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

KAISER COAL CORPORATION,
APPLICANT

v.

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

AND

UNITED MINE WORKERS OF AMERICA,
INTERVENOR

APPLICATION PROCEEDING

Docket No. WEST 88-131-R

Sunnyside 1, 2 & 3 Mines

DECISION

Appearances: John A. Macleod, Esq. and Susan E. Chetlin, Esq., Crowell & Moring, Washington, D.C., for Applicant;
Thomas Mascolino, Esq., and Edward H. Fitch, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia for Respondent;
Mary Lu Jordan, Esq., United Mine Workers of America, Washington, D.C., for the Intervenor.

Before: Judge Melick

This case is before me upon the application of Kaiser Coal Corporation (Kaiser) for a declaratory judgment holding that the regulatory standard at 30 C.F.R. 75.326 does not operate to prohibit two-entry mining at its Sunnyside Nos. 1, 2, and 3 mines. Commission jurisdiction to grant declaratory relief exists under section 5(d) of the Administrative Procedure Act, 5 U.S.C. 554(e), the "APA". Climax Molybdenum Co. v. Secretary of Labor 703 F.2d 447 (10th Cir.1983). Such authority is discretionary but may be used "to terminate a controversy or remove uncertainty." Section 5(d) of the APA, Climax, supra., at p. 452. Specific authority for these proceedings to be conducted before a Commission Administrative Law Judge is granted under section 113(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et. seq., the "Act."

The Sunnyside mines opened in 1896 and began longwall mining operations with two-entry gateroads in 1960. Two-entry mining has apparently continued at the Sunnyside mines until recently.

On September 11, 1985, the Federal Mine Safety and Health Administration (MSHA) notified Kaiser that it was "re-examining certain of its policies and practices regarding operators' use of belt haulage entries as ventilation entries, and particularly the application of 30 C.F.R. 75.326 to mines opened prior to March 30, 1970." (Footnote 1) This notification was apparently the result of MSHA's reevaluation of two-entry mining following the 1984 fire at the Wilberg mine. MSHA further informed Kaiser at this time "that in all future mining areas sufficient entries can be developed so as to permit adequately the coursing of intake or return air through such entries without utilization of the belt entry" and that Kaiser could no longer develop two-entry gateroads at its Sunnyside mines without a granted petition for modification under section 101(c) of the Act. (Footnote 2)

Kaiser thereafter on January 3, 1986, filed a petition for modification of section 75.326, with the Secretary of Labor. On October 27, 1987, the Secretary's representative, MSHA's Administrator for Federal Mine Safety and Health granted the Kaiser petition. The United Mine Workers of America (UMWA) thereafter filed a request for hearing to challenge that decision before a Department of Labor Administrative Law Judge. See 30 C.F.R. 44.20Ä 44.32. Kaiser's application for relief pending appeal to effectuate MSHA's grant of the Petition during the pendency of the Department of Labor proceeding, was denied on April 22, 1988. Kaiser argues that based on past experience in which a similar petition for modification of the same regulatory standard has been pending for more than a year before a Labor Department Judge, a similar delay in disposition of its present petition may reasonably be expected.

Kaiser further argues that in order to maintain the proper mining sequence, two-entry development mining must resume at the Sunnyside mines during the latter part of April, 1988. It points out that it is already in Chapter 11 status under the bankruptcy laws and cannot withstand a prolonged idlement while the merits of its petition for modification are being "debated" in further Labor Department review proceedings. It therefore urges that declaratory relief be granted and that section 75.326 should be held not to prohibit two-entry mining at the Sunnyside mines.

