

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

October 14, 2004

RAG CUMBERLAND RESOURCES, LP, : CONTEST PROCEEDINGS
Contestant :
v. : Docket No. PENN 2000-181-R
: Citation No. 3657290; 7/6/2000
SECRETARY OF LABOR, : Docket No. PENN 2000-182-R
MINE SAFETY AND HEALTH : Citation No. 3657291; 7/6/2000
ADMINISTRATION (MSHA), :
Respondent : Cumberland Mine
: Mine ID 36-05018
SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. PENN 2001-63-A
Petitioner : A.C. No. 36-05018-04200
v. :
RAG CUMBERLAND RESOURCES LP, : Cumberland Mine
Respondent :

ORDER DENYING MOTION TO INTERVENE<sup>1</sup>

On August 10, 2004, the Commission directed reassessment of the civil penalty for Citation No. 3657291 in view of its determination that RAG Cumberland Resources LP's (Cumberland's) failure to immediately correct hazardous bleeder conditions as required by the mandatory safety standard in section 75.363(a) was not attributable to an unwarrantable failure. 26 FMSHRC 639. On October 8, 2004, the United Mine Workers of America (the Union) filed a Motion to Intervene in the above captioned proceedings. The Union relies on Commission Rule 2700.4(b)(1) that provides, in pertinent part, that "[a]fter the start of the hearing, . . . [the Union] may intervene upon just terms and for good cause shown." (Emphasis added). Neither the Secretary nor Cumberland opposes the Union's motion. As discussed below, despite the lack of opposition, the Union has failed to demonstrate the requisite good cause to permit intervention at the late stage of these proceedings.

The hearing in these matters was conducted in two sessions from April 3 through April 6, 2001, and from July 24 through July 25, 2001. Timothy W. Hroblak, a Union safety committeeman, was a principal witness at the hearing. The Union did not move to intervene in

<sup>1</sup> This Order supercedes the previous order issued October 12, 2004. The previous order reflected docket numbers that were not on remand. A correction has been made to the case caption and is reflected in this Order.

the hearing proceeding. After the hearing, the Secretary and Cumberland filed post-hearing briefs. An initial decision in these matters was issued on November 28, 2001. 23 FMSHRC 1241 (ALJ). A copy of the initial decision was sent to the Union because the Union had filed a related compensation case in Docket No. PENN 2000-204-C that was ultimately dismissed on April 26, 2002. The Union did not move to intervene following its receipt of the initial decision.

The Commission granted Cumberland's petition for review of the initial decision on January 7, 2002. On August 10, 2004, the Commission issued its appellate decision affirming the fact of the cited violations in Citation Nos. 3657290 and 3657291, and reversing the initial finding that the violation in Citation No. 3657291 was caused by Cumberland's unwarrantable failure. The Commission's remand for reassessment of the civil penalty for Citation No. 3657291 is currently before me. 26 FMSHRC 639.

In support of its motion, the Union notes the Secretary has informed it that she may not appeal the Commission's decision. Consequently, the Union argues that it can no longer rely on the Secretary to represent the Union's interests. The Union asserts that the Commission's reversal of the unwarrantable failure "is an important aspect of this litigation that will likely have repercussions beyond this matter." (*Union mot.* at p.2). However, the Union does not seek to file a brief before the Commission. (*Union mot.* at p.3). Rather, the Union seeks to intervene for the purpose of participating in judicial review. (*Union mot.* at p.2).

Under the Commission's Rules, a person who is permitted to intervene is a party. 29 C.F.R. 2700.4(a). Thus, the purpose of conferring intervenor status is to permit the intervenor to play an active role by participating in the hearing and/or by filing briefs in support of its position. Here, however, the Union seeks party status at this late stage after briefs have been filed, oral argument has been presented before the Commission, and the initial decisions on the merits have been issued by the judge and the Commission. Granting the Union party status as an intervenor may confer the Union with appeal rights even if the Secretary and Cumberland do not seek judicial review.

I am cognizant of the unopposed nature of the Union's motion. However a lack of opposition cannot overcome the lack of propriety of the Union's motion. Here the Union seeks to accomplish indirectly what it should seek directly. If the Union wishes to intervene in order to participate in judicial review it must file a motion to intervene with the Court of Appeals if an appeal is docketed. It is inappropriate for me to confer intervenor status solely for an anticipated appellate court proceeding.

Finally, the Union relies on *Smoke v. Norton*, 252 F.3d 468 (D.C. Cir. 2001) to support its intervention request. The Union's reliance is misplaced. In *Smoke* the Government represented the interests of a Native American tribal government. The tribal entity sought to intervene after a summary judgment was granted against the Government, before the Government decided whether to appeal, to ensure an appeal of the summary decision. The Court noted that the tribal government had no occasion to intervene in order to protect its interests until after the judgment was entered. Here, the Union has failed to avail itself of the intervenor provisions in the Commission's Rules. See 29 C.F.R. §§ 2700.4(b), 2700.73. Moreover, although their interests may coincide, the Secretary does not represent the Union in these matters.

Accordingly, the Union's motion to intervene before the undersigned Administrative Law Judge lacks the requisite showing of good cause. Consequently, the Motion to Intervene **IS DENIED** as untimely.

Jerold Feldman  
Administrative Law Judge

Distribution: (Certified Mail)

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center,  
401 Liberty Avenue, Suite 1340, Pittsburgh, PA 15222

Susan Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center,  
Suite 630 East, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

Judy Rivlin, Esq., United Mine Workers of America, 8315 Lee Highway,  
Fairfax, VA 22031-2215

/hs