerbated of late by such issues as extended cuts for continuous miners and ERP provisions, especially those involving communication and tracking.

While there are procedures that theoretically allow resolution of these disagreements before the Federal Mine Safety and Health Review Commission (the “Commission”), these procedures are cumbersome, protracted and in many ways unsatisfactory. Such disputes have become increasingly contentious and resolution is compounded by delay and vague standards for resolution. The plan process loses effectiveness as a tool for implementing safety if it is arbitrary or if it is perceived as arbitrary and without a fair dispute resolution process.

I. Early Cases: Underpinnings of the Plan Approval Process

A D.C. Circuit Court opinion, Zeigler Coal Co. v. Kleppe, 536 F.2d 398 (D.C. Cir. 1976), provided initial insights into the nature of a plan and the scope of the approval process. Zeigler did not involve a challenge to a plan approval decision but rather the issue of whether the enforcement provisions of the Mine Act’s predecessor, the Federal Coal Mine Safety & Health Act of 1969 (“Coal

Act”), 30 C.F.R. § 801 et seq. (1976), were applicable to plan provisions.¹ The operator argued that enforcement actions such as a Section 104(b) order may only be issued for violations of mandatory standards and that plan provisions do not constitute “mandatory standards,” as defined under the Coal Act. To the end, the Coal Act defined “mandatory standards” only as the interim standards set out in the Act and the improved standards promulgated under the specific procedures detailed in Section 101 of the Coal Act. Plan provisions are not created by either of those means. The operator further argued that if rules such as plan provisions, which were not subject to the stringent requirements of Section 101, were enforced as mandatory standards, the protections afforded by Section 101 would be rendered a nullity.

The Court held that requirements of duly adopted plans are indeed enforceable as mandatory standards. In so ruling, however, it specifically addressed the operator’s concerns that plan provisions would be enforced as mandatory standards but were not enacted with the protections of Section 101. It found that operators were afforded other protections in the creation of plan provisions, namely that the operator plays a coequal role in the development of the requirements of a plan. The Court explained as follows:

¹ In Zeigler, the operator had received a Section 104(b) withdrawal order for failing to abate a violation of its ventilation plan, specifically, its plan’s requirement that wood used in stoppings and doors be treated with fire-retardant material.

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 may have some significant leverage in determining its contents, it does not follow that he has anything close to the 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.

Zeigler Coal, 536 F.2d at 406-07 (citations omitted).

The Court also explained that plan provisions must pertain to the unique and specific conditions at a particular mine and must not serve as a means to set forth additional general requirements that could be applied to all mines. The Court believed that this principle provided an additional protection against the use of a mine plan to circumscribe the promulgation of mandatory standards. It explained as follows:

A less apparent but more significant restriction on the Secretary’s power to use the ventilation plan as a vehicle for avoiding more stringent procedural requirements, arises from the plan provisions obvious purpose to deal with unique conditions peculiar to each mine....The [plan requirement] 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.

Zeigler Coal, 536 F.2d at 407.

A series of cases before the Commission involving the Carbon County Coal Co. built upon the principles announced in Zeigler. Carbon County involved a

dispute over revisions to an existing ventilation plan that arose during MSHA's six-month review of the plan. The operator revised its plan so that the volume of air made available to auxiliary fans used to ventilate some sections of the mine would be greater than the "installed capacity" of the fan. MSHA rejected this provision and insisted that the auxiliary fans be provided with a volume of air greater than their "free discharge capacity." Prior to the review of that particular plan, both MSHA's national office and the local district in which the operator was located published policy guidelines stating that the amount of air delivered to auxiliary exhaust fans must be greater than the free discharge capacity of the fan.

Negotiations proved fruitless in resolving the dispute. Thereafter, MSHA issued a Section 104(a) citation and Section 104(b) withdrawal order to the operator for mining without an approved ventilation plan. The operator adopted the "free discharge capacity" provision to abate the enforcement actions, but contested the citation and order. The operator argued that MSHA had improperly required it to adopt a general rule related to free discharge capacity in its ventilation plan, when the plan approval process was designed to consider the individualized conditions of the mine. The operator further argued that MSHA was imposing a rule of general applicability without promulgating it as a mandatory standard. The operator filed a motion for summary decision and requested that the citation and order be vacated.

The Administrative Law Judge denied the motion for summary judgment and did not reach the legal issue raised by the operator. Instead, he ruled that the record did not present sufficient facts to determine whether MSHA's requirement of free discharge capacity was appropriate. In Carbon County Coal Co., 6 FMSHRC 1123 (Rev. Comm. May 1984) ("Carbon County I"), the Review Commission reviewed Zeigler and adopted its distinction between a negotiated plan requirement and a rule of general applicability, which must be promulgated as a mandatory standard. The Review Commission vacated the Administrative Law Judge's ruling and remanded it to him for consideration of the legal issue. Carbon County I, 6 FMSHRC at 1127.

On remand, the Administrative Law Judge bypassed Zeigler and stated that the issue in the case was the proper amount of air to be supplied to the auxiliary fans. He, therefore, again denied the operator's motion for summary decision. In Carbon County Coal Co., 7 FMSHRC 1367 (Rev. Comm. Sept. 1985) ("Carbon County II"), the Review Commission vacated the Administrative Law Judge's decision and dismissed the citation and order. 7 FMSHRC at 1375. It found that the record conclusively established that MSHA's insistence upon the free discharge capacity provision was a rote application of the national and district policy guidelines. Carbon County II, 7 FMSHRC at 1373. Therefore, MSHA ran

afoul of the Act's plan approval procedure, which required that plan provisions be based on the individual conditions at the subject mine.

In Carbon County II, the Review Commission again adhered to the principles set forth in Zeigler. Notably, it characterized that process as “[t]he bilateral approval-adoption process inherent in developing mine specific plans results from consultation and negotiation between MSHA and only the specifically affected operator....” Carbon County II, 7 FMSHRC at 1370. It also distinguished plan provisions from “nationally applicable standards,” which are the product of promulgation through notice and comment rulemaking. In that same vein, it noted that the scope of a plan provision is necessarily limited exclusively to the mine in which the plan is implemented, whereas a mandatory standard applies across the board to all mines. Carbon County II, 7 FMSHRC at 1370.

Therefore, taken together, Zeigler and Carbon County stand for two important principles regarding the plans: (1) The approval process is one in which MSHA and the operator play equal roles in arriving at a final plan; and (2) A mine plan is designed to address specific individualized conditions at a given mine, not to advance general rules that could apply to all mines. A 1989 decision of the D.C. Circuit, United Mine Workers of America v. Dole, 870 F.3d 662 (D.C. Cir. 1989), appears to temper these two points from Zeigler and Carbon County. Dole did not deal with a mine plan dispute but rather involved a challenge by the UMWA to the

validity of new mandatory safety standards on roof bolts and roof support removal requirements. In dicta, the Court commented on the respective roles of MSHA and the operator by stating in a footnote:

We note that while the mine operator had a role to play in developing plan contents, MSHA always retained final responsibility for deciding what had to be included in the plan. In 1977 Congress “caution[ed] that while the operator proposes a plan and is entitled, as are the miners and representatives of miners [sic] to further consultation with [MSHA] over revisions, [MSHA] must independently exercise [its] judgment with respect to the content of such plans in connection with [the agency’s] final approval of the plan.”

Dole, 870 F.2d at 669 n.10 (citing S. Rep. No. 95-181, 95th Cong., 1st Sess. 25 (1977)). Dole also appears to have taken a step back from the distinction between mine-specific plans and general rules, which should be promulgated as mandatory standards. The Court reviewed Carbon County and opined that it “make[s] the narrow point that mine operators are entitled to have alternative procedures evaluated by the district manager to determine if they achieve the safety objectives set out in the MSHA regulations and policy.” Dole, 870, F.2d at 672; see also C.W. Mining, 18 FMSHRC 1740 (Rev. Comm. Oct. 1996).

