FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 9, 2016

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner,	CIVIL PENALTY PROCEEDING Docket No. WEST 2014-482-M A.C. No. 04-02542-323448
v.	
C.R. MEYER & SONS COMPANY INC, Respondent.	Mine: MT Pass Mine and Mill
C.R. MEYER & SONS COMPANY INC, Contestant,	CONTEST PROCEEDING
v.	Docket No. WEST 2013-826-RM Citation No. 6476312; 04/25/2013
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	MT Pass Mine & Mill Mine ID: 04-02542 1ZU

DECISION AND ORDER

Before: Judge Miller

This matter is before me on the parties' cross-motions for summary decision. The Secretary issued the single citation in this case based on the alleged failure of C.R. Meyer & Sons Company, Inc., to reinstate Dustin Rodriguez to his former position as required under a temporary reinstatement order issued by Commission Administrative Law Judge Steele on April 17, 2013. *See Sec'y of Labor on behalf of Rodriguez v. C.R. Meyer & Sons Co.*, 35 FMSHRC 981 (Apr. 2013) (ALJ). The threshold question in this case is whether the Secretary has the authority to issue a citation based on a violation of a temporary reinstatement order. C.R. Meyer argues that the Secretary does not have such authority and that the company is entitled to summary decision. The Secretary argues that he does have authority to issue the citation, and that the record shows that he has proven a violation. After careful consideration of the parties' motions, the attached exhibits, the relevant case law, and the entire record in the case, I deny Respondent's Motion for Summary Decision and grant the Secretary's Cross-Motion.

I. FACTUAL BACKGROUND

The facts set forth are based on the parties' statements of material facts and the documents and affidavits submitted with the motions for summary decision. The facts are uncontested except where otherwise noted.

Dustin Rodriguez began working for C.R. Meyer on December 13, 2012, as a journeyman pipefitter. The company asserts that Rodriguez was laid off on January 24, 2013, because of performance issues, and that by February 22, 2013, all pipefitting work at the Mountain Pass Mine and Mill had concluded.[1] On February 25, 2013, Rodriguez filed a complaint of discrimination with MSHA. Shortly thereafter, the Secretary filed an application for temporary reinstatement with the Commission on Rodriguez's behalf. Commission Administrative Law Judge Steele conducted a hearing on the Secretary's application on April 10, 2013. He issued an order granting the Secretary's application on April 17, 2013, in which he ordered C.R. Meyer to reinstate Rodriguez immediately at the same rate of pay and benefits as he had had at the time of his discharge.

In a conference call with Judge Steele and the attorney for the Secretary on April 19, 2013, Erik Eisenmann, counsel for C.R. Meyer, stated that the company intended to petition the Commission for review of the order and to request a stay of the order. He further explained that C.R. Meyer did not intend to reinstate Rodriguez "at the very least until [it received] a decision from the Commission." The parties dispute the meaning of Eisenmann's statement as set forth in the transcript of the telephone conference. The Secretary claims that Eisenmann was referring to the Commission's decision on the merits of the temporary reinstatement order, and C.R. Meyer asserts that he was referring only to the Commission's ruling on the motion to stay. In either interpretation, the mine refused to reinstate Rodriquez as ordered, without further ruling from the Commission.

C.R. Meyer filed a petition for review of Judge Steele's order with the Commission on April 23, 2013, along with a motion to stay the order pending appeal. The next day, the Secretary filed a complaint in the U.S. District Court for the Central District of California, seeking a temporary restraining order and preliminary injunction to compel C.R. Meyer to comply with Judge Steele's order. On April 25, MSHA issued the Section 104(a) citation at issue in this case based on the alleged failure of C.R. Meyer to comply with Judge Steele's order to reinstate Rodriguez. The Secretary alleged that the company had not yet reinstated Rodriguez and that this constituted a violation of Section 105(c) of the Act. The citation also alleged that the operator had indicated to the judge that it did not intend to comply with his order until it obtained "a final decision from the FMSHRC, although no stay [had] been entered of the ALJ's order." Compl. Ex. A.

