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Chapter 18

Legislation By Mine Plan: Can Laws Be Created at the District Level?

Melanie J. Kilpatrick
Rajkovich, Williams, Kilpatrick & True, PLLC
Lexington, Kentucky

Synopsis

§ 18.01. Introduction.

In addition to the requirements found in the Federal Mine Safety and Health Act[1] (the Mine Act) and its regulations,[2] the Mine Safety and Health Administration (MSHA) has significant authority to mandate certain details of how a particular mine is run, especially in regard to ventilation and roof control issues. Before mining activity is conducted, a mining operation is required to have a roof control plan and a ventilation plan approved by the MSHA district manager. The requirements of these plans are enforceable as if they were mandatory safety standards.[3] The federal court of appeals has held:

> While the plan must . . . be approved by the Secretary [of Labor]'s representative, who may on that account have some significant leverage in determining its contents, it does not follow that he has

1 30 U.S.C. § 801 *et seq.* (1977).
2 30 C.F.R. § 75.
3 Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976).

> anything close to unrestrained power to impose those 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.[4]

And yet, many mine operators find themselves backed into a corner by the agency's insistence on inclusion of objectionable provisions in "the operator's" mine plans. This chapter will address resolution of mine plan disputes and will detail the authority that the Secretary of Labor (the Secretary) has to, in effect, create legal requirements while bypassing typical legislative and administrative procedural safeguards.

§ 18.02. Mine Plans.

Mine operators are required to create plans addressing specific subjects such as roof control and ventilation. Section 302(o) and 303(o) of the Mine Act provide that roof control and ventilation plans, respectively, that are suitable to the conditions and the mining system of the coal mine and are approved by the Secretary shall be adopted by the operator.[5]

There are also regulations pertinent to the development of such mine plans. Title 30, section 75.220 of the Code of Federal Regulations requires each mine operator to develop and follow a roof control plan approved by the district manager. Section 75.222 sets forth the approval criteria and states that additional measures in roof control plans may be required by the district manager. Section 75.223 provides that revisions to the roof control plan shall be proposed by the operator when conditions at the mine indicate that it is not suitable for controlling the roof and ribs or when accidents or injuries indicate that it is inadequate. The roof control plan shall be reviewed by MSHA every six months. Similar provisions for ventilation plans are found at Title 30, sections 75.370 and 75.371.[6] More recently, section 2 of the MINER Act requires underground coal mine operators to develop and submit for approval and periodic review an emergency response and preparedness

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4 *Id.* at 406-07.

5 30 U.S.C. §§ 862(o) and 863(o).

6 *See also* 30 C.F.R. § 77.216-2 (impoundment plans).

plan ("ERP").[7] The MINER Act and the regulations explicitly provide for referral to the Commission of disputes arising over ERPs.[8]

These plans are then submitted to the district manager of the MSHA district in which the mine is located. Once the district manager approves the plan, the plan provisions are enforceable as if they were law.[9] This is often disconcerting to mine operators because this type of "legislation" is susceptible to abuse and stands in stark contrast to the other methods of creating enforceable standards against mine operators. When the Secretary seeks to promulgate new regulations applicable to the mining industry, she must comply with the requirements of public notice and opportunity for comment set forth in the Administrative Procedure Act. Failure to comply with required section 553 procedures renders agency action arbitrary and capricious, and therefore invalid.[10] Mine plans are, in contrast, developed by informal negotiations between the operator and the Secretary's representative, without any pretense of compliance with the Administrative Procedures Act.

§ 18.03. Good Faith Negotiations.

The specific contents of any individual mine plan are determined through consultation between the mine operator and the local MSHA district manager. Legitimate disagreements about the provisions in mine plans are bound to occur. The Secretary and the operator must negotiate in good faith for a reasonable period of time to attempt to resolve any disputes. An operator who fails to engage in good faith negotiations with the Secretary may be precluded from challenging the disputed provision.[11] Although the operator is the author of the plan, MSHA retains final responsibility for deciding what has to be included.[12]

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7 30 U.S.C. § 876(b)(2)(A).

8 *See* 30 U.S.C. § 876(b)(2)(G)(ii); 29 C.F.R. § 2700.24.

9 *Zeigler,* 536 F.2d at 409.

10 Motor Vehicle Mfrs. Ass'n v. Ruckelshaus, 719 F.2d 1159, 1164 (D.C. Cir. 1983).

11 Secretary of Labor (MSHA) v. Carbon County Coal Co., 7 F.M.S.H.R.C. 1367, 1371 (Sept. 1985)(Comm.); M & H Coal Co. v. Secretary of Labor (MSHA), 25 F.M.S.H.R.C. 95, 98 (Feb. 2003)(ALJ).

12 United Mine Workers of America v. Dole, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989).

Key elements of good faith negotiations are clear notice of each party's position and adequate discussion of disputed provisions.[13] MSHA is required to notify the operator in writing of the specific reasons for the disapproval of, or need for changes to, a mine plan.[14] If MSHA has not provided the operator with this written explanation, the operator should request it.[15] During the litigation process, the reason for MSHA's insistence on disputed plan provisions will be significant.

§ 18.04. Litigation.

If the Secretary and the operator reach an impasse over a plan provision, the operator may refuse to adopt the disputed provision and resort to litigation before the Federal Mine Safety and Health Review Commission (the Commission).[16] Courts have held that compliance with the provisions of an approved revised plan by an operator would appear to result in the waiver of any claim that MSHA failed to follow the regulations or that the plan was never adopted.[17] Therefore, the operator must be careful not to indicate its adoption of the approved plan if it intends to challenge a disputed provision. Typically, when an operator refuses to include the disputed provision in the plan, MSHA revokes the plan. The operator is then issued a citation for operating without having an approved plan. Alternatively, the operator may refuse to comply with the disputed provision, which will likely trigger a citation for failure to comply with the approved plan. MSHA's own Program

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13 M & H Coal, 25 F.M.S.H.R.C. at 98.

14 Secretary of Labor (MSHA) v. Penn Allegh Coal Co., 3 F.M.S.H.R.C. 2767, 2771 (Dec. 1981)(Comm.); Bishop Coal Co., 5 I.B.M.A. 231, 243-44 (1975). *See also,* Secretary of Labor (MSHA) v. Twentymile Coal Co., 2008 WL 4287782, *30 (Aug. 2008)(Comm.)(district manager must supply his rationale for decision to disapprove emergency response preparedness plan in a written decision to operator (dissenting opinion)).

15 Neither the Mine Act nor the regulations set a time limit within which the MSHA must issue a decision on an operator's request for a plan approval or amendment, but, for example, MSHA's Mine Ventilation Plan Approval Handbook states that such requests "should be handled efficiently with an effort to complete all requests of any proposed plan, revision, or change in a time period of 45 calendar days." MSHA Handbook No. PH92-V-6, Ch. 3.

16 Carbon County Coal Co., 7 F.M.S.H.R.C. at 1371; Penn Allegh Coal Co., 3 F.M.S.H.R.C. at 2773 n.8.

17 Bishop Coal, 5 I.B.M.A. 231, n.7.

Policy Manual states that such citations should be issued as "technical" citations and that unwarrantable failure findings would not normally be involved.[18]

This citation provides the mechanism by which the operator can file a notice of contest before the Commission and adjudicate its case, often by expedited means.[19] The operator may resume operations, but must comply with the disputed provision until the matter is resolved through litigation. Otherwise, MSHA would likely refuse to abate the citation and would issue a 104(b) withdrawal order in the face of continued mining under the non-approved plan. The language of section 104(b) provides as follows:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.[20]

MSHA has the authority to assess penalties of up to $5000 per day until the 104(b) order is abated.[21]

Mine operators expressed concerns about MSHA's authority to shut down mine operations for noncompliance with a standard that was neither legislated by a body of elected representatives nor promulgated pursuant to notice and comment rulemaking. In response to those concerns, the

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18 MSHA Program Policy Manual, Vol. V.

19 Expedited proceedings may be preferred in order to minimize the amount of time that the mine is either shut down or subject to operating under the disputed provision.

20 30 U.S.C. § 814(b).

21 30 U.S.C. § 820(b)(1).

United States Court of Appeals for the District of Columbia Circuit noted that operators have the opportunity for a hearing in which they might argue why certain terms mandated by MSHA for inclusion in a mine plan are not proper subjects for coverage. The court also stated that the Mine Act offered sound basis for narrowly circumscribing the subject matter of plans.[22] For example, it noted, section 303(o) of the Mine Act limits ventilation plans to the "ventilation system and methane and dust control." While it recognized that those words might be stretched to encompass requirements pertaining only indirectly to ventilation, the court opined that a wide array of other items could not properly be included in a ventilation plan. An operator could successfully challenge any action brought by the Secretary attempting to enforce those provisions not properly included. The court concluded that such an opportunity for review was a sufficient safeguard against significant circumvention of the traditional regulatory procedures.[23] As will be discussed below, however, the scope of subjects properly considered suitable to control by the mine plan process has widened with the attempted use of "action plans" any time an accident occurs at a mine. First, this chapter will address two principles that circumscribe MSHA's use of the mine plan process.

