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MEDICINE BOW COAL V. MSHA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
DENVER, COLORADO
March 13, 1990

MEDICINE BOW COAL COMPANY,
Contestant

v.

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

CONTEST PROCEEDINGS

Docket No. WEST 90-117-R
Citation No. 3241007; 1/17/90

Docket No. WEST 90-123-R
Citation No. 3295756; 2/13/90

Pilot Butte Mine
Mine I.D. No. 48-01012

ORDER

These cases arose under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

Contestant seeks an expedited hearing. The Secretary opposes.

In WEST 90-117-R the Secretary, pursuant to Section 104(d)(1), issued Citation No. 3241007 on January 17, 1990. The citation alleges a violation of 30 C.F.R. 75.807. The notice of contest was docketed with the Commission on February 20, 1990.

In WEST 90-123-R the Secretary, pursuant to Section 104(d)(1), issued Order No. 3295756 on February 13, 1990. The citation alleges a violation of 30 C.F.R. 75.517. The notice of contest was docketed with the Commission on February 28, 1990.

As a grounds for its motion Contestant states it is subject to a continuing possibility of orders issued pursuant to Section 104(d) of the Act despite its belief that the citation and order were not properly issued pursuant to the Act.

Discussion

Portions of the Mine Act, and Commission Rule 52, 29 C.F.R. 2700.52 1/ deal with expedited hearings. These sections should be considered.

1/ The Commission rule broadly addresses expedited hearings but it does not consider appeals of 104(d) orders.

As a threshold matter: Section 107(a) 2/ and its subparts deal with imminent danger orders and withdrawal notices issued under section 107. Subpart (e) 3, addresses a hearing before the Commission. The subpart provides as follows:

"(e)(i) Any operator notified of an order under this section or any representative of miners notified of the issuance, modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forthwith afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, vacating, affirming, modifying, or terminating the Secretary's order. The Commission and the courts may not grant temporary relief from the issuance of any order under subsection (a).

(2) The Commission shall take whatever action is necessary to expedite proceedings this subsection."

The enforcement documents involved in these cases were not issued under section 107 of the Act but under section 104. Accordingly, it is necessary to look to other portions of the Act. 4, /

The controlling portion of the Act is found in section 105(a)(B)(2) which provides as follows:

2/ 30 U.S.C. 817.

3/ 30 U.S.C. 817(e).

4/ On March 2, 1990, in unrelated cases, Wyoming Fuel Company, WEST 90-112-R the judge ruled contestant therein was entitled to an expedited hearing. However, Wyoming Fuel dealt with an order issued under Section 107(a) of the Act.

"(2) As applicant may file with the Commission a written request that the Commission grant temporary relief from any modification or termination of any order or from any order issued under section 104 together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if -

(A) a hearing has been held in which all parties were given an opportunity to be heard;

(B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

(C) such relief will not adversely affect the health and safety of miners.

No temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section 104. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

In the instant cases contestant's sole basis for an expedited hearing is that it "is subject to a continuing possibility of the issuance of orders pursuant to Section 104(d) of the Act." However, Contestant's position is not unique. Every mine operator is subject to the "possibility" of the issuance of "104(a)" orders. In addition, these cases both involve 104(d) orders and contestant has failed to allege that it is within the criteria required by subparagraphs (A), (B) and (C) of 105(a)(B)(2)

For the foregoing reasons contestant's motion to expedite is denied.

John J. Morris
Administrative Law Judge