Yet, even after Dole, it was still recognized that mine plans must be tailored to the specific conditions of a mine, even if they do include certain universal provisions. See Peabody Coal Co., 15 FMSHRC 381, 386 (Rev. Comm. March 1993) (finding that Dole “clarified that mine plans...may contain generally applicable provisions so long as the provisions address the particular conditions of

the mine to which they apply”) (hereinafter “Peabody I”). Indeed, in Peabody I, the Commission applied Dole, as well as Zeigler and Carbon County and held that the Secretary must demonstrate that the disputed provision is “suitable” to mines at issue. 15 FMSHRC at 388.²

It should also be noted that Dole did not overrule either Zeigler or Carbon County but, on the contrary, incorporated those findings into its own. While the trio of cases left certain questions unanswered, they set forth a framework in which both MSHA and the operator maintained substantial roles in the plan approval process and that plans must be tailored to the individual characteristics of the mines to which they pertain.

II. The Dispute Resolution Process

A. Technical Citations

Both Zeigler and Carbon County also offered insights into the dispute resolution process, should negotiations between MSHA and an operator fail. In Zeigler, the Court anticipated that an operator could initiate an action to compel adoption of a plan on the grounds that MSHA was requiring rules of a general nature, rather than terms that pertain to the particular circumstances of a mine. 536 F.2d at 408.

² In a subsequent decision in the same litigation, the Commission ascribed to MSHA the corresponding burden of also demonstrating the unsuitability of a former plan that it sought to revoke. Peabody Coal Co., 18 FMSHRC 686, 690 (Rev. Comm. May 1996) (hereinafter “Peabody II”).

In Carbon County II, the Commission set forth the outline of a procedure for resolving plan approval disputes. It stated as follows:

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.

Carbon County II, 7 FMSHRC at 1371 (citing Penn Allegh Coal Co., 3 FMSHRC at 2767, 2773 (Rev. Comm. Dec. 1981)). In Carbon County, the operator litigated the plan approval dispute in this manner.³

In its Program Policy Manual ("PPM"), MSHA provided a more uniform procedure for disputes over plan approvals to be resolved. It stated that when an impasse is reached, the operator should advise MSHA that it does not adopt the required provisions and MSHA should issue a "technical" citation. The PPM specifically advises:

In those situations when MSHA can no longer accept a provision of an approved plan, cannot approve a provision in a new plan, or cannot approve a proposed change to an approved plan, operators should be

³ The Commission later interpreted the "good faith" language from Carbon County II by indicating that, "Two key elements of good faith consultation are giving notice of a party's position and adequate discussion of disputed provisions." C.W. Mining, 18 FMSHRC at 1747.

afforded the opportunity to contest MSHA's denial of approval. Where the operator disagrees with MSHA and indicates the desire to seek a citation to contest before the . . . Commission, a citation should be issued. Normally this should be a 104(a) citation and not involve unwarrantable failure findings, unless the circumstances justify it.

MSHA Program Policy Manual, Volume V at p. 4.

Thus, the PPM contemplates three scenarios in which a plan approval dispute might arise: (1) when MSHA no longer considers a plan provision adequate; (2) when MSHA does not approve the provisions of a new plan; and (3) when MSHA does not approve an operator's proposed change to an existing plan. The PPM sets out specific guidance for resolution of disputes in each specific scenario.

In the first situation, where MSHA no longer considers a plan provision adequate, the PPM states that upon revocation of approval, MSHA must issue a citation for operating without an approved plan. The operator should abate the citation by adopting a provision that would satisfy MSHA's concerns, and the matter can then proceed to litigation before the Commission. The PPM advises that in such situations, the operator should have an approved plan prepared before the citation is issued, so that no mining actually takes place without an approved plan and the violation is truly "technical" in nature. PPM at 4.

