

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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April 27, 2022

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

v.

CACTUS CANYON QUARRIES INC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. CENT 2022-0010-M
A.C. No. 41-00009-542457

Fairland Plant & Qys

ORDER GRANTING MOTION TO STAY, IN PART
ORDER CONCERNING MOTION TO COMPEL ANSWERS TO DISCOVERY

Before: Judge Manning

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On March 21 the Secretary filed a Motion for Stay (“Sec’y Mot.”). Subsequently, on April 19, Respondent filed a Response to the Secretary’s Motion for Stay and its own Motion to Compel Answers to Interrogatories and Production Requests (“Cactus Canyon Resp.”). The Secretary then filed an objection to Cactus Canyon’s motion to compel (“Sec’y Obj.”). For the reasons set forth below, the Secretary’s motion for stay is granted, in part. Respondent’s motion to compel is denied but the parties are ordered to continue working on discovery, as described below, so that discovery can be completed expeditiously. A preliminary jurisdictional issue must be addressed before reaching these issues. I am discussing this jurisdictional issue because both parties raised it in their filings.

A. Commission Jurisdiction

On December 1, 2021, the Commission’s Chief Administrative Law Judge issued an order granting the Secretary’s request for an extension of time to file the Petition for Assessment of Penalty in this case.¹ Both the Secretary’s motion and Cactus Canyon’s response make reference to the appeal Cactus Canyon filed to the Fifth Circuit Court of Appeals regarding the Chief Judge’s December 1, 2021 order.² In its brief to the Fifth Circuit, as well as in its response

¹ Respondent’s counsel refers to this order of the Chief Judge as the “Outlaw Order.” Cactus Canyon Resp. 1.

² Cactus Canyon filed its appeal of the Chief Judge’s order to the Fifth Circuit on or about January 14, 2022, after the Commission denied its petition for discretionary review on January 4, 2022. Cactus Canyon filed its brief to the Fifth Circuit on April 18, 2022.

to the Secretary's motion for stay, Cactus Canyon asserts that Commission jurisdiction does not attach in a civil penalty case until the Secretary files his Petition for Assessment of Penalty under Commission procedural Rule 28. 29 C.F.R. § 2700.28. Consequently, it argues, the Chief Judge did not have jurisdiction to issue an order granting the Secretary's request for an extension of time to file the penalty petition in this case. Cactus Canyon's assertion is not correct. Commission jurisdiction attaches in a civil penalty case at the time the mine operator files its Notice of Contest of Proposed Penalty Assessment under Commission Procedural Rule 26. 29 C.F.R. § 2700.26. In this case, counsel for Cactus Canyon signed the Notice of Contest on October 4, 2021, and it was mailed to the Mine Safety and Health Administration (MSHA) via USPS 2-day priority delivery on October 5, 2021. The Commission's jurisdiction over this case began when this notice of contest was filed by counsel for Cactus Canyon in October 2021.

The Commission has long held that once a mine operator contests a citation, neither the citation nor the associated penalty can be compromised by the parties without the consent of the Commission. The Commission summarized the law in this regard in *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1862 (Aug. 2012), as follows:

As the Commission has long recognized, after “an operator contests the Secretary's proposed assessment of penalty, ... *Commission* jurisdiction over the matter attaches.” *Sellersburg Stone Co.*, 5 FMSHRC 287, 291 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984) (emphasis in original). It is clear that the Commission's jurisdiction attaches to a proposed penalty after it has been contested due to the language of section 110(k), which specifies that “[n]o proposed penalty which has been *contested* before the Commission under section 105(a)” shall be settled without the approval of the Commission. 30 U.S.C. § 820(k) (emphasis added).

When an operator files its notice of contest with MSHA's Civil Penalty Compliance Office in Arlington, Virginia, detailed information about the notice of contest and the particular citations contested is transmitted to the Commission's electronic case management system (“eCMS”) within a short period of time.³ The Commission creates a docket number which is transmitted to MSHA. If a case is settled after the operator files its notice of contest but before the penalty petition is filed, a Commission administrative law judge must still review the proposed settlement for compliance with the terms of section 110(k) of the Mine Act. 30 U.S.C. § 820(k). Thus, established law provides that the Commission's jurisdiction commences in a civil penalty case at the time the mine operator files its notice of contest of the proposed penalty assessment.

