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March 4, 2014

ELK RUN COAL COMPANY, Contestant	CONTEST PROCEEDING
v.	Docket No. WEVA 2013-1298-R Notice of Safeguard No. 8154999; 08/01/2013
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Mine: Powellton Deep Mine Mine ID: 46-09163

ORDER DENYING THE SECRETARY OF LABOR'S MOTION TO DISMISS NOTICES OF CONTEST

Before: Judge Steele

The instant proceeding is before me on Elk Run Coal Company's ("Elk Run" or "Contestant") "Notice of Contest," regarding a safeguard (No. 8154999) issued by the Secretary pursuant to Section 314(b) of the Act (30 U.S.C. §874(b) and 30 C.F.R. §75.1403-1. The Secretary of Labor, Mine Safety and Health Administration ("Secretary") filed a "Motion to Dismiss Notices of Contest" on September 27, 2013. After consideration of the arguments of the parties and for the reasons set forth below, the Secretary's Motion is hereby **DENIED**.

The Notice of Contest was filed with respect to Safeguard 8154999 was issued on August 1, 2013. The inspector allegedly noted bottom irregularities at the mine and issued the safeguard to prevent mud, ledges, and water accumulation in travel-ways.

The Mine Act permits the Secretary to issue "safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials…." *See* 30 U.S.C. § 874(b). "Once issued, the safeguard operates as a mandatory standard for that mine." *Oak Grove Resources, LLC*, 2013 WL 4140414, *3 (July 25, 2013). That is, from that point forward, failure to comply with safeguard will result in a citation or order just as if the operator had violated a promulgated mandatory standard.

There is no question that the Commission has jurisdiction to decide on the validity of a safeguard after the issuance of a citation or order related to that safeguard and the proposal of a civil penalty. *See e.g Southern Ohio Coal Co.*, 14 FMSHRC 1 (Jan. 1992); *see also Secretary's Motion to Dismiss* at 3-6. The issue in this proceeding is whether the Commission has

jurisdiction to determine the validity of a safeguard if no subsequent citation or order has been issued.

The undersigned finds that Congress granted the Commission the necessary authority to hear this contest. The Mine Act confers upon Commission Judges jurisdiction to hear a variety of cases. See 30 U.S.C. §815(b)(2)(temporary relief orders); (30 U.S.C. §817(e)(contests to imminent danger orders); 30 U.S.C. 815(c)(complaints of discrimination); 30 U.S.C. §821(complaints for compensation). In this instance, the relevant jurisdiction is authorized in Section 105(d) (30 U.S.C. §815(d)).[1]

Further, "where the statute creates Commission jurisdiction, it endows the Commission with a plenary range of adjudicatory powers to consider issues, to make findings of fact and conclusions of law, and to render relief – in short, to dispose fully of cases committed to Commission jurisdiction." *Drummond Company, Inc.*, 14 FMSHRC 661, 674 (May 1992).

There is no explicit grant of authority in the Mine Act empowering the Commission to consider the validity of safeguards. However, in addition to explicit authority, the Commission possesses implied authority to hear related issues. For example, the Commission has held (with Court of Appeals concurrence) that section 105(d) grants implied authority to grant declaratory relief, as appropriate, in contest proceedings. *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1171 (Sep. 1988); and *Climax Molybedenum Co. v. Secretary*, 703 F.2d 447, 452 (10th Cir. 1983). Similarly, the Commission held in *Drummond* that it had the implied authority to examine an MSHA Program Policy Letter based, in part, on the Mine Act's grant of power to review

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[1] That section states:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination or any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall 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 on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section. The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104.

"question[s] of law, policy or discretion," and to direct review *sua sponte* of matters that are "contrary to…Commission policy" or that present a "novel question of policy." *Drummond* 14 FMSHRC at 674-675 *citing* 30 U.S.C. §823(d)(2)(A)(ii)(IV) & (B).

I find that the instant proceeding presents just such an instance of implied authority. The authority to hear a citation or order implies the authority to examine the underlying safeguard. In this way, a safeguard is analogous to the situation in *Drummond*, where the Commission found that the ability to hear contest proceedings implied the authority to examine a Program Policy Letter issued by the Secretary which informed MSHA's decision in proposing penalties. 14 FMSHRC at 673-676. If a policy issued by the Secretary can form the basis for a citation or order then, under Section 105(d), the Commission has authority to hear a challenge to that issuance. Here, a safeguard serves as the first step in the issuance of a citation and as a threat of civil penalty. In fact, with the requirement that an operator correct the hazardous condition, a safeguard is analogous to a non-assessable citation. In light of this close nexus between a safeguard and a citation or order, I find that the Commission has authority to hear this case.

