CCASE:
HOMESTAKE MINING v. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The Federal Building
Room 280, 1244 Speer Boulevard
Denver, CO 80204

HOMESTAKE MINING COMPANY, CONTESTANT	CONTEST PROCEEDING
v.	Docket No. CENT 90-108-RM Citation No. 3632346; 4/19/90
SECRETARY OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION (MSHA), RESPONDENT	Mine I.D. 39-00055 Homestake Lead Mine

DECISION

Before: Judge Lasher

Respondent, MSHA seeks dismissal of this matter, and on May 30, 1991, has withdrawn its answer opposing the Notice of Contest in this matter. In so doing, it has specifically vacated the subject Citation, No. 3632346, by virtue of a "Subsequent Action" dated May 30, 1991, stating:

> This citation is vacated at the direction of the Office of the Solicitor with the position that future enforcement of this standard at this mine site is not waived and enforcement action will continue, if necessary, after appropriate MSHA policy is established concerning the application of mandatory safety standard, 30 C.F.R. 57.11002. (Footnote 1)

In both its "Notice of Vacation and Motion to Withdraw and Dismiss" filed by Fax on May 30, 1991, and its "Response in Opposition to Contestant's Motion for Declaratory Relief or in the Alternative to Dismiss with Prejudice," the Secretary of Labor (MSHA) indicates that its proposed withdrawal of prosecution of the citation does not constitute in any way a waiver of future enforcement actions (applications) under the subject safety standard at the subject mine site or any other mine site.

Within the 24-hour period after the Secretary issued its "Subsequent Action" and moved to withdraw its answer in this proceeding, Contestant Homestake Mining Company (Homestake) filed its "Motion for Declaratory Relief, etc." (Footnote 2) It is apparent that when this latter motion was filed by Contestant, the exact terms of the MSHA "Subsequent Action" document were not known to it, nor was some of the thinking later reflected in MSHA's "Response in Opposition to Contestant's Motion for Declaratory Relief" within its knowledge. The question remains for resolution, however, whether MSHA's motion to withdraw its answer under Commission Procedural Rule 11 (29 C.F.R. 2700.11) or whether Contestant's responsive motion for declaratory relief should be granted.

Contestant apparently seeks at this juncture to resolve whether it is vulnerable to future 30 C.F.R. 57.11002 citations rather than acquiesce in MSHA's abandonment of its prosecution of the subject citation. (Footnote 3) We note these facts. There is no allegation by Contestant, or other indication, that it took measures to abate the condition cited, or that MSHA issued any withdrawal order, including a Section 104(b) "failure to abate" order in this matter.4 There is no indication that Contestant Homestake is presently charged with a violation of 30 C.F.R. 11002 in connection with the pertinent area of the mine referred to in Citation No. 3632346.

Preliminarily, it is noted that the action of the Secretary in vacating the citation does not automatically moot the substantive issues extant in the contest proceeding by depriving the Commission of jurisdiction. Once a mine operator contests a citation before the Commission, the Secretary cannot by vacating the citation itself deprive the Commission of jurisdiction. Climax Molybdenum Company v. Secretary of Labor and Oil, Chemical and Atomic Workers' International Union, 2 FMSHRC 2748 (October 1980). Motions by MSHA to vacate citations are granted only where adequate reasons to do so are present. Kocher Coal Co., 4 FMSHRC 2123, 2124 (December 1985); Secretary v. Youghiogheny & Ohio Coal Company, 7 FMSHRC 200, 203 (February 1985).5 As shown subsequently, MSHA has in apparent good faith presented such "adequate reasons."

Likewise, Commission Procedural Rule 11, permitting "a party" to withdraw a pleading at any stage of a proceeding, is not absolute, since such must be accompanied by the "approval of the Commission or the Judge." Thus, Commission discretion is invoked here by both rule and precedent.

If, of course, Contestant is entitled to declaratory relief, such would constitute reason for not granting MSHA's motion to withdraw its answer and to vacate the citation.

