CCASE: **RUSHTON MINING V. MSHA** DDATE: 19870330 TTEXT: **FMSHRC-WDC** March 30, 1987 RUSHTON MINING COMPANY Docket Nos. PENN 85-253-R

PENN 86-1

v.

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

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson, Commissioners ORDER

BY THE COMMISSION:

Petitioner, Rushton Mining Company, has filed a petition for discretionary review together with a motion to stay the administrative law judge's decision and a motion to remand this case to the judge for further proceedings.

Petitioner presents two issues: Whether an operator is entitled to reimbursement from the Secretary for costs and attorney's fees under Rule 11 of the Federal Rules of Civil Procedure and, if so, whether the facts in this case support such reimbursement. The administrative law judge's jurisdiction in this case ceased with the issuance of his decision on February 20, 1987. Thus, by operation of Commission Rule 2700.65, petitioner did not have the opportunity to present the issue of reimbursement before the trier of fact.

We believe that under the circumstances it is appropriate that the administrative law judge be given the opportunity to rule on the issues raised in the petition.

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Accordingly, it is ordered that this case be remanded to the administrative law judge for the purpose of developing a record and ruling on the issues presented in the petition for discretionary review.

Ford B. Ford, Chairman Richard V. Backley, Commissioner Joyce A. Doyle, Commissioner James A. Lastowka, Commissioner L. Clair Nelson, Commissioner Distribution

Joseph T. Kosek, Jr., Esq. Rushton Mining Company P.0. Box 367 Ebensburg, PA 15931 David T. Bush, Esq. Office of the Solicitor U.S. Department of Labor 14480 Gateway Bldg. 3535 Market St. Philadelphia, PA 19104 Ann Rosenthal, Esq. Office of the Solicitor U.S. Department of Labor 4015 Wilson Blvd. Arlington, VA 22203 Administrative Law Judge James A. Broderick Federal Mine Safety & Health Review Commission 5203 Leesburg Pike, Suite 1000 Falls Church, Virginia 22041