

CCASE:  
BEAVER CREEK COAL V. MSHA  
DDATE:  
19880620  
TTEXT:

FMSHRC-DC  
JUNE 20, 1988

BEAVER CREEK COAL COMPANY, Contestant	CONTEST PROCEEDING
v.	Docket No. WEST 88-145-R Order No. 3224939; 3/17/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Trail Mountain #9 Mine Mine I.D. 42-01211

ORDER OF DISMISSAL

Appearances: Charles W. Newcom, Esq., Sherman & Howard, Denver, Colorado, for Contestant; James H. Barkley, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent.

Before: Judge Morris

Contestant Beaver Creek Coal Company seeks declaratory relief, attorneys fees and reimbursement for costs.

Procedural History

The Commission file reflects the following procedural history:

1. On March 22, 1988 Beaver Creek filed a contest seeking a review of MSHA Citation 3224939, issued on March 17, 1988. The crux of Beaver Creek's contest of the 104(d)(2) order was that contestant had not accepted the cited condition as a part to its roof control plan (RCP). 1/

In its contest Beaver Creek also sought attorneys fees pursuant to Rule 11 of the Federal Rules of Civil Procedure.

At the same time Beaver Creek moved for an expedited hearing.

2. On March 24, 1988 the judge granted Beaver Creek's motion for an expedited hearing and set the case for March 31, 1988.

---

1/ Under existing law an operator cannot be cited for violating its plan unless the plan and any amendments have been adopted by the operator. Bishop Coal Co., 5 IBMA 231, 1 MSHC (BNA) 1367 (1975).

3. On March 30, 1988 the hearing date of March 31, 1988 was cancelled. Further, Beaver Creek was granted until April 8, 1988 to amend its notice of contest and the Secretary was granted until April 15, 1988 to respond.

4. On April 4, 1988 the Secretary filed a letter indicating that MSHA's Order No. 3224939 was vacated on March 25, 1988. The letter vacating the order indicates there had, in fact, been no agreement on a proposed modification of Beaver Creek's RCP.

5. On April 6, 1988 Beaver Creek filed interrogatories and further requested that certain documents be produced.

6. On April 8, 1988 Beaver Creek filed an amended notice of contest and offer of proof and memorandum in support thereof.

As a factual basis for its amended notice of contest Beaver Creek states as follows:

A. By letter dated January 13, 1988, Exhibit A hereto, Beaver Creek sought a minor modification of its roof control plan, a request that it be allowed to go from a 10 foot cut to a 20 foot cut in development mining. As a part of that request, Beaver Creek also sought a technical amendment to its plan to add, as a matter of informational background in the plan, that it would be using remote controlled continuous mining machines in development pursuant to an approval which had been previously been given for use of such machines in connection with Beaver Creek's ventilation plan. See Exhibit B hereto.

B. By reply letter dated February 16, 1988, Exhibit C hereto, MSHA "tentatively" approved a plan change going to a 20 foot cut. However, that approval letter sought to add five stipulations/conditions, none of which was tied to mining conditions in the Beaver Creek mine as required by Secretary of Labor v. Carbon County Coal Co., 3 MSHC (BNA) 1943 (1985), [7 FMSHRC 1367] and none of which was related to any consequences growing from the proposed change of going from a 10 foot cut to a 20 foot cut. MSHA issued a short follow-up modification to its February 16 letter on February 24, 1988. See Exhibit D hereto.

C. In a responsive letter dated March 9, 1988, (mailed March 14, 1988), Beaver Creek specifically objected to four of the proposed stipulations/conditions and agreed to accept one of the proposed stipulations/conditions. See Exhibit E hereto.

D. Thereafter, Citation and Order No. 3224939 was issued by MSHA on March 17, 1988, as described in the Amended Notice of Contest.

E. By letter dated March 21, 1988, MSHA sought to give added reasons for its actions. See Exhibit F hereto. With regard to those three reasons, it is to be noted with respect to the first reasons that Beaver Creek has safely operated with a plan involving mining distances of up to 140 feet, using temporary roof support, before installing full overhead roof support. The issue as to the location of the continuous miner operator, point number two in the letter, had not been previously raised. That issue is not related to the question of a 10 foot versus a 20 foot cut, and as previously noted, use of remote controlled continuous mining machines had previously been approved under Beaver Creek's ventilation control plan. The third issue raised in the letter relating to face ventilation is simply wrong in addition to being a new assertion. Ventilation is not extended until temporary supports have been set.