[1] — Plan Provisions Should Not Mandate Rules Universally Applicable to All Mines.

The *Zeigler* court held that an even more significant restriction on the Secretary's power to use mine plans as a vehicle for legislating without following the notice and comment procedural requirements was the plan's obvious purpose to deal with the unique conditions peculiar to each mine.[24] Section 303(o) specifically states that the plan is to be "suitable to the conditions and the mining system of the coal mine." The court found that the language of section 303(o), when considered in context with the other fairly specific provisions of section 303, suggested that the plan idea was envisioned as having a quite narrow and specific purpose: to address conditions found

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22 *Zeigler* interpreted section 303(o) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 863(o)(1970). That provision is identical to section 303(o) of the Federal Mine Safety and Health Act of 1977 in its current form, 30 U.S.C. § 863(o)(1977).

23 *Zeigler*, 536 F.2d at 407.

24 *Id*.

at the individual subject mine. Mine plans should not impose additional requirements that could have been dealt with in mandatory standards of universal application to all or nearly all coal mines.[25] The *Zeigler* court felt that this would be a significant safeguard to the agency's circumvention of the use of regulations to enforce requirements on a mine.[26]

If MSHA cannot explain the particular mine-specific circumstances that have led it to insist upon a disputed mine plan provision, its inclusion in the plan contravenes Mine Act procedure.[27] It is not enough for MSHA to present evidence that it believes a particular provision should be imposed as a general rule applicable to all mines. Such rules of universal application should be the subject of notice and comment rulemaking. The revocation of a mine plan for refusal to include such a provision contravenes the Mine Act and any citations or orders issued for violations of rules improperly included in a mine plan should be vacated.[28]

The *Zeigler* court closed its opinion with a reiteration that mine plans "perform a limited function within the statutory scheme, and that mine operators cannot be compelled to adopt a plan which transcends these limits."[29] As the Commission noted in *Secretary v. Carbon County Coal Co.*,[30] "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.[31] 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."

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25 *Id.*; *see also Carbon Cnty.*, 7 F.M.S.H.R.C. at 1371-72.

26 *Zeigler*, 536 F.2d at 407.

27 *Id.*

28 *Carbon Cnty.* at 1375.

29 *Zeigler*, 536 F.2d at 410.

30 Secretary of Labor (MSHA) v. Carbon Cnty. Coal Co., 7 F.M.S.H.R.C. 1367, 1370 (Sept. 1985).

31 30 U.S.C. § 811.

In *Carbon County*, when the ventilation plan came up for its six-month review, the operator suggested a revision that the district manager found unacceptable.[32] MSHA revoked the roof control plan and issued a citation when the operator continued mining. MSHA also issued a 104(b) withdrawal order, at which point the operator adopted the disputed plan and challenged MSHA's action.[33] The administrative law judge twice decided the issue based upon his evaluation of which proposal was safer.[34] Twice, the Commission rejected that standard, holding instead that the relevant inquiry was whether the provision espoused by the Secretary was required because of particular mine specific conditions at the subject mine.[35] Thus, MSHA cannot support revocation of a mine plan by simply advancing that its alternative is safer.

The evidence presented by the Secretary at hearing showed that the operator's proposed plan revision was rejected because the district manager had a district-wide guideline regarding ventilation at all the mines within his district. The Secretary put on evidence that the district believed that the guideline was necessary because it was the minimum requirement necessary to protect the lives of the miners in the mine.[36] The Secretary offered no evidence of any specific conditions at the subject mine.[37] The Commission held that the rote application of a district-wide policy or guideline through the mine plan approval process is impermissible.[38] It emphasized that its decision was not being made on the merits of the disputed provision, but rather upon the basis for MSHA's insistence on the provision at the subject mine. Because the evidence demonstrated that the provision was imposed as a general rule applicable to all mines, MSHA's insistence on the provision was not in accord with Mine Act procedure.[39]

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32 Carbon County Coal Co.. 7 F.M.S.H.R.C. at 1367.
33 *Id.* at 1368.
34 *Id.* at 1369.
35 *Id.* at 1372.
36 *Id.* at 1374-75.
37 *Id.* at 1374-75.
38 7 F.M.S.H.R.C. at 1373-74.
39 *Id.* at 1375.

