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June 5, 2015

UTAHAMERICAN ENERGY, INC., Contestant v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDING Docket No. WEST 2015-435-R Citation No. 7637000; 02/26/2015 Mine ID 42-02241 Lila Canyon Mine

ORDER DENYING MOTION FOR SUMMARY DECISION

Before: Judge Manning

This case is before me upon a notice of contest filed by UtahAmerican Energy, Inc. ("UEI") pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (the "Mine Act"). UEI filed a motion for summary decision accompanied by a legal memorandum and 10 exhibits in support of its motion.[1] The Secretary filed an opposition to the motion and UEI filed a reply to the Secretary's opposition. For the reasons set forth below, the motion for summary decision is denied.

I. BACKGROUND

UEI operates the Lila Canyon Mine, an underground coal mine in Carbon County, Utah. The cover above the working sections of the mine is greater than 1,200 feet. On August 21, 2014, Russell J. Riley, MSHA's District Manager for Coal District 9, sent a letter to "Underground Coal Mine Operators" concerning "Roof Control Plan Deficiencies Developing in

[1] Commission Procedural Rule 67 sets forth the grounds for granting summary decision, as follows:

> 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 fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b).

Cover Exceeding 1200 Feet." (Ex. 1).[2] UEI was a recipient of this letter. The letter stated that roof control plans applicable to development mining where the depth of cover exceeds 1,200 feet "should be amended to include training, monitoring and communication, MSHA notification, and required actions for safety regarding coal or rock outbursts." *Id.* Over the next few months, UEI and MSHA exchanged proposals and held a meeting to see if they could agree upon an amendment to the mine's roof control plan in light of Riley's letter. They were able to agree upon language concerning MSHA's requested changes with respect to training and with respect to monitoring and communication. They reached an impasse regarding MSHA's requested changes requiring MSHA notification of outbursts and other actions that must be taken. The language that MSHA wanted to include in the mine's roof control plan with respect to notifications and actions is as follows:

> **Required MSHA Notification and Actions**. Accidents due to outbursts meeting definitions in Part 50.2 will be reported to the MSHA Call Center in accordance with Part 50.10. The MSHA District Manager or designee will be immediately notified with any incident resulting from an outburst that is not otherwise immediately reportable under Part 50.10. These incidents would include any of the following that would be considered abnormally violent or more frequent than those normally encountered:
>
> a. A forcible ejection of coal or rock that strikes a miner, causing injury.
>
> b. A forcible ejection of coal or rock that causes damage to mining equipment.
>
> c. A forcible ejection of coal or rock that impedes passage or impairs ventilation.
>
> In conjunction with the notification of the MSHA District Office, all production in the affected mining section will cease, and all personnel will be removed. Mine personnel will not be allowed to re-enter the mining section until approved by the District Manager. An exception to this would be those individuals who are necessary to restore ventilation if it was damaged by an outburst (without removing coal or rock), under the direction of a certified foreman.

(Ex. 1 at 3).

During the negotiations over this provision, UEI sought to have it modified so that the reportable events were limited to coal or rock outbursts that were already required to be reported as "accidents" under 30 C.F.R. Part 50. (Ex. 4). MSHA rejected that suggestion. (Ex. 5). On January 20, 2015, UEI sent a letter to District Manager Riley again suggesting that MSHA approve UEI's version of the section on "Notification and Actions" but it also asked that it be issued a technical citation in the event its proposal was again rejected by MSHA so that the issue

[2] Counsel for UEI filed a declaration in support of the summary decision motion. Attached to the declaration are 10 exhibits. Exhibit references in this order are to the exhibits attached to the declaration.

could be brought before a Commission Administrative Law Judge. (Ex. 6). In the meantime, UEI agreed to abide by a third alternative that it suggested until the matter is resolved by the Commission. (Ex. 6, Attachment A). MSHA agreed to issue a technical citation. In addition, MSHA agreed to accept this third alternative in lieu of its original proposal for inclusion in the mine's roof control plan. (Ex 7 at 9).

This third proposal provides:

> **Required MSHA Notification and Actions**. Production in the affected section will cease in the event that an abnormally violent or more frequent than normal forcible ejection of coal or rock strikes a miner and causes a reportable injury; causes damage to mining equipment that disables the equipment from normal operation; impedes passage in a working face or escapeway, or impairs ventilation in the affected section. The MSHA District Manager will be immediately notified of the situation. Only personnel necessary to restore ventilation devices damaged during the event, pump water, mitigate other hazards, or secure the area from further deterioration will be allowed to access the affected working area. These personnel will be under the direction of a certified foreman.