On April 26, the Commission issued an order denying C.R. Meyer's motion for a stay. The same day, the company sent a letter to Rodriguez informing him that he had been reinstated effective April 18, 2013. It notified him that it would issue a check to him for the work days April 18 and 19 and promised to pay him the following week for the work days April 22 through 26. The company asserts that April 26 was the standard pay date for work on April 18 and 19. The Secretary, on the other hand, argues that, given that the mine would not immediately reinstate Rodriquez, the standard pay dates are immaterial to the outright refusal to reinstate. Sec'y Cross-Mot. and Opp. at 21. Rodriguez subsequently returned to work with C.R. Meyer and continued to work there until May 17, 2013.

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1. The Secretary does not agree with the mine's description of Rodriguez's discharge but argues that it is not material to the citation that is the subject of this case. *See* Sec'y Cross-Mot. and Opp. at 21.

The Commission ultimately granted review of Judge Steele's order and issued a decision on May 10, 2013, finding that the judge had erred in excluding evidence that C.R. Meyer no longer had pipefitting work for Rodriguez. The parties entered into a settlement agreement resolving the discrimination case in August 2013.

II. SUMMARY JUDGMENT STANDARD

Commission Rule 67 provides:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no genuine issue as to any material facts; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

In reviewing the record on summary decision, the judge must consider the record "in the light most favorable to ... the party opposing the motion." *Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (citing *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)). The judge should not rely solely on the parties' claims, but must conduct an independent review of the record. *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1946 (Aug. 2016). Inferences drawn from the facts in the record must also be viewed in the light most favorable to the party opposing the motion. *Id.* (citing *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Both parties allege that there is no dispute of material fact and that this case is appropriate for summary decision.

III. DISCUSSION

A. The Secretary's Authority Under Section 104(a)

C.R. Meyer's principal argument is that the Secretary has no authority to issue a citation based upon an operator's failure to follow an Administrative Law Judge's order of temporary reinstatement. It argues that the citation issued by the Secretary is "in the nature of contempt" because it attempts to impose a fine based on the company's failure to comply with a court order. It argues that contempt power is ordinarily not given to administrative agencies, and so should not be inferred. The company further argues that Section 104(a) authorizes the Secretary to issue citations for violations of "health or safety" standards, rules, orders, or regulations only, and that a temporary reinstatement order should not be considered a health or safety order. C.R. Meyer concludes that MSHA may only enforce a temporary reinstatement order in a federal district court, and therefore the 104(a) citation should be vacated.

The Secretary argues that Section 104(a) is plain on its face and authorizes him to issue a citation for a violation of any order, including a temporary reinstatement order issued by a

Commission ALJ. He argues that even if the language of Section 104(a) is ambiguous, his interpretation is reasonable and entitled to deference. The Secretary asserts that while he has the authority to enforce an order of an ALJ in a separate proceeding in federal district court, he may also choose to issue a citation such as the one in this case. Each is a separate and distinct action.

This case turns on a question of statutory interpretation, and thus the first issue to address is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). If the statute is clear and unambiguous, effect must be given to its language. *Id.* at 842-43. If the statute is ambiguous, the Commission gives deference to the Secretary's interpretation according to its "power to persuade." *See United States v. Mead Corp.*, 533 U.S. 218 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Knox Creek Coal Corp. v. Sec'y of Labor, Mine Safety & Health Admin.*, 811 F.3d 148, 160 (4th Cir. 2016); *N. Fork Coal Corp. v. Fed. Mine Safety & Health Review Comm'n*, 691 F.3d 735, 743 (6th Cir. 2012). The weight given to the Secretary's position depends upon "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements," among other factors. *Skidmore*, 323 U.S. at 140; *N. Fork Coal*, 691 F.3d at 743.

The relevant statutory provision here, Section 104(a), provides as follows:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or *any* mandatory health or safety standard, rule, *order*, or regulation *promulgated pursuant to this chapter*, he shall, with reasonable promptness, issue a citation to the operator.

