

CCASE:
AIR PRODUCTS AND CHEMICALS V. SOL (MSHA)
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January 28, 1994

AIR PRODUCTS AND CHEMICALS, INC.	:	
	:	
v.	:	Docket No. PENN 91-1488-R
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	

BEFORE: Holen, Chairman; Backley and Doyle, Commissioners

ORDER

BY THE COMMISSION:

On January 12, 1994, Air Products and Chemicals, Inc. ("Air Products") filed with the Commission a Motion for Stay Pending Appeal of the Commission's December 9, 1993, decision in this matter. 15 FMSHRC 2428 (December 1993). The Secretary filed opposition to the motion on January 21, 1994.

Air Products filed its motion pursuant to Rule 18 of the Federal Rules of Appellate Procedure, which provides that "[a]pplication for a stay of a decision or order of an agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency." Section 106(a)(1) of the Mine Act, 30 U.S.C. 816(a)(1), provides that, upon appeal of a final decision of the Commission, the court of appeals shall have exclusive jurisdiction in the proceeding at such time as the record before the Commission is filed with the court. Because the record has not yet been filed, the Commission has jurisdiction to consider Air Products' motion. See Helen Mining Co., 14 FMSHRC 1993, 1994 (December 1992).

Upon consideration of Air Products' motion and the Secretary's opposition, we conclude that Air Products has failed to establish that a stay should be granted. See Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958); Jim Walter Resources, 9 FMSHRC 1312 (August 1987). In view of this conclusion, we need not discuss the Secretary's arguments

* Air Products filed its notice of appeal with the United States Court of Appeals for the Third Circuit on December 22, 1993 (NO. 93-3646).

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concerning "temporary relief" under sections 105 and 106 of the Mine Act, 30 U.S.C. 815 & 816. Accordingly, Air Products' motion is denied.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner