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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

CLIMAX MOLYBDENUM COMPANY, A DIVISION OF AMAX, INC., APPLICANT	Applications for Review Docket No. DENV 78-556-M Citation No. 331770
v.	August 2, 1978
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. DENV 78-562-M Citation No. 333299 August 7, 1978 Climax Mine
CLIMAX MOLYBDENUM WORKERS, LOCAL NO. 2-24410, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, RESPONDENT	

DECISION GRANTING MOTIONS TO DISMISS

Appearances: William F. Schoeberlein, Esq., Charles W. Newcom, Esq., Dawson, Nagel, Sherman & Howard, Denver, Colorado, for Applicant;
Robert A. Cohen, Esq., Office of the Solicitor, Department of Labor, for Respondent, MSHA;
Edward L. Farley, Leadville, Colorado, for Respondent, Oil, Chemical and Atomic Workers International Union, Local No. 2-24410.

Before: Judge Cook

Applications pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d) (1977 Mine Act), for review of citations issued pursuant to section 104(a) of the 1977 Mine Act, were filed for Climax Molybdenum Company (Climax).

On February 15, 1979, MSHA filed motions to dismiss these proceedings in which it was alleged that the citations involved have been fully abated and that such citations have been terminated. Those motions went on to state, in part, as follows:

* * * * * * *

> 2. The Board of Mine Operations Appeals in considering a similar review provision in the Federal Coal Mine Health and Safety Act of 1969 (1969 Act) (Sec. 105(a)) held that Citations such as the subject one (104(b) Notices in the 1969 Act) could not be reviewed after the cited violation had been abated because there no longer existed an issue for review. Reliable Coal Corporation, 1 IBMA 50, 59 (1971).
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> 3. The 1977 Act likewise does not provide for review of an abated Citation, and provides for review of an unabated citation only as to whether or not the time for abatement is reasonable. Helvetia Coal Company, PITT 78-322 (August 23, 1976); Monterey Coal Company, VINC 78-372 (June 19, 1978); Peter White Coal Mining Corp., HOPE 78-371 (June 16, 1978); Itmann Coal Co., HOPE 78-356 (May 26, 1978).

Climax filed a memorandum in response to such motions on February 28, 1979. In that memorandum Climax agreed that such citations had been abated, but set forth legal arguments in opposition to such motions.

The motions to dismiss will be granted because Climax in these proceedings is apparently not now challenging the reasonableness of the length of abatement time fixed in the citations and the Applicant is premature as to a review of the citations on any other issue. There is no showing that a notice of proposed assessment of penalty has been issued in these cases as yet.

Section 104(a) of the 1977 Mine Act provides for the issuance of citations by an inspector for violations committed by an operator of a mine.

Section 105(a) of the 1977 Mine Act provides in pertinent part:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. * * * If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the

> citation and the proposed assessment of penalty shall be deemed a final order of the Commission * * *. [Emphasis added.]

Section 105(d) of the 1977 Mine Act also sets forth provisions for the assessment of penalties where the Secretary believes an operator has failed to correct a violation within the period permitted for its correction. Under this provision, the operator also has 30 days within which to contest the Secretary's "notification of the proposed assessment of penalty."

Section 105(d) of the 1977 Mine Act provides in pertinent part:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, * * * the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing * * *. [Emphasis added.]

A study of subsection 105(d) shows that Congress provided for review to be obtained as relates to three categories of actions taken by representatives of the Secretary of Labor, First, an operator is permitted to "contest the issuance or modification of an order issued under section 104." Second, an operator is permitted to obtain review of a "citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b)" of section 105. Third, an operator is permitted to obtain review of "the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104."

In view of subsection 105(a), the words of subsection 105(d) referring to review of "a citation or notification of proposed assessment of a penalty issued under subsection (a) or (b) * * *" must be read to mean that the citation can be reviewed when the notification of proposed assessment is reviewed.

It is therefore clear that the time for Climax to file an application to review a citation will not begin to run until after a notice of proposed assessment of penalty has been received by the operator, except in the instance where the operator intends to contest the reasonableness of the length of abatement time fixed in the citation. The issue as to the validity of the citation will then be determined in the civil penalty proceeding.

The operator can then contest both the fact of violation (i.e., the citation) and the amount of the penalty, assuming there is a violation. If it fails to file such a notice within 30 days as provided, both the citation and the penalty become a final order of the Commission.