30 U.S.C. § 814(a) (emphasis added). A reading of this provision of the Mine Act clearly authorizes the Secretary to issue a citation for a violation of any order, including a temporary reinstatement order. Section 105(c)(2) provides that upon receipt of a discrimination complaint, "if the Secretary finds that such complaint was not frivolously brought, the Commission ... shall order the immediate reinstatement of the miner pending final order on the complaint." 30 U.S.C. § 815(c)(2). Thus, a temporary reinstatement order is clearly "promulgated pursuant to" the Act, and one of the ways the Secretary may enforce an order is by issuing a 104(a) citation.

C.R. Meyer asserts that there is some ambiguity in the provision by arguing that "orders" enforceable under 104(a) are limited to "health or safety ... orders." Resp. Mot. at 7. It cites the "series-qualifier" canon of statutory construction, under which a modifier at the beginning or end of a list of terms applies to all terms in the list, so long as the modifier makes sense with all of the terms. *Id.* (citing *United States v. Laraneta,* 700 F.3d 983, 989 (7th Cir. 2012)). Thus, the company argues that when Congress authorized the Secretary to issue citations for violations of "any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter," Congress intended the words "health or safety" to be a limiter on "rule, order, or regulation." However, the Supreme Court has stated that the series-qualifier canon should not be applied where contextual cues point to another meaning. *Lockhart v. United States*, 136 S. Ct. 958, 964–65 (2016). In the Mine Act, "mandatory health or safety standard" is a defined term referring to a specific set of regulations, *see* 30 U.S.C. § 803(l), and it is used throughout the Act.

See, e.g., 30 U.S.C. § 811 (directing the Secretary to develop "improved mandatory health or safety standards"); 30 U.S.C. § 821 (providing compensation for miners upon closure of a mine for the operator's failure to comply with "any mandatory health or safety standards"); 30 U.S.C. § 814(e)(1) (providing enhanced enforcement mechanisms for a "pattern of violations of mandatory health or safety standards"). Thus, it is most likely that Congress intended to invoke a term of art in Section 104(a) and did not intend "mandatory health or safety" to apply to all of the terms in that provision.

In line with this interpretation, the Commission has upheld a 104(a) citation issued for a violation of an order that did not directly involve health or safety. *See Hopkins Cty. Coal, LLC*, 38 FMSHRC 1317, 1336-37 (June 2016). In *Hopkins County Coal*, the Secretary requested personnel records from a mine operator as part of a discrimination investigation, as permitted under Section 103(h) of the Act. *Id.* at 1317. When the mine operator refused to produce the records, the Secretary issued a 104(a) citation for a violation of Section 103(h). *Id.* The mine continued to refuse, and the Secretary issued a failure to abate order pursuant to Section 104(b) of the Act. *Id.* When the mine refused again, the Secretary issued a second 104(a) citation for a violation of the failure to abate order. *Id.* at 1336-37. While the Commission noted that the initial 104(a) violation "may not present an immediate safety risk," it nevertheless upheld the failure to abate order and the subsequent 104(a) citation. *Id.* It noted that this outcome was "consistent with the remedial nature of the Act, its structure, and its progressive enforcement scheme of increasingly severe sanctions that are applied when an operator incurs repeated violations and refuses to comply." *Id.* at 1336.

Even if Congress did intend to limit the Secretary's citation power to violations of "mandatory health or safety orders" as argued by the mine, it is likely that a temporary reinstatement order would fall under the broader definition of "health or safety." The legislative history of the Mine Act is clear that the anti-discrimination provisions of the Act are intended to encourage miners to "be active in matters of safety and health" and to "play an active part in the enforcement of the Act" so as to increase the effectiveness of the Act. S. Rep. No. 95-181, at 35 (1977). A temporary reinstatement order enforcing the anti-discrimination provisions of the Act is thus intended to improve mine safety and health and could therefore be considered a "health or safety order."