(Ex. 6, Attachment A at 2, numbered as p. 31).

At UEI's request, MSHA issued technical Citation No. 7637000 so that UEI could bring the issue before an administrative law judge. UEI agreed to follow all the roof control plan provisions requested by MSHA, which includes the "third proposal" quoted above attached as Exhibit A to the citation, during the pendency of this contest proceeding. By doing so, UEI did not agree that the Secretary has the authority under the Mine Act or his regulations to include the contested provisions in its roof control plan. UEI filed a notice of contest and the case was assigned to me.

II. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

A. UtahAmerican Energy

UEI's principal argument is that the above provision exceeds the Secretary's authority under the Mine Act. The Secretary seeks the authority to require, through a roof control plan, that UEI cease production, withdraw all personnel, and provide immediate notification to MSHA following outbursts that do not rise to the level of accidents or imminent dangers as those terms are used in the Mine Act. Congress has directly and precisely set forth situations where MSHA may require a mine operator to cease production, withdraw miners, and provide immediate notification. The only possible statutory bases for the Secretary's authority to stop production and withdraw miners are found in sections 103(j) and (k), 104, and 107(a) of the Mine Act. 30 U.S.C. §§ 813(j) and (k), 814, and 817. Section 103(j) requires immediate notification only in the case of accidents and the Secretary has provided guidance with respect to this requirement in 30 C.F.R. § 50.10. This regulation only applies when an "accident" has occurred, as that term is defined in section 50.2(h). There can be no dispute that the triggering events listed in the

provision that the Secretary is seeking to include in the roof control plan do not necessarily rise to the level of an "accident."[3]

UEI argues that the Secretary's actions cannot be upheld under the two-step deference analysis set forth in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 827, 842-43 (1984). Under step one, it is clear that Congress did not grant authority for the Secretary to withdraw miners or require immediate notification of outbursts or other events except as enumerated in the Mine Act itself. The Mine Act clearly sets forth those instances where a withdrawal order is authorized. Sections 103(j) and 103(k) delineate situations where Congress required operators to notify MSHA of accidents and authorized MSHA to withdraw miners following such accidents. Section 107(a) grants MSHA the authority to withdraw miners in the event he discovers a condition that creates an imminent danger. Section 104 of the Mine Act sets forth the various types of enforcement orders that MSHA inspectors are authorized to issue for violations of safety and health standards. There is no other provision in the Mine Act that delegates authority to the Secretary to (1) require the immediate notification of events that are not accidents or (2) withdraw miners from a mine or area of a mine in circumstances not set forth in the Mine Act.

Under step two of the *Chevron* analysis, the issue is whether the Secretary's interpretation is based on a "permissible construction of the statute." *Chevron,* 467 U.S. at 843. In this instance, the Secretary must establish that her interpretation of the statute is a reasonable one. *Id.* at 844. UEI maintains that the "Secretary's requirements to cease production, withdraw personnel and provide immediate notification following coal or rock outbursts that are not accidents or imminent dangers result from an impermissible construction of the Mine Act and are not a reasonable interpretation." (UEI Mem. at 14). In the absence of statutory authority, there is "no permissible construction of the Mine Act that gives the Secretary the power to unleash his hoped-for new regulation" in the guise of a roof control plan provision. *Id.*

UEI argues that the Secretary has not offered a reasonable explanation for his interpretation of the Mine Act or his regulations that would permit a roof control plan to require cessation of production, withdrawal of miners, and immediate notification for outbursts that are not accidents or imminent dangers. The statutory language in section 302 of the Mine Act, "Roof Support," does not support the Secretary's interpretation. 30 U.S.C. § 862. In addition, none of the Secretary's proposed rules, final rules, regulations, or prior interpretations relating to roof control plans have "required, allowed, referenced, discussed, or otherwise mentioned in any way the cessation of production, withdrawal of miners, or immediate notification to the MSHA District Manager in relation to any roof, rib, or other ground control issue." *Id.* at 17. MSHA's "Roof Control Approval and Review Procedures Handbook is silent as to the issue. (MSHA Handbook Series, Handbook No. PH13-V-4 (Dec. 2013)). Thus, the "Secretary's position in this case is inconsistent not only with his own rules and regulations, but also his comprehensive interpretative guidance contained in MSHA's Roof Control handbook." *Id.* at 19.

