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RUSHTON MINING V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

RUSHTON MINING COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. PENN 85-253-R
Order No. 2403926; 6/11/85

Rushton Mine

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),
PETITIONER v. RUSHTON MINING COMPANY, RESPONDENT
CIVIL PENALTY PROCEEDING
Docket No. PENN 86-1
A.C. No. 36-00856-03548
Rushton Mine

DECISION ON REMAND

Before: Judge Broderick

STATEMENT OF THE PROCEEDING

By order issued March 30, 1987, the Commission remanded this case to me to rule on an issue raised by Rushton Mining Company (Rushton) in a Petition for Discretionary Review, which issue had not been presented to me before my decision which was issued February 20, 1987. The issue is whether Rushton is entitled to reimbursement from the Secretary for costs and attorney fees incurred in connection with the proceeding involving Order No. 2403926. The parties have stated in response to my order issued April 15, 1987, that they do not wish to submit further evidence on the issue presented. Each party has filed a legal brief addressing the issue.

FACTUAL BACKGROUND

Rushton filed a notice of contest on July 3, 1985, contesting Order 2403926 issued under section 104(d)(1) of the Act. The order alleged a violation of 30 C.F.R. 75.326. At the request of contestant, the proceeding was continued by order issued December 23, 1985, pending the filing of the

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related civil penalty case. On November 21, 1985, the Secretary filed a Petition for the Assessment of Civil Penalties seeking penalties for 5 alleged safety violations including the violation charged in Order 2403926. A penalty of \$1,100 was sought for that violation. The penalty case was assigned to me on June 27, 1986. I consolidated the cases (and other contest cases) by order issued July 10, 1986, and issued a prehearing order the same day. The Secretary responded on August 13, 1986, and Rushton on November 6, 1986. Rushton's response included copies of a settlement motion and order and a vacated citation in other cases involving alleged violations of 30 C.F.R. 75.326.

Pursuant to notice issued August 21, 1986, the proceeding was called for hearing in Pittsburgh, Pennsylvania, on November 6, 1986, at 9:00 a.m. The hearing was concluded the same day at 4:25 p.m. At the commencement of the hearing, one of the contested violations was settled, and the related contest proceeding was dismissed. Testimony was taken on the 4 remaining violations. With respect to the violation charged in Order 2403926, Inspector Klemick testified for the Secretary (Tr. pages 126-167). Raymond Roeder testified for Rushton (Tr. pages 169-197). I directed that posthearing briefs limited to the issue of whether statements made by MSHA personnel at MSHA Manager's Conference should have been admitted. The briefs were to be filed on or before December 29, 1986. I later extended the briefing time to January 16, 1987. Rushton's brief was submitted January 29, 1987. On February 5, 1987, the Secretary filed a motion to withdraw the petition for a civil penalty based on Order 2403926, "which should be vacated." Respondent did not object to the Secretary's motion.

On February 20, 1987, I issued my decision, including my ruling granting the motion to withdraw the petition insofar as it was based on Order 2403926, vacating the order and dismissing the contest proceeding. Rushton filed a Petition for Discretionary Review with the Commission limited to the issues whether it is entitled to reimbursement of costs and fees under Rule 11, and whether the facts of this case support such reimbursement. The Commission remanded the case to me.

ISSUES

1. Whether a mine operator is entitled to reimbursement from the Secretary for costs and attorney's fees under Rule 11 of the Federal rules of Civil Procedure (FRCP).

2. If so, whether the facts in this case support such reimbursement.

CONCLUSIONS OF LAW

I. DOES RULE 11 APPLY

The Commission's Procedural Rules provide in 29 C.F.R. 2700.1(b):

On any procedural question not regulated by the Act, these procedural rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission or any Judge shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil Procedure as appropriate.

The Mine Act does not deal with reimbursement of costs and attorney's fees in connection with contest or civil penalty proceedings. The Administrative Procedure Act (APA) refers to litigation costs and attorney's fees only in connection with proceedings under the Freedom of Information Act (5 U.S.C. 552(a)(4)(E)), the Privacy Act (5 U.S.C. 552a(g)(1)(3)(B)), and the Government In the Sunshine Act (5 U.S.C. 552b(i)). There are no references to costs and attorney's fees in sections 554, 555, 556, 557, or 558 of the APA.