Next, C.R. Meyer argues that the citation at issue is "in the nature of contempt" because it attempts to impose a fine based on the company's failure to comply with a court order. The company argues that contempt power is ordinarily not given to administrative agencies, and should not be inferred absent clear wording to the contrary. The company thus argues that the Secretary's only means of enforcing a temporary reinstatement order is to seek an injunction in federal district court and that the Secretary may not also use the sanctions associated with a citation. This argument relies on language in the Supreme Court case *Interstate Commerce Commission v. Brimson*, in which the Court observed that "a subordinate administrative or executive tribunal ... could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment." 154 U.S. 447, 485 (1894), *overruled on other grounds by Bloom v. Illinois*, 391 U.S. 194, 198–200 (1968). *Brimson* involved enforcement of an administrative subpoena in a federal court of appeals, and several courts of appeals have subsequently applied its language in finding that administrative agencies do not have the power to enforce their own

subpoenas. *See NLRB v. Interbake Foods, LLC*, 637 F.3d 492, 497–98 (4th Cir. 2011); *NLRB v. Detroit Newspapers*, 185 F.3d 602, 605–06 (6th Cir. 1999); *NLRB v. Int'l Medication Sys., Ltd.*, 640 F.2d 1110, 1115–16 (9th Cir. 1981); *cf. Atl. Richfield Co. v. U.S. Dept. of Energy*, 769 F.2d 771, 793 (D.C. Cir. 1984). It is important to note that in this case the order was not issued by the agency attempting to enforce the order, as a subpoena typically is, but instead was issued by a separate agency, the Commission. There is no precedent in the Commission body of cases, or the court of appeals that prohibit the Secretary from issuing both a 104(a) citation for a violation of a temporary reinstatement order and simultaneously proceeding in the federal district court to enforce the order.

Finally, an interpretation permitting the Secretary to issue a citation for the failure to comply with a temporary reinstatement order is consistent with the policies underlying the temporary reinstatement provision. The legislative history of the Act indicates that Congress believed temporary reinstatement to be "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." S. Rep. No. 95-181, at 37 (1977). Consistent with this concern, the discrimination provision emphasizes the need for temporary reinstatement orders to be processed quickly: once a miner files a complaint, the Secretary must begin an investigation within 15 days; and if he finds that the complaint was not frivolously brought, he must apply for the Commission to order "immediate" temporary reinstatement "on an expedited basis." 30 U.S.C. § 815(c)(2). Further, the low standard of proof for obtaining a temporary reinstatement order reflects Congress's intention to place the burden of the risk of an erroneous decision on employers rather than miners. *See Jim Walter Res., Inc. v. Fed. Mine Safety & Health Review Comm'n*, 920 F.2d 738, 748 n.11 (11th Cir. 1990). It is thus unlikely that Congress intended to require the Secretary to seek enforcement of temporary reinstatement orders solely in federal court, which would substantially delay the proceedings and leave the miner without compensation. Therefore, I conclude that Section 104(a) authorizes the Secretary to issue a citation for a violation of a temporary reinstatement order in addition to any enforcement in the federal district court.

B. The Violation

In order to prevail on the Cross-Motion for Summary Decision, the Secretary must demonstrate that the undisputed facts prove that a violation of Judge Steele's order occurred. In this case, the facts are well established based on the pleadings, the decision from the related discrimination case, and the affidavits and documentation submitted by the parties with their motions for summary decision. The controversy instead lies in the parties' understanding of the law. After careful consideration of the record and the parties' arguments, I find that the Secretary has proven a violation.

Judge Steele's April 17 order required C.R. Meyer to "provide immediate reinstatement to Rodriguez, at the journeyman pipefitter's rate of pay for the same number of hours worked, and with the same benefits, as at the time of his discharge." *Sec'y on behalf of Rodriguez v. C.R. Meyer & Sons Co.*, 35 FMSHRC 981, 1005 (Apr. 2013). The record shows that on April 26, the company sent Rodriguez a letter of reinstatement and issued him a paycheck for his first two days of reinstatement, April 18 and 19. In the intervening days between the order and the letter send to Rodriguez, Erik Eisenmann, counsel for C.R. Meyer, expressed in a telephone

conference with the judge that the company planned to appeal Judge Steele's order and would not comply with it until it received a decision from the Commission. The company subsequently filed its petition for review with the Commission on April 23, along with a motion to stay the order pending appeal. At that time the company had taken no steps to show that it was complying with the order. The Secretary filed a complaint in federal district court on April 24 seeking to compel the company to comply, and on April 25 issued the 104(a) citation at issue here. The Commission denied the company's motion for a stay on April 26.