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[3] UEI does not dispute that if a "forcible ejection of coal or other rock" creates a condition that fits into the definition of an "accident" as that term is defined in section 50.2(h), then it would be required to comply with the immediate notification requirements of section 50.10 and that it would also be required to comply with any orders of withdrawal issued by MSHA under sections 103(j) and 103(k) of the Mine Act as a result of such accident.

Finally, UEI argues that the "additional measures" that a district manager may take in roof control plans to protect miners, as specified in 30 C.F.R. §§ 75.220(a)(1) and 75.222(a), cannot be reasonably interpreted to include the contested provision in this case. UEI contends that such "additional measures" must be "similar in scope and nature to those expressly enunciated in Section 302 of the Mine Act or in the Secretary's existing roof control plan regulations." *Id.* at 19. The Secretary cannot use these regulations to require additional measures that exceed the scope of his statutory authority.

B. Secretary of Labor

The Secretary maintains that the contested roof control plan provision is "modest, reasonably directed to outburst hazards . . . and [is] consistent with conditions and practices specific to the mine." (Sec'y Resp. at 1). Indeed, UEI represents that its current roof control plan provisions are sufficient to prevent coal or rock outbursts at the mine. (Ex. 7 pgs. 6-7). If that is the case, then the challenged provisions will have no material effectthe mine's operations except in unusual circumstances when notification and withdrawal are warranted.

The Secretary emphasizes that it is important to "recognize the limited and precisely-drawn nature of the requested plan modifications, each of which are triggered only in the event of a significantly dangerous roof or pillar event," that is an "abnormally violent or more frequent than normal forcible ejection of coal or rock" from mine roof or rib. (Sec'y Resp. at 4). With the exception of district manager notification, the challenged provision only requires UEI to take those steps that an operator would be required to take in any event, which are to (1) cease production, (2) assess the current mine conditions, (3) assign only necessary personnel to take the steps necessary to correct any damage resulting from the outburst, and (4) to resume mining operations after determining that it is safe to do so. *Id.* As modified in the "third proposal" during negotiations, the proposed plan amendment does not "contemplate MSHA permission or approval prior to UEI acting to assure the safety of its miners following an outburst and then resuming production." *Id.* at 5.

The "authority to assure adequate protection against rock and coal outburst hazards is within the Secretary's broad statutory roof control plan approval authority, as outbursts intricately are connected to roof control measures and practices, which contemplate factors including quantity of supported overburden, as well as geological features associated with the overburden and surrounding strata." *Id.* at 8. Thus, District Manager Riley properly sought to modify the mine's roof control plan to "more effectively protect miners against hazards associated with potential coal and rock outbursts." *Id.* at 9.

District Manager Riley has legal authority to request immediate notice of specific coal or rock outbursts at the Lila Canyon Mine. The Secretary relies upon section 103(h) of the Mine Act to seek information about coal and rock bursts. 30 U.S.C. § 813(h). The Commission recently held that section 103(h) gives the Secretary "authority to request whatever information [he] deems relevant and necessary." *Big Ridge, Inc.*, 34 FMSHRC 1003, 1012 (May 2012). The Commission quoted, with approval, the administrative law judge's conclusion that "section 103(h) creates 'a legitimate basis for enforcement of reporting requirements even without the Part 50 rules.'" *Id. quoting Big Ridge, Inc.*, 33 FMSHRC 1306, 1320 (May 2011) (ALJ) (citation

omitted). The Secretary contends that section 103(h) of the Mine Act together with section 302(a) provide District Manager Riley with ample authority to request UEI officials to immediately notify him after one of the enumerated outburst events. Such a reporting requirement furthers Riley's ability to perform his function to continually review roof control plans "'taking into consideration any falls of roof or rib or inadequacy of support of roof or ribs' to assure the plan's adequacy given current conditions and practices at an individual mine." (Sec'y Resp. at 11 quoting section 302(a)). A district manager is required to consider such information when analyzing the continuing sufficiency of existing roof control plans.