This interpretation is supported by the legislative history. An extensive discussion of this history is contained in decisions on similar motions by Judge Steffey in Itmann Coal Company v. MSHA (HOPE 78-356), dated May 26, 1978, and Judge Merlin in United States Steel Corporation v. MSHA (PITT 78-335), dated July 11, 1978.

It should be further noted that under the Federal Coal Mine Health and Safety Act of 1969 (1969 Act) notices of violation (citations under the 1977 Mine Act) were not reviewable where abatement had occurred and no penalty was sought. Freeman Coal Mining Company, 1 IBMA 1 (1970); Reliable Coal Corporation, 1 IBMA 50 (1971); Lucas Coal Company, et al. v. Interior Board of Mine Operations Appeals, 522 F.2d 581 (3rd Cir. 1975).

The Court of Appeals for the Third Circuit stated that:

> The Board's interpretation here (of section 105 of the 1969 Act as expressed in Freeman and Reliable) is a particularly acceptable one in view of the safety objectives of the Act, the obvious desirability of encouraging prompt abatement of violations while still allowing ultimate review, and the necessity of limiting review in order to permit more expeditious consideration of serious grievances. Lucas Coal Co., v. Interior Board of Mine Operations Appeals, 522 F.2d 581, 587 (1975). (Parenthetical portion added.)

The legislative history of the Federal Mine Safety and Health Amendments Act of 1977 contains nothing to indicate that Congress intended to change the Board's interpretation of section 105 of the 1969 Act as stated in Freeman and Reliable. Since all of the alleged violations were abated, the subject citations may not be reviewed under section 105(d). The "reasonableness of the length of time set for abatement by a citation" is the only issue reviewable in a section 105(d) proceeding to review citations. Abatement of the citation renders the issue of "reasonableness of time" moot. Review of fact of violation remains available through a challenge to the civil penalty assessed under section 110.

The Procedural Rules of the Federal Mine Safety and Health Review Commission contain certain regulations relating to the processing of applications for review of citations and orders. Part of these rules are contained in 29 CFR 2700.18(a). If it were not for the fact that the intent of Congress is expressed in subsections 105(a) and (b) and subsection 105(d) of the 1977 Act, it would be possible to argue that

29 CFR 2700.18(a) allows review of citations generally rather than only as to the reasonableness of the length of abatement time. However, the word "citation" in the regulation cannot be construed to grant more than the type of review of a citation which the statute itself grants at that stage, and that is a review of the reasonableness of the time for abatement. Unlimited review of the citation will eventually be obtained, but that will take place during the course of the civil penalty proceeding.

In view of the statements of the Court of Appeals in Sink v. Morton, 529 F.2d 601 (4th Cir. 1975), it is clear that no due process problem arises in this instance.

The court therein noted that the District Court:

> [T]hough concluding that the obligation of the plaintiff to "exhaust his administrative remedies under the Act [was] entirely reasonable and in accord with accepted principles of administrative law," held that the plaintiff had made a showing of irreparable harm, without any countervailing interests of safety, by reason of the "failure of the Secretary of the Interior to utilize his discretion in order to provide a hearing before a mine closure order is issued" and had "had no opportunity to present his case to the appropriate authorities." For these reasons, it granted an injunction against the enforcement of the notice and withdrawal orders "pending a final administrative determination of the isuses involved." [Footnote omitted.]

at 603.

The Court of Appeals ruled that the District Court erred in this finding. It went on to state:

> Nor is it of any moment that the inspector's withdrawal orders were issued without a hearing. By appeal, the plaintiff can obtain a hearing, which, by the terms of the Act, is to be held as soon as practicable, and he is accorded the right to apply, as an incident to that appeal, for a temporary stay of the orders. Such procedure accords the plaintiff due process. Due process does not command that the right to a hearing be held at any particular point during the administrative proceedings; it is satisfied if that right is given at some point during those proceedings. Reed v. Franke (4th Cir. 1961) 297 F.2d 17, 27.

at 604.

Accordingly, MSHA's motions to dismiss are GRANTED. IT IS THEREFORE ORDERED that the above-captioned proceedings be, and they hereby are, DISMISSED.

John F. Cook
Administrative Law Judge