Turning now to Contestant's various contentions, we first take up its alternative plea to declaratory relief, i.e., "dismissal with prejudice." MSHA's initial motion, in seeking to withdraw its answer did not specifically deal with the concept of "with prejudice," but simply qualified the withdrawal to the extent of not waiving future enforcement of the safety standard. However, in its Response in Opposition on May 31, the Solicitor clarified its motion to withdraw by stating it "is intended to request a dismissal with prejudice of the subject citation. . . . " This would be the usual meaning attributable to the idea of dismissal with prejudice and I conclude that MSHA's agreement not to seek future action on the subject citation is reasonable and a proper adjunct to its abandonment of the instant prosecution by withdrawal of its answer. Contestant does not specify if it has some other purpose in mind in seeking "dismissal with prejudice,"

such as (1) enjoining MSHA from future use of Section 57.11002, or (2) preventing MSHA from applying this standard to the same mine area described in the subject Citation. Expanding "with prejudice" to these latter concepts would in effect be (a) granting the Contestant's declaratory relief request (b) without benefit of due process, hearing, and normal adjudication processes. To the extent that Contestant's contention may be so intended, it is denied.

The Commission, in Secretary of Labor v. Mid-Continent Resources, Inc., and UMWA, 12 FMSHRC 949 (May 1990), has provided a thorough and superbly-crafted statement of the principles governning invocation of declaratory relief, stating inter alia:

> The Commission has noted that "the primary purpose of declaratory relief is to save parties from unnecessarily acting upon their own view of the law." Beaver Creek, supra, 11 FMSHRC at 2430, quoting Climax, supra, 2 FMSHRC at 2752. Additionally, for any grant of Commission declaratory relief, the complainant must show that there is an actual, not moot, controversy under the Mine Act between the parties, that the issue as to which relief is sought is ripe for adjudication, and that the threat of injury to the complainant is real, not speculative.

While the language of the first sentence of this holding is found applicable to this proceeding, it also could apply to the majority of the proceedings before the Commission. What is meant by it is a preamble or introductory statement setting forth the "purpose" in a grant of declaratory relief. The second sentence is the one which sets forth the prerequisite showing to be made by a contestant for actually obtaining declaratory relief. It is concluded that Contestant Homestake has not carried its burden of establishing any of these prerequisites in this matter.

The Secretary (MSHA) on May 31 specified the reasons for withdrawal of the answer and its prosecution of the Citation:

> The Secretary vacated this citation because information obtained during discovery revealed various opinions of MSHA staff as to what constitutes an "elevated walkway or travelway" under standard 30 C.F.R. 57.11002.6 The Secretary recognizes that MSHA policy relating to "elevated walkways" needs (to be) clarified and therefore decided that this citation should be vacated on that basis. This is similar to the "feasibility" question in the Climax Molybdenum Company, 2 FMSHRC 2748 (October 1980) at 2753.

> . . . And, there is no "substantial likelihood of recurrence of the claimed enforcement harm or the imminence of repeated injury' to the Contestant, Homestake Mining Company (Homestake). Mid-Continent Resources, Inc., 12 FMSHRC at 956. As indicated in MSHA's action to vacate, enforcement of mandatory safety standard 30 C.F.R. 57.11002 will continue after MSHA policy is established concerning the standard's application. No undue prejudice or harm will occur to Homestake because of this action to vacate.

The Secretary's recognition of the need for clarifying its policy as to application of the standard and the fact that no subsequent enforcement of the standard as to the mine area described in Citation No. 3632346 has been initiated are found to be "adequate reasons" for the vacation of the Citation.