Furthermore, due process and public policy also weigh in favor of finding Commission authority to hear such cases.

In considering due process, it is important to note that even if no citation or order is issued with respect to a safeguard, that safeguard is already constraining or otherwise adversely affecting the operator. As noted *supra*, the safeguard acts as a mandatory standard at the subject mine. The operator is required to take potentially time-consuming or expensive actions to ensure that it complies with this new "standard." In short, the Secretary's actions with respect to a safeguard place some burden on the rights of a private individual (in this case a private corporation). I am concerned that without recourse to the Commission, an operator would have no way to challenge this government action and would suffer some harm to its rights.

In the instant case, Contestant was required to change its behavior and to take potentially expensive and time-consuming actions based on a mandatory directive by a federal inspector. As a result, there must be some forum at which Contestant can apply for relief. It is impossible that an individual can be constrained by the government and maintain no avenue of appeal.

In light of this infringement on an operator's prerogatives, there must be some court or agency with jurisdiction over a safeguard even if there is no citation or order. If the Commission does not have jurisdiction to grant relief in this matter, then the Contestant must have recourse to an Article III tribunal. For the reasons stated *supra*, it is clear that Congress intended that the Commission, rather than a federal court, have jurisdiction over this matter. The federal courts agree. As the D.C. District court stated, when the "Secretary acts in a manner which adversely affects an operator, the proper procedure for review of that act [is] to proceed first to the Commission and then to the appropriate Court of Appeals." *See Bituminous Coal Operators' Ass'n, Inc. v. Marshall*, 82 F.R.D. 350, 353 (D.D.C. 1979). Therefore, in the interest of due process, the Contestant must have some recourse to judicial review and that judicial review should come from the Commission.

Beyond serving the interest of due process, the Commission's exercise of authority over the instant proceeding also supports the purpose of the Act. As Congress noted, "the first

priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource – the miner." 30 U.S.C. §801(a). Mandatory standards, safeguards, and other protections afforded by the Act should be implemented in light of this goal to protect the health and safety of miners.

In the instant situation, if the validity of the safeguard cannot be challenged until a citation or order is issued, an operator is confronted with a perverse incentive. If the operator believe that the safeguard is invalid it must choose to either comply with the safeguard and sit on its rights indefinitely (incurring delay and costs as a result) or to willfully violate the safeguard to gain access to the Commission. Under the latter approach, it is possible that miners would needlessly be exposed to hazards that might not otherwise arise. It order to protect its rights, an operator may be forced to place miners in harm's way. Surely the Mine Act does not require such an absurd result. Exercising authority to hear the challenge to the safeguard now prevents such a situation from occurring.

Finally, the Commission's exercise of authority over the instant proceeding ensures that the validity of the safeguard is determined in a timely manner. If the Commission waits until a citation or order has been issued pursuant to a safeguard, the delay between the issuance and the challenge can be extreme. For example, in *Oak Grove Resources, LLC*, *supra*, the time between the issuance of the safeguard and the subsequent challenge was 22 years. Over the course of years an operator could spend large amounts of money complying with an invalid safeguard. More importantly, when the operator can finally challenge the standard, the inspector and everyone involved with the safeguard could be retired or deceased making the issue impossible to properly adjudicate. Therefore, the Commission's ability to hear this case now protects the interest of fair and timely adjudication.

The Secretary presented several arguments for why I do not have authority to hear this challenge to the safeguard. However, I do not find any of these arguments to be compelling. I will address each argument in turn.

First, the Secretary cited *Kaiser Coal Corp.* for the proposition that the Commission is an adjudicatory agency of limited jurisdiction. (*Secretary's Brief* at 3 *citing* 10 FMSHRC at 1169). Based on this holding, the Secretary averred that Section 105(d) delineates the scope of Commission authority to hear cases. (*Id*.). Specifically, the Secretary noted that Section 105(d) lists the situations in which the Commission has authority to hear a case and that, based on the principle of *expressio unius, exclusio alterius*, failure to specifically list safeguards shows that Congress did not intend the Commission to hear those cases. (*Id*. at 4 *citing Marx v. Gen. Revenue Corp.*, --- U.S. ---, 133 S. Ct. 1166, 1181 (2013)).

