CCASE:
COLORADO WESTMORELAND V. SOL (MSHA)
DDATE:
19880914
TTEXT:

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

COLORADO WESTMORELAND, INC., CONTESTANT	CONTEST PROCEEDINGS
	Docket No. WEST 88-223-R
v.	Order No. 3226870; 5/6/88
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Orchard Valley West Mine Mine ID 05Ä04184

ORDER OF DISMISSAL

Before: Judge Morris

The issues presented here arise under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq., ("Act").

Contestant filed its notice of contest herein seeking a review of Safeguard number 3226870 issued May 6, 1988. Said safeguard recites that contestant failed to comply with 30 C.F.R. 75.1403 but no enforcement action was issued based on th safeguard.

The safeguard provides as follows:

> Dick Love (Utility Man) was operating a scoop in a forward motion while J.R. Davis (Section Foreman) was being transported inside the scoop bucket in the #3 entry of the 001Ä0 section.
>
> Notice to provide safeguards.
>
> All scoops, EIMCO or other types not equiped (sic) with locking devices to precluded (sic) any possibility of accidently activation of the hydrolic (sic) control levers, shall not be used to transport crew members, while equipment is in a traveling motion.

For its relief contestant requests that the subject safeguard be vacated, or, in the alternative, that it be granted declaratory relief declaring that the subject nature to provide safeguards is an improper interpretation of 30 C.F.R. 75.1403. (Footnote 1)

The Secretary has moved to dismiss the notice of contest. As a grounds therefor the Secretary states the contest herein fails to state a claim upon which relief can be granted.

Oral arguments were heard on the record on August 31, 1988 in Denver, Colorado.

Discussion

This is a case of first impression in that contestant seeks review of a safeguard notice issued under 30 C.F.R. 75.1403 without any accompanying enforcement action under the Act. (Footnote 2)

The Act provides that an operator may contest an order of withdrawal issued under 104, a citation or a penalty assessment issued pursuant to 105(a) or 105(b), or the reasonableness of time fixed for abatement of a citation. However, there is no statutory authority for an independent review of a safeguard notice prior to the issuance of a citation. To like effect see Mettiki Coal Corporation, YORK 81Ä42ÄR (February 19, 1981), an unreported decision by Judge James A. Broderick.

Contestant asserts that Mettiki Coal Corporation is not controlling since declaratory relief was not requested in that case.

I recognize that the Commission can grant declaratory relief under appropriate circumstances Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447. However, declaratory relief cannot be a vehicle to enlarge jurisdiction.

Contestant also asserts that its options are either to comply with the safeguard notice or receive a citation for its knowing noncompliance.

I disagree. Contestant may seek a modification from MSHA or proceed under Section 101(c) of the Act. [See MidÄContinent Resources, Inc., Docket No. 88ÄMSAÄ13, July 19, 1988, Brissenden. J (attached hereto)].

Finally, contestant asserts the doctrine of pendent jurisdiction is applicable citing United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 219 (1966) and Jones v. Intermountain Power Project, 794 F.2d 546 (10th Cir.1986)

I agree the federal courts have jurisdiction to exercise pendent jurisdiction. This power exists when there is a substantial federal claim and when both the state and federal claims derive from a common nucleus of facts so that plaintiff would "ordinarily be expected to try them all in one judicial proceeding," 794 F.2d at 549.

While the doctrine might be held applicable here the undersigned Judge does not consider it fairly within the Commission's statutory grant of authority.

For the foregoing reasons the Secretary's Motion to dismiss is GRANTED and the contest filed herein is DISMISSED.

John J. Morris
Administrative Law Judge

Footnote starts here:-

1 An imminent danger order that apparently preceded the issuance of the instant safeguard notice is pending before the undersigned judge in Colorado Westmoreland, WEST 88Ä222ÄR.

2 The Commission decisions in Southern Ohio Coal Company, WEVA 86Ä190ÄR (August 19, 1988); Jim Walter Resources, Inc., 7 FMSHRC 493 (April 1985) and Southern Ohio Coal Co., 7 FMSHRC 509 (1985) all involve safeguards followed by an enforcement action.

~1239
In the Matter of
MIDÄCONTINENT RESOURCES, INC. CASE NO: 88ÄMSAÄ13

RULING AND ORDER ON MOTION TO DISMISS

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (the "Act"). By notice dated December 6, 1976, the Mine Safety and Health Administration ("MSHA") applied a Section 314(b) safeguard (30 C.F.R. 75.1403Ä5(g)) to Petitioner Appellant MidÄContinent Resources, Inc. ("MCR"). On February 3, 1987, MCR filed a Section 101(c) petition for modification of the safeguard. MSHA then amended the safeguard on June 11, 1987. On December 14, 1987, the Deputy Administrator for Coal Mine Safety and Health dismissed MCR's petition for modification. MCR then requested a hearing pursuant to 30 C.F.R. 44.14, and the Deputy Administrator referred this matter for hearing by this office on January 21, 1988.

On March 2, 1988, MSHA filed a motion to dismiss this matter for failure to state a claim upon which relief can be granted, contending that safeguards imposed under Section 314(b) are not subject to petitions for modification under Section 101(c). MSHA also contends that MCR's petition for modification did not allege either of the statutory grounds for modification. MCR filed a reply to the motion on March 23, and MSHA filed a response to MCR's reply on March 31, 1988.