Commission Procedural Rule 6 (29 C.F.R. 2700.6) states:

When a person who appears in a representative capacity signs a document, his signature shall constitute his certificate

(a) that he is authorized and qualified to represent the particular party in the matter;

(b) that he has read the document; that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay.

Commission Procedural Rule 80 (29 C.F.R. 2700.80) deals with standards of conduct required of individuals practicing before the Commission (they "shall conform to the standards of ethical conduct required of practitioners in the courts of the United States"), and sanctions for unethical or unprofessional conduct (disciplinary proceedings and "an appropriate disciplinary order, which may include reprimand, suspension or disbarment from practice before the Commission"). The sanctions do not include an order assessing costs or attorney's fees.

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Rule 11 of the FRCP requires that pleadings and other paper of a party represented by counsel be signed by counsel. It further provides:

The signature of an attorney or party constitutes a certificate by him that he has read the . . . paper; that to the best of his knowledge, information and belief formed after reasonable inquiry it 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, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The rule provides that the court shall impose "an appropriate sanction" upon the person who signed a document in violation of the rule or the represented party or both, which sanction may include an order to pay the other party's expenses incurred because of the filing.

Commission Rule 6 was obviously modeled after Rule 11 of the FRCP except that it does not provide for a sanction when the rule is disregarded. A sanction is provided, however, in Rule 80. Therefore, I conclude that the "procedural question" raised here (sanctions for filing a document which to the best of the knowledge, information or belief of the signer does not have good grounds to support it) is "regulated" by the Commission Procedural Rules: Rule 6 and Rule 80. The fact that the sanctions provided do not include the sanction sought here (whether because the Commission had questions about its authority to impose costs and attorney's fees or because it decided as a matter of policy not to impose such sanctions), it is clear that the regulations deal with the question. Therefore, under Commission Rule 1, it is unnecessary to look to the Federal Rules of Civil Procedure for guidance.

II. RULE 11

Assuming the applicability of Rule 11 FRCP as a guide, do the facts of this case justify the imposition of costs and attorney's fees against the Secretary?

Rule 11, as I stated earlier, provides that a court may impose sanctions, including costs and attorney's fees, on a person who signs a pleading or other paper unless to the best of his knowledge and belief it is well grounded in fact and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

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law. After the rule was amended in 1983, it became unnecessary to find subjective bad faith to impose sanctions under the Rule. Zaldivar v. City of Los Angeles, 780 F.2d 823 (9th Cir.1986); Rodgers v. Lincoln Towing Service, Inc., 771 F.2d 194 (7th Cir.1985); Westmoreland v. CBS, Inc., 770 F.2d 1168 (D.C.Cir.1985); Weisman v. Rivlin, 598 F.Supp. 724 (D.D.C.1984). Nevertheless, like all rules which permit or mandate the assessment of costs for abuse of process, the rationale "is punitive rather than promotional or enabling. [Its] purpose is to punish and deter certain specific and, as a rule, narrowly defined forms of procedural abuse." I DERFNER & WOLF, COURT AWARDED ATTORNEY FEES, 5.03[11].

Rushton's brief assumes that it is self-evident, or at least evident from the record made in this case, that the Secretary's Answer in the contest case and his Petition in the penalty case did not meet the requirements of Rule 11 that the papers filed were to the best of the knowledge, information and belief of the attorneys filing them well grounded in fact and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. But there was no adjudication on the merits of the issues raised. Indeed, there were no legal briefs filed addressed to the propriety of the order involved here. So far as I am aware, there is no Commission or Administrative Law Judge decision on the merits of the issue raised concerning this order. Therefore the record before me is limited to the testimony and exhibits addressed to the order and its propriety, and the fact that after hearing, the Secretary moved to withdraw the penalty petition as related to the order and to vacate the order. Rushton did not object to the motion and it was granted. It would be presumptuous in the extreme on the basis of such a record to conclude that the documents in question were filed by officers of the court without the belief that they were well grounded in fact and warranted by law. I don't know and the record does not show what inquiry was made prior to the filing of the documents and, absent an adjudication on the merits, there is no way I could determine whether they were well grounded in fact and warranted by law. Therefore, even if Rule 11 applied to Commission proceedings, I would conclude that this record does not show that it was violated.

ORDER

Based upon the above findings of fact and conclusions of law, IT IS ORDERED that Rushton's request for an award of

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litigation expenses as a sanction under Rule 11, Federal Rules of Civil Procedure, IS DENIED.

James A. Broderick
Administrative Law Judge