Since the enforcement agency is re-evaluating its position wth respect to enforcement of the standard and applying it to Contestant's aqueducts, it is first concluded that this issue is not ripe for adjudication. Contestant contends: "declaratory relief is appropriate because 30 C.F.R. 57.11002 is unconstitutionally vague and, in this case, did not give fair notice that it was applicable. In short, Homestake faces a continuing legal dilemma in being forced to act at its peril in light of MSHA's inconsistent interpretation of this provision." Both these contentions are directly addressed by MSHA's admitted recognition of "various opinions" existing among its staff, intended re-evaluation and clarification of its policy in enforcing the standard, and vacation of the citation issued to the mine operator involving application of the standard. I find no basis established by Contestant that the standard is unconstitutionally vague on its face. The "vagueness" contention would have raised both questions of fact and law insofar as its application to the mine area specified in the citation is concerned--had not the citation been vacated and MSHA withdrawn its prosecution thereof. In view of MSHA's actions, however, I conclude the general question of vagueness of the standard also is now moot in this proceeding.

To paraphrase the United States Court of Appeals, Tenth Circuit in Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 451 (1985), the government's vacation of the citation eliminated the prospect that Homestake would be held liable for the charged violation and rendered moot the specific issues that this administrative proceeding was intended to adjudicate, including unconstitutional vagueness. As a result, this case "has lost its character as a present, live controversy." The prospect of future citations for the same condition or practice is purely conjectural at this time. See Beaver Creek Coal Company, 11 FMSHRC 2428 (December 1989). Again, as the Court also noted in Climax, supra, there is no indication in the record that MSHA has made a practice of citing Homestake or other companies for safety violations, only to subsequently vacate the citations. More specifically, there is no indication of bad faith on the enforcement agency's part in this proceeding in withdrawing its prosecution. Finally, it is noted that Contestant Homestake has obtained the remedy originally sought in its Notice of Contest, extension of abatement time, and finally, vacation of the Citation itself.(Footnote 7) Accordingly, Contestant'm motion for declaratory relief is found to lack merit.

Contestant also seeks set-off of its litigation expenses "against future penalties." Application of the set-off principle in general could have deleterious consequences to mine safety enforcement since it would diminish - if not vitiate - the deterrent effect of the Act's most prominent deterrent, civil fines. Contestant has achieved its original objectives in this proceeding. To in effect insulate it from future mine safety penalty imposition would undermine the enforcement system envisaged by Congress. This remedy, being discretionary, and the stated rationale for rejecting it being "acceptable," (Footnote 8) Contestant's petition therefor is also found to lack merit.

ORDER

1. Contestant Homestake's motion for declaratory relief and prayer for set-off of litigation expenses are DENIED.

2. Citation No. 3632346 is VACATED.

3. Respondent MSHA's motion to withdraw its answer pursuant to Rule 11 is GRANTED, and this proceeding is DISMISSED WITH PREJUDICE to Respondent MSHA to renew its prosecution of Citation No. 3632346.

Michael A. Lasher, Jr.
Administrative Law Judge

Footnotes start here:-

1. Section 57.11002 provides:

Handrails and toeboards.

Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

2. This motion again makes various unilateral assertions of fact which would be in litigation should the matter proceed to hearing on the substantive merits of the issues raised by the violation charged in the Citation. Contestant's prior motion to dismiss and/or for summary decision was denied by my Order dated May 23, 1991, and to the extent that such issues are raised again in its present motion for Declaratory Relief, such motion is denied.

3. It alleges: "None of the elevated walkways, located around RBC's (rotating biological concentrators), at the water treatment plant were provided with handrails to prevent employees from falling to surfaces below. Walkway measurements varied from five feet to seven feet wide and the height varied from 20 inches to 43 inches."

4. In its "Response in Opposition to Contestant's Motion "MSHA points out that "No undue abatement expense has occurred here since the abatement time has been extended for this citation."

5. The ultimate determination to be made is whether "adequate reasons" do exist, and/or whether Contestant is entitled to declaratory relief.

6. The Secretary concedes the essence of the information contained in Contestant's "Supplement to Memorandum of Points and Authorities" which was received by the undersigned on June 4, 1991, and considered in the formulation of this decision.

7. Vacation of the Citation negates the possibility that the

violation charged will become part of Contestant's history of previous violations.

8. Climax Molybdenum Co. v. Secretary, 703 F.2d 447 at 453. See also Climax Molybdenum v. Secretary, 2 FMSHRC 2748 at p. 2753.