³ Indeed, all information contained within a contested citation is transmitted to the Commission at this time, including the safety standard cited, the description of the alleged violation written by the inspector, the inspector's determinations as to gravity, negligence, and significant and substantial (S&S), as well as the penalty proposed by the Secretary.

B. Motion for Stay

The Secretary asks that this case be stayed “while the Fifth Circuit Court of Appeals resolves Cactus Canyon’s appeal of a procedural order.” Sec’y Mot. 1. He argues that “it makes no sense for the parties to continue litigating this case while there is a pending appeal that could result in the case’s dismissal.” *Id.* at 2. The Secretary maintains that because the Commission’s administrative record has already been filed with the Fifth Circuit, section 106(a)(1) provides that the court of appeals has “exclusive jurisdiction of the proceeding.” Sec’y Obj. 1 (citing 30 U.S.C. 816(a)(1)). He also asserts that staying the case will not prejudice Cactus Canyon. Sec’y Mot. 2.

In response, Cactus Canyon argues that the Secretary’s Motion for Stay “is an attempt to breathe life into the Outlaw Order.” Cactus Canyon Resp. 2. It goes on to argue that I have “no jurisdiction to consider any matter set forth in the Commission’s Certified Index of Administrative Record to the Fifth Circuit.”⁴ *Id.* Finally, counsel argues that the “Secretary’s Motion to Stay seeks a bond where none is possible.” *Id.*

For good cause shown, the Secretary’s Motion for Stay is **GRANTED**, in part, to the extent that I will not set the case for hearing during the pendency of the stay. Cactus Canyon seemingly asks me to ignore the fact that it filed an appeal of the Chief Judge’s December 1, 2021, order granting the Secretary an extension of time to file the petition for penalty. The case before me can only progress so far while this appeal is pending. Consequently, staying the case is prudent and will not prejudice Respondent.

C. Motion to Compel Answers to Discovery.

Cactus Canyon states that it served discovery upon the Secretary on February 11, 2022, and that the Secretary has not responded despite repeated attempts to secure responses. It contends that the Secretary filed its motion for stay to avoid having to respond to discovery.

As stated above, the Secretary objects to the motion to compel and maintains that “[f]or procedural simplicity, and to avoid this Court’s conducting litigation inconsistent with the Fifth Circuit’s disposition of this case, this Court should stay the case . . . and deny Respondent’s motion to compel.”⁵ Sec’y Obj. 1-2.

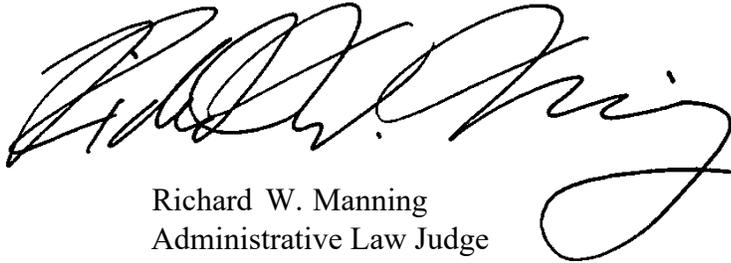
For good cause shown, the motion to compel is **DENIED** to the extent that, at this time, I am not ordering the Secretary to respond by a certain date. Consistent with my analysis above, I believe it is likely the Fifth Circuit will deny Cactus Canyon’s motion to dismiss and will remand the case back to the Commission. Accordingly, the parties should be prepared to resume active litigation of this matter as soon as the stay is lifted. The Secretary is **ORDERED** to begin

⁴ This index includes everything filed with the Commission or issued by the Commission in eCMS between November 28, 2021, and January 4, 2022.

⁵ Nevertheless, the Secretary makes clear that he “believes that the Fifth Circuit lacks subject-matter jurisdiction over Cactus Canyon’s appeal and has filed a motion to dismiss . . .” Sec’y Obj. 1.

gathering the information necessary to respond to Cactus Canyon's interrogatories and prepare draft answers. The Secretary is also **ORDERED** to begin gathering the documents requested by Cactus Canyon's request for the production of documents. Finally, the Secretary is **ORDERED** to begin drafting his own interrogatories and document requests, if any, for prompt service to Cactus Canyon if the case is remanded to the Commission.

If the case is remanded to me, I intend to set it for hearing and order the parties to quickly complete discovery.⁶ The parties would be wise to use this time to move discovery along.



Richard W. Manning
Administrative Law Judge

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⁶ This case involves three non-S&S citations and a total penalty of \$375.