In the second situation, where MSHA does not approve a provision in a new mine plan, the PPM states that the operator should indicate the date when mining

operations will begin using the unapproved plan. On that date, MSHA would issue a citation for failure to adopt and follow an approved plan. The operator should abate the citation by promptly adopting the provisions insisted upon by MSHA, and the matter can then proceed to litigation before the Commission. PPM at 4.

In the third situation, where MSHA does not approve a change to an existing plan proposed by the operator, the dispute should be resolved in a similar fashion as a new plan dispute. Specifically, the operator should inform MSHA of the date when it will begin mining using the unapproved change. MSHA would then issue a citation on that date for failure to have and adopt an approved plan. The operator should abate the citation by promptly adopting the provisions of the most recently approved plan, and the matter can then proceed to litigation before the Commission. PPM at 4.⁴

Historically, MSHA field personnel have evidenced some reluctance to issue technical citations outside the ERP context. In recent times this has been more evident. It has taken, in some instances, months for MSHA to agree to issue

⁴ In the context of Emergency Response Plans (“ERP”) for underground coal mines, the Act and Commission rules specifically provide for referral of disputes arising over ERPs. 30 U.S.C. § 876(b)(2)(G); 29 C.F.R. § 2700.24(a). Under that process, when a dispute arises over an ERP provision, the Secretary must issue a citation and refer the citation to the Commission within two days of issuance. A hearing then must take place within 15 days of the referral. 29 C.F.R. § 2700.24(e). See also S. Rep. No. 109-365, 109th Cong., 2d Sess., Committee on Health Education Labor and Pensions, December 6, 2006 at 5 (“The Committee has recognized the need for expedition in the resolution of such disputes . . .”).

technical citations. In at least one instance MSHA has refused to follow its own policy in the fashion that the citation would be issued.

An operator has a choice in those circumstances. It can, as occurred in Carbon County, simply notify MSHA and begin to mine and accept the risk of more severe enforcement actions. It would be expected in those circumstances that MSHA would utilize a closure order under Section 104(d) or Section 104(b) of the Act. The operator would then have the ability to litigate the validity of that order, along with its corresponding abatement requirements. Alternatively, it could consider seeking a judicial remedy but would, of course, be confronted with distinguishing the Supreme Court's holding in Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994), which held that the federal courts do not have pre-enforcement jurisdiction over matters arising under the Act. In a situation where MSHA refuses to issue a technical citation, the restrictions of that holding would be most distinguishable due to the absence of an administrative remedy.

B. Standard of Review and Burden of Proof

Should litigation of a plan dispute ensue, the standard of review that has developed also presents a challenge to operators who contest plan disapprovals. The Commission has recently affirmed the use of the “arbitrary and capricious standard,” in two ERP cases whereby MSHA's actions are reviewed to determine whether the agency properly exercised its discretion and judgment in the plan

approval process. Emerald Coal Resources LP, 29 FMSHRC 956, 966 (Rev. Comm. Dec. 2007); Twentymile Coal Co., 30 FMSHRC 736, 748 (Rev. Comm. Aug. 2008). This standard involves a review of the record to determine “whether the Secretary properly exercised her discretion and judgment in the plan approval process.” Twentymile, 30 FMSHRC at 748. Evidence that will be considered under this standard includes adequate notice of the agency’s position, discussion with representatives of the operator, and potential bad faith or arbitrary conduct. See C.W. Mining, 18 FMSHRC at 1747.

Here, it is important to distinguish “standard of review,” under which a case may be adjudicated, from the Secretary’s burden of establishing both the suitability of a plan provision it advances and the unsuitability of one it opposes. See Peabody II, 18 FMSHRC at 690.

It is questionable whether the arbitrary and capricious standard of review should extend beyond the ERP context. Emerald and Twentymile both arose in that context. In each, the Commission based its application of the arbitrary and capricious standard largely on language from C.W. Mining, which stated that “absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan’s approval.” Twentymile, 30 FMSHRC at 748; Emerald, 29 FMSHRC at 956 (citing C.W. Mining, 18 FMSHRC at 1746)). That language, however, appeared in C.W.

