

CCASE:  
SOL (MSHA) V. YOUGHIOGHENY & OHIO COAL  
DDATE:  
19860130  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

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

CIVIL PENALTY PROCEEDING

Docket No. LAKE 84-98  
A.C. No. 33-00968-03568

v.

Nelms No. 2 Mine

YOUGHIOGHENY & OHIO COAL  
CO.,  
RESPONDENT

ADDENDUM TO DISCIPLINARY REFERENCE

Appended to the trial judge's decision of January 22, 1986, in the captioned matter was a Disciplinary (Rule 80) Reference on Robert C. Kota, counsel for the operator. In support of Specifications 2 through 6, the trial judge cited provisions of the Model Rules of Professional Conduct. These rules are reflective of the standards of professional conduct imposed by Rule 11 of the Federal Rules of Civil Procedure as amended and promulgated in 1983. (FOOTNOTE 1) Three recent decisions by United States Courts of Appeals show that amended Rule 11 imposes a duty of competence and diligence that is to be judged by a standard of objectivity designed to deter the filing and prosecution of unfounded claims.

Thus, in *In Re TIC, Ltd.*, 769 F.2d 441, 445 (7th Cir.1985), the Court held that "If a lawyer pursues a path that a reasonably careful attorney would have known, after appropriate inquiry, to be unsound, the conduct is objectively unreasonable and vexatious." The Court further held that lawyers who continue to litigate even initially plausible claims after it becomes clear they are unfounded violate Rule 11 Id. at 448-449.

In *Eastway Construction Company*, 762 F.2d 243, 253Å254 (2d Cir.1985), the Court admonished the bar as follows:

No longer is it enough for an attorney to claim that he acted in good faith, or that he was personally unaware of the groundless nature of an argument or claim. For the language of the new Rule 11 explicitly and unambiguously imposes an affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading before it is signed. Simply put, subjective good faith no longer provides the safe harbor it once did.

\*

\*

\*

In light of the express intent of the drafters of Rule 11, and the clear policy concerns underlying its amendment, we hold that a showing of subjective bad faith is no longer required to trigger sanctions imposed by the rule. Rather sanctions shall be imposed against an attorney and/or his client when it appears that a pleading has been imposed for any improper purpose, or where, after reasonable inquiry, a competent attorney could not form a reasonable belief that the pleading is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

Accord: *Davis v. Veslan Enterprises*, 765 F.2d 494, 497, n. 4 (5th Cir.1985).

It is clear that the position taken by counsel for the operator in this proceeding was based on a legal theory that had been authoritatively rejected and sought remedies for which there was no precedent or statutory authority.

The premises considered, therefore, it is ORDERED that this addendum be made a part of the order of reference in this proceeding.

Joseph B. Kennedy  
Administrative Law Judge

FOOTNOTE START HERE

1 Rule 1(b) of the Commission Rules of Practice provides that on any procedural question not otherwise covered by the rules "the Commission or its Judges shall be guided so far as practicable by any pertinent provision of the Federal Rules of Civil Procedure as appropriate."