The Commission did leave open the possibility that the provision could be properly applied to the mine if, upon continued negotiations, MSHA could establish that particular conditions as this mine warranted the inclusion of the provision. Moreover, the Commission counseled, if the Secretary believed that the provision should be applied universally to all mines, she could proceed to rulemaking under section 101 of the Mine Act.[40]

[2] — Plans Must Be Suitable to the Conditions and Mining System of the Mine.

Even if the disputed provision is based upon the particular circumstances of the mine, MSHA must demonstrate that the provision is suitable to the conditions and the mining system of the mine. In *Secretary v. C.W. Mining Co.,*[41] MSHA and the mine operator faced off over provisions in a roof control plan. The mine's roof control plan was subject to its biannual review, and the operator stated that it did not feel that any changes were needed to the plan.[42] MSHA responded by letter that there were 40 revisions that would have to be made to the plan before MSHA would approve it. The operator noted that the same roof control plan had been in use at the mine for 30 years with no uncontrolled falls, and it refused to make the changes.[43]

After four months of negotiations, MSHA revoked the roof control plan and issued a citation to the operator for operating without an approved roof control plan.[44] The operator then filed MSHA's proposed roof control plan under protest.[45] The operator contested the citation, arguing that the mine's old roof control plan was improperly revoked; that MSHA did not consult over the required revisions in good faith; and that the former roof control plan was adequate, more suitable and a safer roof control plan than the new plan.[46] The administrative law judge affirmed the citation, holding that the

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40 *Id.*
41 Secretary of Labor (MSHA) v. C.W. Mining Co., 18 F.M.S.H.R.C 1740 (Oct. 1996).
42 *Id.* at 1742.
43 *Id.*
44 *Id.* at 1743.
45 *Id.*
46 *Id.* at 1744.

old roof control plan was not suitable for the mine and that MSHA's proposed plan was suitable.[47]

On appeal, the Commission rejected the operator's contention that revocation of its plan was improper because the old plan did not in any way conflict with regulatory requirements on roof control. The Commission held that roof control plans are not limited to implementing the substantive provisions of the Secretary's regulations.[48] Thus, the door was left open for the district manager to create new requirements with the force of law, even though the requirement may be a new measure not found anywhere in the statutory or regulatory provisions.

As for the issue of suitability to the mining conditions, the Secretary agreed to assume the burden of proving both that the old plan was no longer suitable to the mine, and that the new plan was suitable.[49] Later, in *Secretary of Labor (MSHA) v. Peabody Coal Co.*,[50] the Commission explicitly confirmed that the Secretary does bear the burden of proving suitability of a disputed plan provision. At the same time, the Commission declined to rule whether the Secretary's burden of proof included showing that the previous plan was unsuitable.[51] The Commission rejected the operator's contention that the Secretary be required to prove that the hazard addressed by the new plan provision either exists or was reasonably likely to occur. Rather, the Secretary was deemed to have carried her burden once she identified a specific mine condition not addressed in the previously approved plan and addressed by the new provision.[52] Allocating the burden of proof to the Secretary, the *C.W. Mining* Commission reviewed the judge's determination that the Secretary's witnesses were more credible in their testimony that the roof conditions were changing, that the old roof control plan was therefore

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47 *Id.* at 1740.

48 *Id.* at 1745.

49 *Id.* at 1748.

50 Secretary of Labor (MSHA) v. Peabody Coal Co., 15 F.M.S.H.R.C 581, 588 (March 1993).

51 15 F.M.S.H.R.C at 628.

52 Secretary of Labor (MSHA) v. Peabody Coal Co., 18 F.M.S.H.R.C. 686, 690 (May 1996)(Comm'n).

no longer suitable, and that the plan proposed by MSHA was suitable to the mine conditions.[53]

[a] — Standard of Review.

Although case law has assigned the Secretary the burden of establishing suitability of its proposed plan, MSHA is granted wide discretion in this determination. Initially, the Commission declined to opine whether the Secretary should be accorded deference in her decision not to approve a plan or whether the Secretary's plan provision was to be reviewed under an arbitrary and capricious standard of review. In *C.W. Mining,* the Commission 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."[54] However, that pronouncement was included in the assessment of whether the parties engaged in good faith negotiations, and the Commission appeared to revert to a reasonableness standard when reviewing the unsuitability of the old plan and the suitability of the new plan to the mining system.[55]

More recently, though, the Commission directly addressed the standard of review applicable to mine plans in the context of approval of emergency response and preparedness plans (ERPs). In *Secretary v. Twentymile Coal Co.*,[56] the MSHA district manager had refused to approve the operator's emergency response plan in full because he believed it did not adequately provide for post-accident breathable air to outby personnel.[57] The operator submitted that unique circumstances at its mine made the district manager's suggested provision inapplicable.[58] After months of negotiations, MSHA issued a citation for violation of section 316(b)(2) of the Mine Act, requiring

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53 18 F.M.S.H.R.C. at 1752.