C.R. Meyer asserts that it timely complied with Judge Steele's order when it issued a paycheck to Rodriguez on April 26. It claims that April 26 was the regular pay date for the two days following the date of the order, April 18 and 19, and thus there was no delay in Rodriguez's pay. It argues that its reinstatement of Rodriguez was therefore within the reasonable bounds of "immediate" reinstatement as required by the order. I am not persuaded by the argument. The company waited nine days after the date of the order to notify Rodriguez of his reinstatement. While it argues that it paid him as soon as practicable under its payroll system, it has produced no evidence for the delay in sending him a reinstatement letter. While I accept the company's argument that "immediate" should be interpreted as "as soon as practicable," I do not find that C.R. Meyer's actions were within that time frame.

The company further argues that the Secretary has inappropriately relied on Eisenmann's statement about refusing to comply with the order, and that such a statement of intention is not a legitimate basis for a citation. However, I base my finding of a violation not so much on the statements of Eisenmann, but rather on the company's failure to notify Rodriguez of his reinstatement.[2] Nevertheless, I note that Eisenmann's statement is relevant to the fact that the mine refused to put Rodriquez back to work until the Commission issued some type of ruling and is also relevant to the negligence analysis for this violation.

Finally, C.R. Meyer's delay in reinstating Rodriguez is not excused by its April 23 motion to stay Judge Steele's order. Under Commission Procedural Rule 45, "The filing of a petition shall not stay the effect of the Judge's order unless the Commission so directs; a motion for such a stay will be granted only under extraordinary circumstances." 29 C.F.R. § 2700.45(f). Thus, the stay would not have gone into effect until granted by the Commission, which it was not in this case.

Accordingly, I find that a violation occurred.

IV. PENALTY

The principles governing the authority of Commission Administrative Law Judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i)

[2] The parties dispute the meaning of the statement by Eisenmann in the conference call that "Our position is that we are not going to reinstate Mr. Rodriguez at the very least until we get a decision from the Commission." Sec'y Cross-Mot., Ex. 2 (Conference Call Transcript). The Secretary argues that Eisenmann was referring to a decision on the merits of the reinstatement order, while C.R. Meyer argues that he was referring to a decision on the motion to stay pending appeal. In either case, the mine did not intend to immediately put the miner back to work.

of the Mine Act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The duty of proposing penalties is delegated to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires that in assessing civil monetary penalties, the judge must consider six statutory penalty criteria: the operator's history of violations, its size, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and whether the violation was abated in good faith. 30 U.S.C. § 820(i). In keeping with this statutory requirement, the Commission has held that judges must make findings of fact on the statutory penalty criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1152 (7th Cir. 1984). Once these findings have been made, a judge's penalty assessment for a particular violation is an exercise of discretion "bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act's penalty scheme." *Id.* at 294; *see also Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

In this case, I find the gravity of the violation was lessened due to the fact that the miner was reinstated within nine days of the ALJ's order. With regard to negligence, the statements of Eisenmann indicate that the company intentionally refused to comply with the judge's order. The violation was not abated in good faith; rather, the company waited until receiving a decision on its motion to stay to comply with the judge's order. The Secretary did not introduce the company's history of violations or its size but both are available on the MSHA website. Therefore, I take judicial notice of the company's record as indicated in the MSHA Mine Data Retrieval System, which shows a history of few violations in the fifteen months prior to this violation and that this contractor is a small operator. The mine did not raise the defense of its inability to pay the proposed penalty. In view of these factors, I find that a penalty of $308.00 as proposed by the Secretary is appropriate.

V. ORDER

Based on my review of the record and the applicable law, I find that there is no dispute of material fact and the Secretary is entitled to summary decision as a matter of law. Respondent's Motion for Summary Decision is hereby **DENIED** and the Secretary's Cross-Motion for Summary Decision is **GRANTED**. Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $308.00 within 30 days of the date of this decision. Upon receipt of payment, the contest case is **DISMISSED**.

Margaret A. Miller
Administrative Law Judge

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