CCASE:
MSHA V. KOCHER COAL
DDATE:
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
December 8, 1982
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA) Docket Nos. PENN 80-174-R
PENN 81-179(A)

v.

KOCHER COAL COMPANY

DECISION

This case on interlocutory review involves a civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1976 & Supp. IV 1980).

On March 1, 1977, a fatal inundation occurred at Kocher Coal Company's Porter Tunnel Mine. On February 20, 1980, after the Mine Safety and Health Administration (MSHA) completed its accident investigation, seven citations and orders were issued to the operator. A notice of contest of the citations and orders was filed. Order No. 0611706, the sole order presently at issue, alleged that the operator failed to drill boreholes required by 30 C.F.R. $ 75.1701.

On July 17, 1981, the Secretary filed a request for settlement approval with the administrative law judge. Among other things, the Secretary sought vacation of Order No. 0611706. The judge denied the settlement motion on the basis of insufficient supporting information, and scheduled a hearing on the proposed settlement motion. At the hearing, counsel for both parties described the conditions leading to the citations and orders. Regarding the order at issue here, counsel for the Secretary stated that the MSHA inspector who had viewed the area concerned and the Solicitor did not believe Kocher violated section 75.1701 by failing to drill the required boreholes. He also stated, however, that the MSHA district manager who had issued the order still believed a violation occurred.

On October 19, 1981, the Secretary filed a petition for penalty assessment for all seven citations and orders. In the petition, the Secretary reaffirmed his previous request for settlement approval, including the requested vacation of Order No. 0611706.

On October 26, 1981, the administrative law judge issued an order approving settlement of six of the citations and orders. The judge disapproved, however, the Secretary's request to vacate the order

concerning the boreholes and ordered the Secretary to produce the district manager at an evidentiary hearing. Subsequently, the operator filed a motion for judgment on the pleadings and a motion to withdraw
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its notice of contest. The Secretary supported these motions, restating his position that no violation of section 75.1701 had occurred. The judge denied the operator's motions stating that because he would not grant the Secretary's motion to vacate the order, there were no grounds for Kocher's motions. The judge certified the case to the Commission for interlocutory review. In his certification, he observed that his "conclusion is not free from doubt." The Commission granted interlocutory review.

The threshold question before us is whether the requested action pertaining to the subject order is appropriately treated as a motion for settlement approval or a motion to vacate the order. We conclude that the latter treatment is necessary. Although the request for vacation of the order was initially contained in a settlement motion, it is clear that in substance it was a request to vacate the order. Further, the subsequent pleadings filed by the parties clearly demonstrate that they seek vacation of the order rather than settlement. Also, Commission precedent requires that this type of request not be treated as a settlement. In Co-op Mining Co., 2 FMSHRC 3475 (December 1980), we reversed a judge's approval of a proposed settlement because the record established that no violation occurred. See also Amax Lead Company of Missouri, 4 FMSHRC 975 (June 1982). In the present case, the Secretary has stated clearly that he does not believe a violation occurred. The operator concurs. Thus, there can be no settlement; the Secretary's request must be treated as a motion to vacate the order.

The remaining issue is whether the judge erred in refusing to grant the Secretary's motion to vacate the order and in requiring the district manager's attendance at an evidentiary hearing. Preliminarily, we hasten to dispel any lingering notions on the part of the Secretary that the Commission and its judges are without authority to review the request made in this case. When a notice of contest is filed, Commission jurisdiction attaches. 30 U.S.C. $ 815(d). Thereafter, any affirmance, vacation, or modification of the subject citation or order is accomplished only upon order of the Commission. Id.; Climax Molybdenum Co., 2 FMSHRC 2748 (October 1980), pet. for rev filed No. 80-2187, lOth Cir. (Nov. 6, 1980).

The Secretary's original request for settlement approval cited the testimony of an MSHA inspector, at an MSHA public hearing, that the operator had complied with the borehole regulation:

Order No. 00611706 was vacated, since MSHA Inspector

Charles Klinger testified at the public hearing that he had gone up to the old Weaver slope and observed the hole into it. He further testified that from his observations, the Respondent was complying with 30 C.F.R. $ 75.1701 at that location (Tr. 770, 772). It should be noted that the No. 15 breast was more than 200 feet from the Bush slope where the inundation water came from. Thus, boreholes were not required from the No. 15 breast relative to the Bush slope. The only abandoned working within 200 feet was the Weaver slope, which had been cut into
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and drained. In view of Inspector Klinger's testimony, MSHA does not feel that a violation could be established. [1/]
Further, the Secretary's petition for penalty assessment stated:
The Solicitor's Office does not believe that the violation of 75.1701 ... existed. Therefore, the Solicitor's Office with the approval of MSHA has determined that it will not prosecute this violation.
(Emphasis added). We assume from this statement that the Solicitor conferred with MSHA before deciding not to prosecute the violation. The operator agrees with the Secretary's determination not to prosecute. 2/ In light of the reasons given by the Secretary on the record in support of the request to vacate the order, we hold that in these unique circumstances the judge erred in not granting the motion. We are cognizant of and fully appreciate the reasons behind the judge's action. Counsel for the Secretary informed the judge that the district manager who issued the order still believed that a violation occurred. We note that conflicts among the opinions of various Secretarial personnel are not unprecedented occurrences. It is not clear from the record why the Secretary chose to air this particular dispute on the public record. Nevertheless, it is the responsibility of the Secretary to resolve his internal conflicts and he ultimately has done so in this case.
We conclude that, insofar as our review of the action officially requested by the Secretary is concerned, i.e., vacation of the involved order, adequate reasons to support his request have been stated on the record.

1/ Shortly after the inundation, the Mining Enforcement and Safety Administration (MSHA's predecessor) convened a public hearing on the causes of the inundation. The inspector testified at this hearing.
We note that Kocher's brief in support of the motion for settlement request also relies on Inspector Klinger's testimony at the public hearing. Kocher further states that "[N]o reason is advanced why the accuracy or credibility of this inspector should now be brought into

question. No conflicting testimony was elicited." Brief at 5.

2/ The parties' agreement distinguishes this case from Climax Molybdenum Co., supra, where the operator objected to the Secretary's attempted unilateral vacation of the citations therein at issue.

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Accordingly, we grant the Secretary's motion to vacate Order No. 0611706 and dismiss this case.

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