F. By letter dated March 25, MSHA advised Beaver Creek, essentially, that in MSHA's view things were "to go back to square one" and enforcement action would commence on Wednesday, March 30, 1988, absent some agreement. See Exhibit G hereto. A copy of that letter was first received by Beaver Creek personnel by hand delivery on March 28, 1988, at a meeting involving Beaver Creek personnel and MSHA personnel at MSHA's Denver offices.

G. During the course of the March 28, 1988 meeting, or in subsequent discussions relating to the roof control plan approval process, MSHA has taken, and continues to take, the following positions with regard to review and/or approval of Beaver Creek's current plan or any requested amendments thereto:

1. MSHA understood that the stipulations in the February 16, 1988 letter had been accepted by Beaver Creek personnel. Beaver Creek disputes that. Further, Beaver Creek states that MSHA Coal Mine Safety and Health District 9 has improperly departed from the District's prior plan approval practice and has begun in recent months attaching to many, if not all, roof control and ventilation control plan approval requests such as the request by Beaver Creek, additional "conditions" or "stipulations" which do not relate to changed roof control circumstances caused by the proposed amendment, but rather involve ancillary matters not addressed to the conditions at the particular mine. These additional proposed conditions/stipulations thus appear to be matters of personal preference rather than changes needed to address some inadequacy specific to the mine in question and its roof control plan. Such efforts to use the amendment process to "open" a plan are improper.

2. MSHA's position is that it may undertake a general review, whether in response to an amendment request or on its own initiative, of the Beaver Creek roof control plan regardless of whether the current plan "continues to effectively control the roof face and ribs." This position is contrary to the new regulations. 30 C.F.R. § 75.200, 53 Fed. Reg. 2375 (January 27, 1988).

3. MSHA's position is that in reviewing the issue of moving from a 10 foot cut to a 20 foot cut, it may base its approval of the amendment, in some part, upon non-roof control matters such as perceived traffic hazards or the type of production equipment to be used in advancing the face. Beaver Creek does not dispute MSHA's right to properly exercise its statutory powers, but it does dispute MSHA's position that unrelated issues, such as those just noted, may be raised and used as a basis for refusing approval of a proposed amendment to a roof control plan or withdrawing approval of an existing roof control plan.

H. As matters are currently postured, Beaver Creek may imminently be subject to enforcement action including the possibility of closure orders which could prevent coal production. In these circumstances, and in light of the continuing dispute, Beaver Creek should be allowed to pursue declaratory relief rather than being unnecessarily forced to face MSHA enforcement action.

7. On April 11, 1988 Beaver Creek filed a notice to take the deposition of witness DeMichiei.

8. On April 12, 1988 Beaver Creek filed notices to take the depositions of witnesses Poncerhoff, Holgate, Jones, and Smith.

9. On April 18, 1988 the Secretary moved for an extension of time to respond to the amended notice of contest and further moved to stay discovery until a ruling is entered on the Secretary's motion to dismiss.

10. On the same date, Beaver Creek responded to the Secretary's motions. Beaver Creek objected to any extension of time on discovery. Further, Beaver Creek asserts any indefinite stay may prejudice its interests. Beaver Creek did not object to an extension until May 6, 1988 for the Secretary to respond to its amended notice of contest.

11. On April 19, 1988 the judge granted the Secretary until May 17, 1988 to file his response to the notice of contest. Further, the judge further authorized Beaver Creek to proceed with discovery. Oral arguments were set for May 27, 1988.

12. Subsequently amended notices were filed by Beaver Creek resetting the above depositions for May 25, 1988.

13. On May 2, 1988 the Secretary filed two motions to dismiss and for a protective order. The motion to dismiss was supported by memorandum. In her motion for a protective order, the Secretary seeks to protect from disclosure any deliberations between any agency personnel relating to contestant's claims and from identifying or disclosing the contents of any internal agency deliberative document relating to Beaver Creek's claims. The Secretary further submitted authorities in support of her position.

The Secretary seeks the protective order as to the Beaver Creek's interrogatories as well as to the depositions of the district manager, the district engineering supervisor, and the district roof control supervisor.

14. The Secretary's supplemental motion to dismiss (filed May 2, 1988) states that MSHA has granted the RCP modifications requested by Beaver Creek and the parties are no longer engaged in Bishop negotiations.

15. On May 5, 1988 the Secretary filed a second motion to stay discovery. The Secretary states there are two days scheduled for depositions in Denver, Colorado and three days in Price, Utah. The Secretary estimates that \$4,000 will be spent on such depositions.

16. On May 6, 1988 Beaver Creek filed its response opposing the Secretary's second motion to stay.

17. On May 9, 1988 Beaver Creek filed its response in opposition to the Secretary's motion for a protective order.

18. On May 11, 1988 the judge issued an order directing the Secretary to respond to Beaver Creek's interrogatories. Further, if the Secretary believed her answers were protected by her claim of privilege she was directed to submit said answers for an in camera inspection by the judge. The depositions of all witnesses were otherwise stayed until the entry of an order on the Secretary's motions to dismiss. The judge's order further reconfirmed the oral arguments previously set for May 27, 1988.