Mining, a case involving a roof control plan, as part of its discussion of good faith negotiations, not a standard of review.

There is also a question as to whether this test is the appropriate one for adjudicating plans, even ERPs. Plans are different. That is why a different standard of review is necessary and appropriate for an emergency response plan. This why they should be evaluated for the reasonableness of the operator's plan provisions. Plans result in negotiated rules without the protection of notice and comment rulemaking. See, e.g., Zeigler, 536 F.2d at 407; Carbon County I, 6 FMSHRC at 1127; Martin County Coal Company, 28 FMSHRC 247, 274 (Rev. Comm. May 2006) (Duffy concurring); Jim Walter Resources, Inc., 28 FMSHRC 579 (Rev. Comm. August 2006).

It would be more logical to review the plan under a standard other than the arbitrary and capricious standard. The reasonableness of MSHA's decision-making process should be evaluated on the basis of the reasonableness of what the operator has proposed is fully consistent with the provisions of the Act that it is the operator that develops the plan. It is consistent with the mantra that has been recited to operators over the years by MSHA personnel that ventilation and roof control plans are "your plans."

C. What Evidence Should the ALJ Consider

Of late, the issue has developed of what evidence the District Manager must consider when making a plan approval decision. In Twentymile, two Commissioners in a separate opinion stated that the District Manager must “examine the relevant data.” 30 FMSHRC at 754 (citing Motor Vehicle Mfr’s Ass’n v. State Farm Auto Ins. Co., 463 U.S. 29, 43 (1983)). A recent Administrative Law Judge decision followed this approach on this issue. See Mach Mining, LLC, Docket Nos. LAKE 2010-1-R & 2010-2-R (ALJ Miller Jan. 28, 2010) at 16-18. In Mach, the Administrative Law Judge emphasized, however, that in applying the arbitrary and capricious standard, the focus must be on what information was before the District Manager at the time he made his decision. Mach Mining, Docket Nos. LAKE 2010-1 & 2010-2-R at 19. For this reason, she refused to admit evidence of plans from other mines that were not produced to the District Manager during negotiations. Mach Mining, Docket Nos. LAKE 2010-1 & 2010-2-R at 19. In Twentymile, the Administrative Law Judge granted the Secretary’s motion in limine to preclude evidence of the approval of plans in other districts that were similar to the one advanced by the operator. On review, the Commission split evenly over whether barring this evidence was appropriate. Twentymile, 30 FMSHRC at 764-66 & 778-79. In Twentymile, this left the Administrative Law Judge’s ruling undisturbed, but the issue remains unresolved

as to the probative value of approved plans for other mines. This issue is also perhaps broader than simply evaluating the evidence the District Manager had before him. The question is also whether the District Manager must evaluate the data readily available to him, such as MSHA plans or studies or NIOSH studies.

In addition, the arbitrary and capricious standard requires an agency “to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” The “agency must cogently explain why it has exercised discretion in a given manner,” and that explanation must be sufficient for a court “to conclude that the agency’s action was the product of reasoned decision making.” Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156 (1962) (contradictory positions and inconsistency by the agency indicate an abuse of discretion) (internal quotes omitted). See also Alpha Pharma Inc. v. Leavitt, 460 F.3d 1 (D.C. Cir. 2006). The decision must also describe the standard under which the conclusion has been arrived. See, e.g., American Lung Assoc. v. EPA, 134 F.3d 388, 392 (D.C. Cir. 1998).

This case law would suggest that the District Manager is not free to ignore the information readily available to him. But the limitation to information before the District Manager also places an operator in an awkward position. If it does not do a “data dump” on the District Manager, including bringing in experts it may use in a hearing, it risks the possibility that such evidence might be excluded. In Mach

Mining, MSHA sought to exclude the operator's expert witness because he did not present his testimony to the District Manager. On the other hand, if the operator prepares to litigate while negotiating, it may be accused of bad faith.

