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CLINCHFIELD 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

CLINCHFIELD COAL COMPANY,
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. VA 89-67-R
Order No. 2965464; 8/1/89

AND

McClure No. 1 Mine

UNITED MINE WORKERS OF
AMERICA (UMWA),
INTERVENOR

DECISION

Appearances: Laura E. Beverage, Esq., and David J. Hardy, Esq.,
Jackson & Kelly, Charleston, West Virginia, for
Contestant; James Crawford, Esq., Office of the
Solicitor, U.S. Department of Labor, Arlington,
Virginia, for the Respondent, the Secretary of
Labor (Secretary); Mary Lu Jordan, Esq.,
Washington, D.C., for Intervenor, United Mine
Workers of America (UMWA).

Before: Judge Broderick

STATEMENT OF THE CASE

On August 2, 1989, Contestant Clinchfield filed a Notice of Contest of an order of withdrawal issued August 1, 1989, under section 104(b) of the Act for failure to abate a citation issued June 5, 1989. On the same day Clinchfield filed a Motion for Expedited Proceedings. Following a telephone conference call with counsel for Clinchfield and the Secretary, I scheduled a prehearing conference in Falls Church, Virginia, on August 3, 1989, and notified counsel for the UMWA as the putative representative of the miners. The Secretary's counsel stated the Secretary's answer to the notice of contest on the record at the prehearing conference. The parties informed me that a Petition for Modification had been filed by Clinchfield, which, if granted, would permit the condition for which the citation and order were issued. The Secretary supports the Petition, but it is opposed by the UMWA, and a hearing was requested, and is

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scheduled in November 1989, before a Department of Labor Administrative Law Judge.

Clinchfield also filed an Application for Temporary Relief on August 3, 1989, and a memorandum in opposition to UMWA's request to intervene on August 4, 1989.

Pursuant to notice issued August 3, 1989, the hearing commenced in Abingdon, Virginia, on August 7, 1989. Following oral argument, I granted UMWA's request to intervene and denied Clinchfield's motion to dismiss UMWA as a party. The case was heard on August 7, 8, and 9, 1989. James A. Baker, Robert A. Elam and Harry C. Verakis testified on behalf of the Secretary. George Strong, Donald Mitchell, and Thomas Asbury testified on behalf of Clinchfield. George P. Willis, Thomas J. Rabbit, Robert J. Scaramozzino, James Weeks, Samuel J. Clay, and Danny Davidson testified on behalf of the UMWA.

At the conclusion of the testimony, counsel for all parties waived their right to file post-hearing briefs and each argued his/her client's position on the record. Following the oral arguments, I issued the following decision from the Bench:

JUDGE BRODERICK: All Right.

First, there are a couple of matters that I will rule on.

Number one, the motion to certify my order permitting UMWA intervention, to certify that order to the Commission for Interlocutory Review is denied. Secondly, because I have heard the entire testimony on the merits of this proceeding, the motion for relief under section 105(c) of the Act is denied. Now, on the basis of the entire record made before me, and the contentions of the parties, I issue the following Decision. I should preface that with the observation that the overriding value in the Mine Act is the health and safety of the miners, and all Commission decisions interpreting the Mine Act have to keep that overriding value foremost. Citation Number 2911079 was issued June 5, 1989, to the McClure Number One Mine alleging that the conditions in the Decision and Order modifying the effect of 30 C.F.R. 75.326, which were in effect at the subject mine, were not being complied with, in that air velocity in excess

of three hundred feet per minute was found to exist on the belt entry; namely, at one location, a velocity of seven hundred twenty feet per minute was found.

Because the citation was not abated in the time fixed and extended for abatement, an order of withdrawal was issued on August 1, 1989, under section 104(b) of the Act for failure to abate.

Clinchfield filed a notice of contest of the order. It is not contested that the conditions found in the citation and order existed; nor is it contested that these conditions violated the provisions of 30 C.F.R. 75.326, as modified. The contest is based on the contention that complying with those provisions would create a diminution of safety in the mine.

The Secretary who issued both the Citation and the Order agrees that compliance with the present requirements, that the air velocity in the belt entry not exceed three hundred feet per minute, would result in a hazard to miners.

The Intervenor, United Mine Workers of America, representative of the miners, disagrees with the Secretary's position and urges that the Order of Withdrawal be affirmed. The Secretary and the operator have introduced substantial evidence that to enforce the present belt entry air velocity requirements would result in serious danger to miners in the subject mine because of the possibility of a methane fire or explosion.

The United Mine Workers of America have introduced substantial evidence that permitting an increase in the belt entry air velocity would result in serious danger to miners in the subject mine because of the potential for propagating belt fires and because of the potential of causing float coal dust and respirable dust. Whether the belt entry air velocity requirements should be increased or remain unchanged is, I believe, the primary issue in the Petition for Modification proceeding presently pending before the Department of Labor. I have heard substantial evidence relating to that issue and I permitted evidence to be introduced by all parties in order to complete the record because I believe the case before me is a case of first impression.

This evidence has been perhaps far ranging beyond the scope of my responsibility in this hearing, but I believe it is important to have as complete a picture as I can. However, I do not have, fortunately or unfortunately, the responsibility or jurisdiction to determine whether the belt entry air velocity requirements should be increased or should be kept at the same level. The question before me, as I see it, is whether to affirm, vacate, or modify the contested order and its underlying citation.

On the bases of the substantial evidence submitted by Contestant and the Secretary, and particularly that submitted by the Mine Safety and Health Administration, which is the government agency charged with enforcing the Act in the interests of the safety of miners, and because there is a pending petition for modification which is intended to resolve the conflicting views relative to safety and hazards presented by the belt entry air velocity, I hereby order that Order of Withdrawal, Number 2965464 is DISSOLVED.

I further order that the underlying Citation 2911079, is modified to extend the time of abatement to the date of the commencement of hearing on the 101(c) Petition for Modification.

By these orders, I am not in any way discounting or minimizing the substantial safety issues raised by the Intervenor, the United Mine Workers of America. Neither am I attempting to weigh the evidence on either side of the issue, which is the responsibility of the authorities charged with deciding the Petition for Modification.

I am, however, ruling that in view of the Secretary's position and the evidence introduced in support of it, that complying with the contested citation and order may result in a diminution of safety, and in view of the pending petition for modification, relief should be granted. I am granting it from the terms of the order until this matter is submitted for decision on the Petition for Modification.

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I hereby reaffirm the above Bench Decision. I GRANT the Notice of Contest and VACATE the contested order. I MODIFY the underlying citation by EXTENDING THE TIME FOR ITS ABATEMENT to the date the hearing commences on the pending Petition for Modification.

James A. Broderick
Administrative Law Judge