When declaratory relief will not be effective in terminating the underlying controversy it should generally be denied. See Greater Los Angeles Council on Deafness, Inc., v. Zolin, 812 F.2d 1103 (9th Cir.1987); U.S. v. State of Washington, 759 F.2d 1353,

(9th Cir.1985) cert. den., 106 S.Ct. 407. In this case, regardless of the decision, the underlying controversy would not be terminated. Thus even assuming, arguendo, that I should find section 75.326 inapplicable to the Sunnyside mines, Kaiser would nevertheless still find it necessary to obtain the Secretary's approval before engaging in two-entry mining through the process of submitting ventilation and roof and rib-control plans for approval. While such plans had been approved for two-entry mining in the past MSHA has made it clear that it would be compelled to evaluate anew any plans for future two-entry mining. (Tr. 50, 56Ä60). Thus even a decision in this case favorable to the mine operator would not terminate the underlying controversy and declaratory relief is accordingly inappropriate. (Footnote 3)

The UMWA also maintains that even should section 75.326 be found inapplicable to the Sunnyside mines, the application of another regulation (30 C.F.R. 75.1704) would nevertheless prohibit mining without separate and distinct escapeways ventilated with separate splits of air (See UMWA's Response to Kaiser Coal Corporation's Application for Declaratory Relief and Cross Application for Declaratory Relief pp. 5Ä6). Indeed the UMWA maintains that should section 75.326 be found inapplicable to the mines at issue then further declaratory proceedings will be necessary to determine the applicability of section 75.1704. It is therefore apparent that the underlying controversy herein i.e. the use of two-entry mining at the Sunnyside mines, would not be resolved solely on the basis of a determination of the applicability of section 75.326. The litigation would only continue on new issues. For this additional reason declaratory relief is inappropriate.

Finally, it appears that a comprehensive solution to the underlying conflict may soon be reached in the section 101(c) modification proceedings now pending before a Department of Labor Administrative Law Judge. The case reportedly is on a "fast track", a pretrial conference is scheduled to be held within a few weeks, and trial may commence as early as this June (Tr. 20Ä24). It is accordingly reasonable to expect resolution of that case in the near future with a comprehensive solution to the underlying conflict. See Wright and Miller, Federal Practice and Procedure: Civil, 2758 and 2763. Those proceedings also provide the UMWA with an opportunity to participate as a party in

the resolution of an issue of particular concern to the miners who must ultimately work in the affected mines.

Under the circumstances I do not find this case to be an appropriate one in which to consider declaratory relief.

ORDER

The application for declaratory relief is DENIED.

Gary Melick
Administrative Law Judge
(703) 756Ä6261

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Footnote starts here:-

~Footnote_one

1 The regulatory standard at 30 C.F.R. 75.326 tracks the language of section 303(y)(1) of the Federal Coal Mine Health and Safety Act of 1969, which was effective March 30, 1970, and later reenacted as Section 303(y)(1) of the Federal Mine Safety and Health Act of 1977. As relevant hereto it provides as follows:

> Whenever an authorized representative of the Secretary finds, in the case of any coal mine opened on or prior to March 30, 1970, which has been developed with more than two entries, that the conditions in the entries, other than belt haulage entries, are such as to permit adequately the coursing of intake or return air through such entries, (a) the belt haulage entries shall not be use to ventilate, unless such entries are necessary to ventilate, active working places, and (b) when the belt haulage entries are not necessary to ventilate the active working places, the operator of such mine shall limit the velocity of the air coursed through the belt haulage entries to the amount necessary to provide an adequate supply of oxygen in such entries, and to insure that the air therein shall contain less than 1.0 volume per centum of methane.

~Footnote_two

2 Section 101(c) provides as follows:

> Upon petition by the operator or the representative of miners, the Secretary may modify the appliction of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. Upon receipt of such petition the Secretary shall publish notice thereof and give notice to the operator or the representative of miners in the affected mine, as appropriate,

and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of such operator or representative or other interested party, to enable the operator or the representative of miners in such mine or other interested party to present information relating to the modification of such standard. Before granting any exception to a mandatory safety standard, the findings of the Secretary or his authorized representative of the miners at the affected mine. The Secretary shall issue a decision incorporating his findings of fact therein and send a copy thereof to the operator of the representative shall be made public and shall be available to the representative of the miners, as appropriate. Any such hearing shall be of record and shall be subject to section 554 of Title 5 of the United States Code.

~Footnote_three

3 In light of the history of the underlying issue it is also likely of course that any final resolution of this case would be delayed for years as the case works its way through the appellate process.