The Secretary is correct that a safeguard is not amongst the areas over which the Commission has explicit authority under Section 105(d). A safeguard is not a citation, order, or a violation. However, as noted *supra*, a safeguard forms the basis for a citation, order, or a civil penalty and therefore the Commission maintains the implied authority to consider it.

It should be noted that my authority to hear matters not explicitly stated in Section 105(d) is not only supported by relevant Commission case law, but also by the Secretary's position in this case. In its brief, the Secretary argued that the validity of a safeguard is reviewable by the

Commission (albeit after a citation or order is issued). (*Secretary's Brief* at 3-6). Nowhere in the Mine Act does Congress explicitly grant the Commission the right to review the validity of a safeguard. The Commission has determined that this authority is implied based on the fact that citations and orders are written pursuant to safeguards.

If, as the Secretary argues, the Commission can only consider issues explicitly stated in Section 105(d), then the Commission must never have authority to consider the validity of a safeguard. Presumably if that were the case, the Commission could determine the validity of a citation or order issued pursuant to a safeguard (under the express grant of authority to do so in Section 105(d)) but lacks any authority to consider the validity of the underlying safeguard. This would analogous to the more common situation, when a citation issued with respect to a mandatory safety standard. In such a case the Commission may rule on the propriety of a citation or order but the validity of the underlying standard is reserved for the Federal Courts.

However, as even the Secretary recognizes, the Commission does have authority to hear challenges to safeguards. Therefore, there must be implied authority outside the list in Section 105(d). Further, I see no statutory reason for the proposition that this implied authority should be limited to situations where a citation or order has already been issued. The implied authority to consider a safeguard exists and therefore may be exercised now.

The Secretary next argued that Commission precedent supports his interpretation that I have no authority to consider the validity of the safeguard at this time. (*Secretary's Brief* at 8). However, in doing so the Secretary first concedes that the Commission has never directly addressed that issue. (*Id.*). Despite this, the Secretary notes that historically, the Commission has only considered the validity of a safeguard when a citation is being contested. (*Id.*). Specifically, the Secretary pointed to several decisions where ALJs summarily refused to review safeguards without subsequent citation or order. (*Id. citing Beckley Coal Mining Co.*, 9 FMSHRC 1454 (Aug. 1987)(ALJ Melick); *Colorado Westmoreland, Inc.*, 10 FMSHRC 1236 (Sep. 1988)(ALJ Morris); and *Jim Walters Resources, Inc.*, 18 FMSHRC 380 (Mar. 1996)(ALJ Merlin).

While I recognize that, as a general matter, Commission ALJs have historically waited for a citation or order to be issued pursuant to a safeguard before discussing the validity of that safeguard, I do not believe that there was a statutory necessity for this restraint. As noted *supra*, the implied authority to consider the validity of a safeguard exists at issuance. To the extent that Commission ALJs chose not to exercise their authority over challenges to safeguards, I believe they failed to fully appreciate the extent of the Commission's authority in these matters. As a result, I do not find these cases to be persuasive.

Finally, the Secretary argued that the Commission has implied that a review of a safeguard is not available until a citation has been issued. (*Id. citing Southern Ohio Coal Co.* 14 FMSHRC at 13 ("An operator may challenge a safeguard's validity in a contest or civil penalty proceeding arising from the issuance of a citation or order based on that safeguard.")).

Contrary to the Secretary's reading of *Southern Ohio Coal Co.*, I do not believe that the Commission has implied that it did does have authority to hear challenges to the validity of safeguards at any time. In *Southern Ohio Coal Co.*, the Commission stated that the validity of a

safeguard is reached after a citation or order is issued, but it did not intend to make a sweeping declaration regarding its rights and powers. The section cited by the Secretary was merely dicta explaining how the issue generally arises in a portion of the decision discussing the burden of proof. No issue in that case turned on the timing of the challenge as an order had already been issued on the subject safeguard. 14 FMSHRC at 2-3. As the Secretary has conceded, the Commission has never decided on the issue of whether a citation or order is needed to challenge the validity of a safeguard (though perhaps it is time for the Commission to weigh in). Further, as noted *supra*, such authority exists at the time of issuance. I do not believe the Commission intended to deny the existence of that authority in a single sentence of a decision where the ultimate issue here was not in contention.

For the reasons set forth above, the Secretary's Motion to Dismiss Contestant's Notices of Contest is hereby **DENIED**. The parties are directed to mutually agree to a discovery and deposition schedule so that a hearing can be set.

/s/ William S. Steele
William S. Steele
Administrative Law Judge

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