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BEAVER CREEK COAL V. MSHA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
December 20, 1989

BEAVER CREEK COAL COMPANY

v. Docket No. WEST 88-145-R

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

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

DECISION

BY THE COMMISSION:

The questions presented in this contest proceeding are whether Beaver Creek Coal Company ("Beaver Creek") is entitled to declaratory relief under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) (the "Mine Act"), and to attorney's fees and costs Commission Administrative Law Judge John J. Morris concluded that Beaver Creek was not entitled to either declaratory or monetary relief, and he dismissed Beaver Creek's contest. 10 FMSHRC 758 (June 1988)(ALJ). For the reasons that follow, we affirm the judge's decision.

Beaver Creek's application for declaratory relief involves a dispute between Beaver Creek and the Department of Labor's Mine Safety and Health Administration ("MSHA") regarding the revision of Beaver Creek's roof control plan at its Trail Mountain No. 9 Mine located in Emery County, Utah. 1/ The plan permitted 140 feet of penetration on

1/ Pursuant to 30 U.S.C. 862 and mandatory safety standard 30 C.F.R. 75.200 (1987), an operator is required to adopt a roof control pla suitable to the conditions and mining system of the mine. The plan must be approved by the Secretary and must be reviewed at least every

six months. Once adopted and approved, the provisions of the plan are enforceable as mandatory safety standards. See Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976); Jim Walter Resources, Inc.,

development mining without installation of permanent roof support. It also permitted continuous mining machines to make 10 foot cuts. By letter dated January 13, 1988, Beaver Creek requested that MSHA approve a modification of the roof control plan to allow remote controlled continuous mining machines to make cuts of 20 feet during development mining. By letter dated February 16, 1988, MSHA "tentatively" approved the modification subject to various conditions, one of which stated that "[t]he maximum depth of penetration is limited to 40 feet. If adverse conditions are encountered or anticipated, the cut depth shall be substantially reduced." Exhibit C. By letter mailed March 14, 1988, Beaver Creek objected to this and other conditions.

On March 17, 1988, MSHA inspector Dick Jones conducted an inspection at the mine. Jones found that a remote controlled continuous mining machine had exceeded the 40 foot penetration limit set forth in MSHA's letter. Jones therefore issued to Beaver Creek an order of withdrawal pursuant to section 104(d)(2) of the Act, 30 U.S.C. 814(d)(2), alleging a violation of section 75.200 for failure to comply with the approved roof control plan. Jones further found that the violation significantly and substantially contributed to a mine safety hazard and resulted from Beaver Creek's unwarrantable failure to comply with the standard.

Beaver Creek personnel informed Jones that Beaver Creek had not agreed to the 40 foot penetration condition stated in MSHA's letter. They showed Jones a copy of Beaver Creek's letter to MSHA in which it stated its objections to the condition MSHA sought to impose. Later that same morning, MSHA terminated the withdrawal order and mining was allowed to resume. MSHA, however, refused to vacate the withdrawal order issued by Jones.

On March 22, 1988, Beaver Creek initiated this proceeding before the Commission asserting that the order was improperly issued. Beaver Creek argued that, because it had not agreed to the condition, it had not violated section 75.200 by not complying with the condition. Beaver Creek also requested the Commission to order the Secretary to reimburse Beaver Creek for its attorney:s fees and costs pursuant to Rule 11 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P. 11"), section 105(d) of the Mine Act, and the common law, asserting that MSHA's defense of the contested withdrawal order was frivolous and in bad faith. Notice of Contest 2-3. Beaver Creek also challenged the inspector's unwarrantable failure finding.

On March 25 1988, MSHA vacated the withdrawal order and in a letter to Beaver @reek conceded that, because there had been no agreement between MSHA and Beaver Creek regarding the stipulation, penetration by the remote controlled continuous mining machine beyond 40 feet did not violate the

mine's roof control plan or section 75.200.

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9 FMSHRC 903, 906-07 (May 1987). On March 28, 1988, the Secretary's revised mandatory safety standards for roof, face, rib support, and roof control plans became effective. The revised standards generally retain the adoption, approval, and review requirements of section 75.200 (1987). See e.g., 30 C.F.R. 75.220(a); 30 C.F.R. 75.223(d)(1988).

MSHA also advised Beaver Creek that the roof control plan in effect on January 13, 1988, would be enforced, commencing March 30, 1988, absent an agreement on the conditions proposed by MSHA.

On April 8, 1988, Beaver Creek filed an amended notice of contest, requesting declaratory relief and charging that the Secretary's practices and procedures for approving new and revised roof control plans were improper. Beaver Creek also renewed its request for attorney's fees and costs. On April 22, 1988, MSHA unconditionally approved the roof control modification requested by Beaver Creek, and moved to dismiss the notice of contest as amended. The Secretary essentially argued that Beaver Creek's request for declaratory relief was moot and that the principle of sovereign immunity barred Beaver Creek's claims for attorney's fees and costs.

The administrative law judge granted the Secretary's motion to dismiss. The judge concluded that, although the Commission had authority to grant declaratory relief, relief was not warranted because the issues were moot. 10 FMSHRC at 764. The judge specifically noted that the modification sought by Beaver Creek had been granted by the Secretary. Id. The judge also denied Beaver Creek's request for an award of attorney's fees and costs, concluding that Fed. R. Civ. P. 11 does not provide a basis for an award of fees and costs in Commission proceedings. 10 FMSHRC at 763. We granted Beaver Creek's petition for review.

Beaver Creek submits that the Commission should reverse the order of dismissal and reinstate its contest. Beaver Creek asserts that, despite MSHA's approval of Beaver Creek's proposed modification of the roof control plan at the Trail Mountain No. 9 Mine, the relief Beaver Creek seeks involves an interpretation of the proper procedures to be followed in the roof control plan approval process and, therefore, that the issues are not moot. PDR at 2, 16-19. Beaver Creek also argues that it should be awarded the monetary sanctions it seeks.