In connection with the Judge's Order of May 11, 1988 the Secretary filed two notebooks of documents for an in camera inspection by the judge relating to the Secretary's claim of privilege. In connection with the documents the Secretary requested that any matter the judge finds is not privileged be

~763

returned to the Secretary without releasing the contents to Contestant. The Solicitor states this procedure will preserve his position in event he elects to appeal an order requiring disclosure. If the case is remanded the judge will grant the Secretary's request in this regard.

Since the issue of privilege has not been reached in the case the two notebook files remain in the Commission's office in Denver, Colorado.

The Secretary further requested that the Solicitor be present for any in camera review. He believes that such proceedings should be ex parte because the reason for the privilege is not always apparent from the face of the document and the contents of certain documents will be revealed in an explanation of the privilege involved. The Secretary states this procedure is not without precedent since warrants are often issued with only the moving party present.

It is the Judge's view that the Secretary's request should be denied. Her presence, without the presence of Contestant, would constitute an ex parte communication in violation of Commission Rule 82, 29 C.F.R. § 2700.82. If the case is remanded the judge will so rule on this issue.

19. Oral arguments took place as scheduled.

Discussion and Evaluation  
on Motions to Dismiss

The two issues presented here are whether Beaver Creek is entitled to costs and attorneys fees and whether declaratory relief should be granted.

In connection with attorneys fees and reimbursement for costs Beaver Creek particularly relies on Rule 11, FRCP. In support of its position Beaver Creek also cites Rushton Mining Company, 9 FMSHRC 392 (1987).

Rushton was originally heard by Commission Judge James A. Broderick. After Judge Broderick entered his initial decision Rushton raised, for the first time and before the Commission, the issue of reimbursement. The Commission remanded the case to give Judge Broderick an opportunity to rule on the issue, 9 FMSHRC at 393.

In his decision after remand Judge Broderick concluded that Rule 11 of the Federal Rules of Civil Procedure was not applicable, 9 FMSHRC 1270 (1987). I completely agree with Judge Broderick's decision. Inasmuch as this is an expedited ruling it is not necessary to further review Judge Broderick's views.

Beaver Creek argues the Commission would not have remanded Rushton to Judge Broderick if the Commission believed Rule 11 was not applicable. I cannot speculate on the Commission's reasons for the remand. However, a Commission decision in Rushton and in this case will no doubt serve as a guide as to these issues.

The second issue presented here is whether Beaver Creek is entitled to declaratory relief.

As a threshold matter the Commission has jurisdiction to grant declaratory relief under section 5(d) of the Administrative Procedure Act, 5 U.S.C. § 554(e). Such authority is discretionary and it may be used to terminate controversy or remove uncertainty. *Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447, (10th Cir. 1983).

However, declaratory relief is not warranted here because the issues are moot. The modification sought by Beaver Creek was granted by the Secretary. In addition, the parties have not reached an impasse in Bishop negotiations. Further, the relief sought by Beaver Creek (paragraphs 4(a) through 4(f) of amended Notice of Contest) appears to be an open invitation for the Commission to become a third party in Bishop negotiations. However, without specific facts any determination made by the judge would be of no value.

Beaver Creek vigorously asserts that if declaratory relief is not allowed here it has only two choices. It can acquiesce in the improper interpretative positions taken by the Secretary regarding roof control plan review procedures (see paragraph 4(a) through 4(f), amended notice of contest) or object and risk enforcement actions which could cause a shutdown of the mine.

Beaver Creek is not without remedy. In *Penn Allegh Coal Company*, 3 FMSHRC 2767 (1981) the Commission observed that the statute makes it clear that a plan similar to the one involved here is not formulated by the Secretary but is "adopted by the operator". While the plan must be approved by the Secretary's representative, who may on that account have some significant leverage in determining its contents, it does not follow that he has anything close to unrestrained power to impose 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, 3 FMSHRC at 2772.

In view of the foregoing factors it follows that declaratory relief is not warranted.

For the foregoing reasons, the Secretary's motion to dismiss is granted.

John J. Morris  
Administrative Law Judge



~765

Distribution:

Charles W. Newcom, Esq., Sherman & Howard, 633 Seventeenth Street,  
3000 First Interstate Tower N., Denver, CO 80202 (Certified Mail)

James H. Barkley, Esq., Office of the Solicitor, U.S. Department of  
Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294  
(Certified Mail)