While it is true that the contested roof control provision requires affirmative action by UEI without a specific request for information from MSHA, District Manager Riley is not privy to the information he is seeking so he would not be in a position to request information about an outburst after it has occurred. The Secretary argues that "given the district manager's significant authority to obtain information necessary to perform his duty to assure the continuing sufficiency of Lila Canyon's roof control plan, as well as his duty to assure that UEI is taking appropriate and timely actions to protect miners from hazards associated with outbursts, [District Manager] Riley's request for personal notification of significant outbursts is reasonable and readily is recognized within the scope of his statutory authority." *Id.* at 17. He seeks notification to help him ensure that the roof control plan remains adequate in light of outbursts as mining progresses. The types of outbursts about which Riley seeks information could be precursors to subsequent, more violent and hazardous outbursts. MSHA's safety standards and other regulations do not limit the district manager's authority to request information about such outbursts.

District Manager Riley also has the legal authority to require UEI to cease production, assess the conditions, and address the hazards before determining whether it is safe to resume mining. This requirement is incorporating UEI's "statutory obligations into the roof control plan to better assure that Lila Canyon personnel recognize and act consistently with their statutory duties following an outburst." *Id.* at 21. This requirement meets the first step of *Chevron* analysis because section 302(f) of the Mine Act requires an operator to assess potential dangers associated with the roof, face, and ribs at the mine before engaging in normal production activities. The proposed roof control plan language merely sets forth "the operator's obligation under section 302(f) to independently undertake the specified actions to assure that roof support hazards associated with an enumerated outburst event are corrected immediately, and to unilaterally determine that the affected area is safe, before allowing miners to resume production activities." *Id.* at 22. Even assuming that there is ambiguity in the statutory language, *Chevron* mandates deference to an interpretation that is reasonable and consistent with other statutory provisions. UEI's focus upon sections 103(j) and (k) and 107(a) is misplaced. Those sections, as well as section 104, are distinguishable because those provisions concern MSHA's unilateral authority to shut down areas of a mine until MSHA determines that the affected area is safe.

C. UtahAmerican's Reply

Section 103(h) in conjunction with section 302(a), section 302(f), and 30 C.F.R. § 75.223(d) do not provide the district manager with the authority to require immediate notification of outbursts. (UEI Reply at 2). The Secretary may reasonably require information from operators from time to time, but he cannot place an affirmative duty on operators to immediately

report events that are not otherwise reportable under the statute or his regulations. *Id.* at 2-3. The Secretary has significantly overstated the district manager's authority in this regard. *Id.* at 3.

Section 302(f) of the Mine Act does not authorize the Secretary to require the cessation of production and withdrawal of miners. *Id.* at 5. The proposed roof control plan provision is clearly designed to require more than what is already provided for in the Mine Act and in the Secretary's regulations. *Id.* at 6. The Secretary is "attempting to remove *the mine operator's discretion* in section 302(f) in ascertaining the existence of a danger by creating a *per se* rule requiring the cessation of production and withdrawal of miners following the occurrence of specific categories of outbursts that the Secretary has pre-determined constitute dangers, regardless of the circumstances actually encountered by the mine operator." (Id. at 6)(emphasis in original)(footnote omitted).

III. DISCUSSION AND ANALYSIS

The Commission has long recognized that "summary decision is an extraordinary procedure." *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981)). I conclude that, as presented by the parties, there are no genuine issues as to any material fact. For the reasons set forth below, I find that UEI is not entitled to summary decision as a matter of law. Consequently, I deny UEI's motion for summary decision.

As material here, the Secretary seeks to add two additional requirements in UEI's roof control plan. First, he wants to require the operator to immediately notify the MSHA district manager whenever there is "an abnormally violent or more frequent than normal forcible ejection of coal or rock," which:

1. strikes a miner and causes a reportable injury;
2. causes damage to mining equipment that disables the equipment from normal operation;
3. impedes passage in a working face or escapeway; or
4. impairs ventilation in an affected section.

(Sec'y Resp. at 3).[4] Second, in the event that such immediate notification must be provided, the Secretary wants to require the operator to only allow "personnel necessary to restore ventilation devices damaged during the event, pump water, mitigate other hazards, or secure the area from further deterioration" in the affected working area. This work must be conducted under the direction of a "certified foreman." UEI may resume production only after UEI determines that it is safe to do so. I analyze the two requirements separately below.

[4] I presume that the term "reportable injury" refers to an "occupational injury" as defined in section 50.2(e) that is required to be reported to MSHA under section 50.20. UEI and the Secretary should clarify this language to avoid any future disputes.