Whether Section 314(b) Safeguards Are Subject to Section 101(c) Petitions:

Section 101(a) of the Act (30 U.S.C. 812(a)) provides that "[t]he Secretary shall by rule . . . develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines," and it sets forth various rulemaking procedures. The Section 101(a) standards apply to all mines. Section 101(c) (30 U.S.C. 811(c)) provides that "[u]pon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine . . .," and it sets forth grounds and procedures for such mine-specific modifications. (See also 30 C.F.R. Part 44.) Thus,

it is clear that mandatory standards promulgated through rulemaking under Section 101(a) may be modified either by further rulemaking applicable to all mines or through Section 101(c) petitions for modification by individual mine operators.

Section 314, 30 U.S.C. 874, is part of Title III of the Act, which covers "Interim Mandatory Safety Standards for Underground Coal Mines". (Section 314 was formerly Section 314 of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 787, P.L. 91Ä173 (1969)). Section 314 sets forth safety requirements for "hoisting and mantrips". In addition, Subsection (b) provides that "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." Provisions for the promulgation of such safeguards by MSHA inspectors (authorized representatives of the Secretary) on a "mine-by-mine" basis are set forth at 30 C.F.R. 75.1403 et seq. It is clear that Section 314(b) safeguards may be modified by MSHA inspectors on their own initiative. I must determine whether the safeguards are also subject to Section 101(c) petitions for modification by mine operators like MCR.

MSHA's first argument in support of its motion to dismiss is that another procedure by which mine operators may challenge safeguards already exists. Citing Secretary of Labor (MSHA) v. Southern Ohio Coal Co., 7 FMSHRC 509, 3 MSHC (BNA) 1743 (1985), and Secretary of Labor (MSHA) v. Jim Walter Resources, Inc., 7 FMSHRC 493, 3 MSHC (BNA) 1739 (1985), MSHA points out that operators may challenge the application of safeguards in proceedings before the Federal Mine Safety and Health Commission (the "Commission"), which has jurisdiction over contested violations of standards and safeguards MSHA argues that there is therefore no need also to permit Section 101(c) petitions. Further, permitting challenges to safeguards both through proceedings before the Commission and through Section 101(c) petition proceedings could cause duplicative efforts and conflicting rulings.

MSHA's second argument involves the purpose of Section 314(b) and regulations thereunder. MSHA notes that Section 314(b) safeguards may be imposed on individual mines and modified or withdrawn by MSHA inspectors without resort to rulemaking procedures such as those set forth in Section 101(a). Thus, according to MSHA, Congress intended to enable MSHA inspectors to respond flexibly and quickly to unsafe conditions at particular mines without the necessity of Section 101Ätype procedures. MSHA argues that permitting Section 101(c) petitions for modification of Section 314(b) safeguards would interfere with that flexibility.

In response to MSHA's first argument, MCR points out that Commission review of Section 314(b) safeguards is actually only available after a safeguard has been violated, and violation of a safeguard subjects an operator to potential civil and criminal penalties under Section 110 (30 U.S.C. 820). (See, e.g., U.S. Steel Corp., 3 FMSHRC 2540, 2 MSHC (BNA) 1583 (1981)). In other

words, Commission review is not equivalent to Section 101(c)

petition procedures. In fact, in Southern Ohio Coal Co. and Jim Walter Resources, Inc., supra, the Commission actually interpreted a safeguard for the purpose of determining whether certain operators had violated the safeguard; the Commission did not permit the operators to challenge or request modification of the safeguard itself.

In response to MSHA's second argument, MCR contends that the unusually broad grant of power to MSHA inspectors to impose Section 314(b) safeguards without the necessity of rulemaking procedures actually means that the safeguards should be easier to challenge than Section 101(a) standards. (See Southern Ohio Coal Co., supra, at pp. 511Ä12.) According to MCR, the broader the grant of power, the more checks on that power should be provided. MCR also argues that by its wording, Section 101(c) applies to "any mandatory safety standard", and Section 314(b) safeguards are just as mandatory as standards promulgated under Section 101(a) because both are enforced in the same manner under Sections 104 and 110 (30 U.S.C. 814, 820). (30 U.S.C. 846; See Southern Ohio Coal Co., supra, at p. 512.)

I find MCR's arguments persuasive. There is no doubt that the Commission (and administrative law judges under the Commission) has jurisdiction over contested violations of safety standards, while the Secretary (and this office) has jurisdiction over petitions for modification of those standards. (See Johnson, "The SplitÄEnforcement Model", 39 Adm.L.Rev. 315, 316, 319 n. 13, 341 (Summer 1987)). MSHA has not shown that there is any basis for making an exception to the above jurisdictional scheme for Section 314(b) safeguards, which are a special type of safety standards. The Commission may have jurisdiction to interpret Section 314(b) safeguards that may have been violated, but unlike the Secretary, it does not have the power to modify inappropriate safeguards. Accordingly, I find that I have jurisdiction over MCR's petition for modification of the Section 314(b) safeguard at issue (30 C.F.R. 75.1403Ä5(g)), and MSHA's motion to dismiss on the basis of lack of jurisdiction is therefore denied.

Sufficiency of Pleadings:

As stated above, MSHA has also moved to dismiss on the basis of MCR's failure to allege either of the statutory grounds for modification in its petition. Pursuant to Section 101(c) and 30 C.F.R. 44.4, the grounds for modification are: 1) there exists an alternative method of achieving the result of the safety standard or safeguard at issue, or 2) the application of the standard at issue will result in a diminution of safety. My own examination of MCR's petition reveals that it alleged facts intended to support the second ground for modification at Paragraph 7 and the first ground at Paragraph 9. Accordingly, MHCA's motion to dismiss on the basis of the insufficiency of MCR's pleadings is denied.

~1242

ORDER

The motion to dismiss is denied.

ROBERT J. BRISSENDEN
Administrative Law Judge

Dated: JUL 19 1988

San Francisco, California