

Plan Disputes Under the Mine Act

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EMLF Conference – March 2010*

1. The plan review process has been characterized as a “peculiar species” of rule making between MSHA and an operator. Zeigler Coal Company v. Kleppe, 536 F.2d 398, 406 (D. C. Cir. 1976). Accordingly, the process requires MSHA and the affected operator to negotiate in good faith for a reasonable period of time concerning a disputed plan provision. Bishop Coal Co., 5 IBMA 231 (1975). Two key elements of good faith consultation are giving notice of a party’s position and adequate discussion of the disputed provisions. C.W. Mining Company, 18 FMSHRC 1740, 1747 (Oct. 1996). In this plan review process, the Commission and the Courts have recognized that -
 - a. The Secretary is not in the same position as a private party conducting arm’s length negotiations in a free market. C.W. Mining Company, 18 FMSHRC 1740, 1746 (Oct. 1996).
 - b. The Secretary must exercise judgment with respect to the content of plans in connection with her final approval of a plan. UMWA v. Dole, 870 F.2d 662, 669 n. 10 (D.C. Cir. 1989).
2. Standard of review of MSHA’s decisions –
 - a. Emergency Response Plans (ERPs) – whether MSHA was arbitrary and capricious. See Twentymile Coal Company, 30 FMSHRC 736 (Aug. 2008); Emerald Coal Resources, 29 FMSHRC 956 (Dec. 2007).
 - This standard involves a review of the record to determine whether the Secretary properly exercised her discretion and judgment in the plan approval process, and does not require the Secretary to prove that the operator’s proposed plan provision is unreasonable. Twentymile Coal Company, 30 FMSHRC at 748.
 - A decision-maker cannot act arbitrarily and capriciously by not considering information that has not been provided. See State of Wisconsin v. Weinberger, 745 F.2d 412, 418-419 (7th Cir. 1984); American Horse Protection Ass’n, Inc. v. Watt, 694 F.2d 1310, 1320 n. 42 (D. C. Cir. 1982).
 - b. Competing views in the non-ERP context –
 - Whether MSHA was arbitrary and capricious. See Twentymile Coal Company, 30 FMSHRC 736 (Aug. 2008); Emerald Coal Resources, 29 FMSHRC 956 (Dec. 2007).
 - Whether MSHA has established the suitability of its own proposal and the unsuitability of the operator’s proposal. See Peabody Coal Co., 15 FMSHRC 381 (March 1993); Peabody Coal Co., 18 FMSHRC 686 (May 1986).