54 Secretary of Labor (MSHA) v. C.W. Mining, 18 F.M.S.H.R.C. 1740, 1746 (Oct. 1996)(Comm'n); *see also*, Secretary of Labor (MSHA) v. Monterey Coal Co., 5 F.M.S.H.R.C. 1010, 1019 (June 1983)(Comm'n).

55 18 F.M.S.H.R.C. at 1749-54.

56 Secretary of Labor (MSHA) v. Twentymile Coal Co., 2008 WL 4287782 (Aug. 2008)(Comm'n).

57 *Id.* at *6.

58 *Id.* at *7.

that operators develop and submit for approval an emergency response and preparedness plan that provides for the maintenance of miners trapped underground.[59] Section 2 of the MINER Act provides for referral to the Commission of disputes arising over ERPs.[60] Commission Rule 24 provides for submission of materials relevant to the dispute or a hearing within fifteen days of the referral.[61] The operator requested a hearing.[62]

The administrative law judge held that the Secretary carried her burden of proving that MSHA's requirement of the disputed plan provision was not arbitrary and capricious and affirmed the citation.[63] On appeal, the Commission addressed whether the judge applied the appropriate standard of review. The Commission noted that Congress intended that the principles governing the process of formulating emergency response and preparedness plans be similar to those governing other mine plans under the Mine Act.[64] Citing to the *Peabody, C.W. Mining* and *Monterey Coal* cases, the Commission stated that the plan approval process involves an element of judgment on the Secretary's part. The Commission determined that review of the Secretary's actions under an arbitrary and capricious standard is in accordance with Commission precedent.[65] The Commissioners were then evenly divided over whether MSHA's refusal to approve the ERP without the requested provision constituted arbitrary and capricious action. Therefore, the effect of the split decision was to affirm the judge's order requiring the operator to implement MSHA's provision.[66]

Under the abuse of discretion standard, the scope of review is narrow. MSHA must show that it considered the relevant factors, that there is a rational connection between the facts found and the choice made, and that

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59 *Id.*
60 30 U.S.C § 876.
61 29 C.F.R. § 2700.24(e).
62 *Id.* at *7.
63 *Id.* at *8.
64 *Id.* at *9.
65 *Id.* at *10. *See also,* Secretary of Labor (MSHA) v. Emerald Resources, 29 F.M.S.H.R.C. 956, 966 (Dec. 2007).
66 *Id.* at *15.

there has not been a clear error of judgment or law.[67] In *Peabody,* thus, at the district level, the Commission has accorded MSHA the authority to create requirements that have the force of law, even though they were neither passed by Congress nor subject to notice and comment.

[3] – MSHA's Use of Action Plans as a Means to Impose Additional Requirements on a Mine.

At times, MSHA has even attempted to expand this local law-making authority by requiring the implementation of "action plans." Typically, MSHA will request an action plan after an accident occurs at a mine. MSHA will refuse to lift a 103(k) order unless the operator submits and follows a plan containing MSHA's suggested provisions to help ensure that a similar accident does not occur in the future. These action plans are then looked upon by MSHA as additional mine plans that are enforceable as law on a going-forward basis.

MSHA's authority to require plans after an accident derives from section 103(k) of the Mine Act, which provides in pertinent part, "[T]he operator of such mine [where an accident has occurred] shall obtain the approval of [the Secretary's] representative . . . of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal."[68] But section 103(k) does not empower the Secretary to require the submission of post-accident plans that create new mandatory standards that must be followed by an operator once the recovery has been accomplished and the affected areas have returned to normal.

There are numerous lines of attack in such a situation. For instance, there is no authority for the requirement of an action plan if the 103(k) order was not properly issued. A 103(k) order is only appropriate if an "accident" has occurred. An accident is defined in 30 C.F.R. section 50.2. Even in cases where an "accident" has occurred, the issuance of 103(k) orders (and, thus, the basis for the action plan) is reviewable for an abuse of discretion.[69] [70]

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67 *Twentymile Coal Co.*, 2008 WL 4287782 at *11, 16.