The Commission has previously recognized that it may grant declaratory relief in appropriate proceedings where jurisdiction otherwise exists. Climax Molybdenum Co., 2 FMSHRC 2748, 2751-52 (October 1980), aff'd sub nom. Climax Molybdenum Co. v. Secretary of Labor, 703 F.2d 447, 452 (1Oth Cir. 1983); Kaiser Coal Corp., 10 FMSHRC 1165, 1170-71 (September 1988); See also Youghiogheny & Ohio Coal Co., 7 FMSHRC 200, 203 (February 1985)("Y&0"). The question is whether declaratory relief is appropriate.

The primary purpose of declaratory relief is "to save parties from unnecessarily acting upon their own view of the law." Climax Molybdenum Co., 2 FMSHRC at 2752. Beaver Creek instituted this case to challenge the validity of the withdrawal order and the inspector's finding of

unwarrantable failure. Beaver Creek argued that MSHA had not approved, and Beaver Creek had not adopted, the provision of the plan for which it was cited and thus that it had not violated section 75.200. Shortly after Beaver Creek initiated this proceeding MSHA itself vacated the contested withdrawal order. MSHA admitted that the order had been improperly issued because the inspector mistakenly believed that a

limitation of 40 feet for the penetration of the remote controlled continuous mining machine had been adopted and approved. Thus, MSHA agreed with Beaver Creek that the company had not violated section 75.200.

In addition, MSHA approved without conditions and Beaver Creek adopted the modification of the roof control plan originally sought by Beaver Creek. The requirements of the roof control plan concerning the advancement of remote controlled continuous mining machines inby permanent roof supports during development mining are now clearly understood by both Beaver Creek and MSHA. Accordingly, denial of declaratory relief does not mean that Beaver Creek will have to act at its peril regarding the meaning of this previously disputed provision.

Further, there are no allegations by Beaver Creek that there is a present dispute between it and MSHA with respect to the approval or review of the mine's roof control plan or of any proposed revisions to it. See Tr. 15, 31-32. The prospect that the Secretary will take similar enforcement action in the future is purely conjectural and cannot be the basis for declaratory relief. See SEC v. Medical Committee on Human Rights, 404 U.S. 403, 406 (1972).

Beaver Creek also requests that we declare invalid certain of the practices and procedures used by MSHA in negotiating with operators with respect to approval or revision of roof control plans, and that we issue a declaratory ruling regarding the effect of the revised roof control regulations upon MSHA's authority to review a roof control plan. See Amended Notice of Contest 4; 53 Fed. Reg. 2354 (1988). The prospect of future allegations of violations resulting from the Secretary's practices and procedures for approval or revision of Beaver Creek's roof control plan is entirely speculative. Indeed, the Secretary acknowledges that MSHA's presently published roof control plan approval and review policies "are largely consistent with the positions taken by Beaver Creek and the declarations it seeks." See S. Br. 20-24. We further find it inappropriate to consider declaratory relief in the context of the revised roof control regulations. The revised regulations were not in effect at the time of the Secretary's enforcement action in this proceeding. It would be inadvisable, therefore, to express an opinion as to the propriety of the revised procedures, absent a factually grounded controversy arising under those procedures. Hence, we agree with the judge that, under the circumstances of this case, declaratory relief is not warranted.

We also agree with the judge that Beaver Creek is not entitled to attorney's fees and litigation expenses. Subsequent to granting review of this proceeding, we concluded that the provision of Fed. R. Civ. P. 11 providing for monetary sanctions does not apply to Commission proceedings.

Rushton Mining Co., 11 FMSHRC 759 (May 1989). 2/ We held

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2/ Fed. R. Civ. P. 11 provides:

> Signing of Pleadings, Motions, and Other Papers;

that, absent specific statutory authority, the Commission cannot award attorney's fees and costs against the Secretary. We noted that the barriers to such relief "include the silence of the Mine Act on the subject, the nature of the Federal Rules of Civil Procedure, the bar of sovereign immunity, and the Equal Access to Justice Act (Pub. L. No. 96-481, 94 Stat. 2325, reauthorized, Pub. L. 99-80, 99 Stat. 183) ("EAJA")." 11 FMSHRC at 763. Beaver Creek raises no arguments causing us to reconsider our decision in Rushton. Therefore, for the reasons set forth in Rushton, we conclude that Beaver Creek is not entitled to attorney's fees and reimbursement for costs under Fed. R. Civ. P. 11.

Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to

pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(As amended April 28, 1983, effective August 1, 1983.) (Emphasis added.)

Beaver Creek also argues for an award of attorney's fees and costs under section 105(d) of the Mine Act and under general principles of American common law. It asserts that such fees and costs are warranted when the government engages in frivolous or bad faith litigation. However, as we observed in Rushton, the doctrine of sovereign immunity bars the award of attorney's fees and costs against an agency of the United States absent Congressional authorization. 11 FMSHRC at 765. As we explained in Rushton, the EAJA is "the exclusive remedy provided by Congress to prevailing litigants who seek reimbursement of their litigation expenses from the Secretary in Commission contest and civil penalty proceedings." 11 FMSHRC at 765. Because Beaver Creek makes no claim or showing of an entitlement to an award of fees and costs under the EAJA, its request must be denied.

On the foregoing basis, we conclude that the judge properly denied Beaver Creek's motion for declaratory relief and for monetary sanctions against the Secretary, and we affirm the judge's decision dismissing Beaver Creek's contest.

Richard V. Backley, Commissioner
Joyce A. Doyle, Commissioner
L. Clair Nelson, Commissioner

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