This issue can have material consequences in the litigation of plan approval disputes. The problem is that to exclude such evidence is to ignore information readily available to the District Manager and to permit the District Manager to decide on an ad hoc basis what should be in a particular plan. It also permits a District Manager to reach an inconsistent decision with no check or balance on his decision.

III. It Is Not Getting Easier.

In recent years, the plan process has become decidedly more difficult. This is, in part of the result of the multi-fatality accidents at Sago and then Crandall Canyon. Extensive media coverage of these accidents and the intense political scrutiny of a Republican Administration's MSHA by a Democratically-controlled Congress resulted in MSHA increased inflexibility in plan approvals and unprecedented MSHA enforcement activities. The 2007 Crandall Canyon Mine collapse led to intense and unprecedented criticism of MSHA's approval of the Crandall Canyon Mine's roof control plan.

Since Sago and Crandall Canyon, the imperfect mine plan adoption and approval process has become much more problematic. In addition, MSHA seems

to have adopted the use of the plan process as a means of avoiding notice and comment rulemaking. The ERP plan process is symptomatic of this. The whole process was regulated by a series of policy documents which were not binding theoretically but which were treated as such in the field.⁵ See, e.g., Program Information Bulletin No. P07-03 (Feb. 8, 2007); Program Policy Letter No. P09-V-01 (Jan. 16, 2009); Program Policy Letter No. P10-V-01 (Jan. 25, 2010). The concept in Dole that MSHA retains final responsibility for deciding what had to be included in a mine plan has now become a mechanism for imposing across-the-board requirements in the plan approval process.

Adoption and approval of mine plans is rarely an actual negotiation between MSHA and an operator; instead, MSHA may hold the approval of mine plans hostage to its demands for changes. Under MSHA's new approach, the plans do not seem to be adopted by operators the way Congress intended, but rather imposed on them by MSHA under a threat of being unable to operate.

MSHA has also appeared to frustrate the ability of operators to seek a plan dispute citation and resolve plan-related issues in contest proceedings before the Commission. This is accomplished by either delaying or refusing to issue the technical citation that its own procedures appear to require it to do. Even when a contest before the Commission can be finally initiated the fact that the Commission

⁵ See, e.g., National Mining Association v. Secretary of Labor, No. 08-14309 (11th Cir. Dec. 15, 2009).

has a current backlog of over 13,000 cases and a limited number of ALJs to adjudicate them, has seriously undermined any administrative remedy. The Commission is simply overwhelmed, and even expedited reviews of contests have become harder to obtain. In one instance of a new mine, the contest took more than two months before an ALJ was assigned to the case on the operator's motion to expedite. In addition, in at least one case MSHA has opposed a motion to expedite a plan dispute contest. Given that the operator must operate under a plan that it objects to for an extended period, the remedy is seriously compromised by such delays.

The exception to this is the expedited dispute resolution provision of the ERP requirements of Section 2 of the MINER Act. The MINER Act provision (codified in 30 U.S.C. § 316(b)(2)(G)), establishes an impasse procedure aimed at getting any ERP dispute between MSHA and an operator about an ERP's contents, or any refusal by MSHA to approve an ERP, before a Commission ALJ on an expedited basis. Thus, when an impasse occurs in the judgment of the mine operator, this provision makes it mandatory for MSHA to issue a technical citation that triggers a process for expedited Commission review. Under that process: (1) the citation must be immediately referred to an ALJ; (2) the operator and MSHA must provide all relevant material about the dispute to the ALJ within 15

days of the referral; and (3) the ALJ must issue a written decision within 15 days of the receipt of this material.

Conclusion

The plan process and plan dispute resolution mechanisms are in great need of improvement. There seems, however, little opportunity for such improvements unless MSHA adopts a different approach to plan development and the Commission levels the playing field in the dispute resolution process.