68 30 U.S.C. §813(k).

69 *Id.* at *10. *See also, Emerald Resources,* 29 F.M.S.H.R.C. 956, 966 (Dec. 2007).

70 Emerald Coal Res. v. Secretary of Labor (MSHA), 30 F.M.S.H.R.C. 122, 122 n.1 (Jan. 2008)(ALJ).

Several of these issues came to a head at once in the recent case styled *Clintwood Elkhorn Mining Co. v. Secretary.*[71] This case was tried in an expedited proceeding when MSHA shut down Clintwood Elkhorn's preparation plant after the parties deadlocked on the requirements for an action plan to abate a 103(k) order. The event that precipitated the dispute was an incident in which a truck, driven by an employee of a trucking company that hauled coal to the preparation plant, lost control of his truck while en route to the preparation plant.[72]

MSHA issued a 103(k) order and informed Clintwood Elkhorn that it would have to create an action plan to prevent future similar occurrences before the 103(k) order would be abated. The parties agreed on several terms to be included in the action plan, but MSHA wanted Clintwood Elkhorn to agree to obtain gross vehicle weight ratings (GVWRs) for every truck that hauled coal to its preparation plant and to either put the GVWR on each weigh ticket for each load or otherwise make it available to drivers at the scale house.[73] Clintwood Elkhorn balked at this requirement and asked MSHA what authority it had to regulate the load weight of trucks used to haul coal. MSHA did not cite to any such authority. Clintwood Elkhorn submitted another action plan stating that it would notify any truckers who exceeded state law weight limits and would not allow them to unload any additional trucks that exceeded those state law requirements. MSHA continued to reject Clintwood Elkhorn's action plans because they did not contain the provision regarding the GVWR, and it refused to release the site so that coal haulage could continue to the preparation plant.[74]

Shortly after the impasse, MSHA issued Clintwood Elkhorn a 104(d)(1) citation, a 104(b) order and a 104(a) citation, all premised upon alleged overloading and Clintwood Elkhorn's failure to obtain GVWRs and refusal to provide truck weigh tickets to MSHA.[75] After a hearing, the administrative

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71 Clintwood Elkhorn Mining Co. v. Secretary of Labor (MSHA), 32 F.M.S.H.R.C. 1880 (Dec. 2010)(ALJ).

72 *Id.* at 1882.

73 *Id.* at 1883.

74 *Id.* at 1886.

75 *Id.*

law judge held that the 103(k) order was improperly issued because an "accident" had not occurred. Under 30 C.F.R. section 50.2(h)(2), "accident" means an injury to an individual at a mine that has the reasonable potential to cause death. The definition of "injury" is satisfied only if medical treatment is administered.[76] No one was injured in the truck roll-over, and so a 103(k) order should never have been issued. Consequently, the requirement of an action plan to terminate the order was unwarranted.[77]

Nevertheless, the administrative law judge went on to address MSHA's conduct in issuing the 103(k) order and the subsequent citations and order, as well as the refusal to terminate or abate such citations until an action plan agreeing to regulate truck weights was instituted. The administrative law judge found that MSHA ignored evidence of other causes of the roll-over in order to promote its theory of overloading. He also noted MSHA's acknowledgment that it lacked authority to regulate truck loads. He concluded that MSHA had a preconceived plan to use GVWR data as a means to regulate load limits and wanted to use this case to test its theory. He determined that such action was arbitrary and capricious and an abuse of discretion. Accordingly, he vacated all of the citations and orders, invalidating MSHA's insistence that operations must cease until the operator implemented a plan to regulate truck weights and provide MSHA data regarding truck loads.[78]

§ 18.05. Conclusion.

As the *Clintwood* case demonstrates, it is possible to attack legislation by mine plan. Proof that the agency has ignored certain facts in an unbending quest to apportion to itself new subjects of regulation establishes an abuse of discretion. However, in a great many cases, MSHA is given wide discretion to, in effect, create its own laws that have not been passed by duly elected legislators and have not even been subject to notice and comment rulemaking.

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76 30 C.F.R. § 50.2(e).

77 *Id.* at 1890-91.

78 *Id.* at 1895. The *Clintwood* case is currently on appeal before the Commission. However, the Secretary's appeal does not involve the ALJ's decision to vacate the 103(k) order nor the ALJ's finding that MSHA abused its discretion in requiring Clintwood to submit an action plan agreeing to regulate truck weights