A. Proposed Immediate Notification Requirement

The proposed addition to the roof control plan only comes into play if the forcible ejection is not otherwise immediately reportable under section 50.10 of the Secretary's regulations. Under section 50.10, certain specified events must be immediately reported to MSHA via a toll-free number. On the other hand, the proposed roof control plan provision requires immediate notification to District Manager Riley. The immediate notification provisions of section 50.10 are invoked whenever an "accident" occurs at a mine, as that term is defined at section 50.2(h). The term "accident" is defined to include the death of an individual at a mine, an injury to an individual at a mine which has a reasonable potential to cause death, the entrapment of an individual under certain circumstances, and falls of roof or ribs under certain circumstances. (Sections 50.10, 50.2(h)(3) and 50.2(h)(8)).

The definition of "accident" also includes a "coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour." (Section 50.2(h)(9)). Such an event is currently required to be immediately reported by UEI via the toll-free number so UEI should not be required to contact the district manager under the proposed roof control plan provision.[5]

The Secretary contends that he has legal authority to require UEI to immediately notify the district manager of abnormally violent or more frequent than normal forcible ejection of coal or rock that causes any of the four events listed above. He cites section 103(h) of the Mine Act to support his position. That section states, in part, that every operator of a coal mine "shall establish and maintain such records, make such reports, and provide such information as the Secretary . . . may reasonably require from time to time to enable him to perform his functions under this Act." 30 U.S.C. § 813(h).

I agree with the Secretary's argument. One of the Secretary's most important functions is to review roof control plans to ensure the safety of miners. The control of outburst hazards is appropriately addressed in an operator's roof control plan. Notification of the types of outbursts set forth in the proposal furthers the district manager's ability to perform his functions under the Mine Act. It will provide the district manager with the opportunity to effectively evaluate the situation because these outbursts may be precursors to more significant roof control problems.[6] The reporting of these outbursts will allow the district manager to offer input and take action where appropriate to more effectively assure that miners are protected from subsequent, more hazardous events. (Ex. 7 at 8).

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[5] In his response, the Secretary implies that UEI would be required to call both the toll-free number and the district manager in such circumstances. (Sec'y Resp. 15-16). I do not believe that the disputed plan provision should require a mine operator to immediately report the same event to MSHA two times.

[6] In his February 20, 2015, response to UEI's objections to the plan provision, District Manager Riley stated: "Unfortunately, the history of coal bursts is replete with examples of significant, "precursor" incidents that were not reported to MSHA, and which were subsequently followed by major events that caused fatalities, serious injuries and/or projectile material capable of resulting in death or serious injury to miners." (Ex. 7 at 8).

I find that section 103(h), when read with section 302, provides sufficient legal basis to sustain the Secretary's request that UEI immediately report the specified outbursts to the district manager. "The language of section 103(h) does not limit the Secretary's access only to records that are specifically required to be maintained or prescribed by regulation, but instead give [him] authority to request whatever information [he] deems relevant and necessary." *Big Ridge, Inc.*, 34 FMSHRC 1003, 1012 (May 2012). Section 103(h) "grants a broad delegation to the Secretary to require mine operators to provide information necessary to enable the Secretary 'to perform his functions'" under the Mine Act. *Energy West Mining Co.*, 40 F.3d 457, 461 (D.C. Cir. 1994). It "contains little limitation on the type of information to be provided." *Id.*

UEI contends that the Secretary cannot use section 103(h) to create a standing, affirmative request for immediate notification of and information about outbursts. I hold that section 103(h) should not be interpreted in such a limited fashion. It is impossible for the district manager to request information about a specific outburst because he would not know about it without being advised of its occurrence by the mine operator. I find that because District Manager Riley has a specific need to obtain information necessary to perform his duty to assure the continuing sufficiency of Lila Canyon's roof control plan, his request for notification of significant outbursts is reasonable and is within the scope of his statutory authority. The other provisions in the Mine Act, including sections 103(j) and (k), do not limit the Secretary's authority to obtain information under section 103(h).[7]

UEI greatly exaggerates the impact of the Secretary's proposal. UEI candidly states that the Lila Canyon Mine has not experienced any coal or rock outbursts and that its existing roof control plan is sufficient to prevent such outbursts at the mine. (Sec'y Resp. at 2; Ex. 6, Jan. 19, 2015 letter of Jared Childs). Thus, UEI will only be required to immediately notify the district manager under this provision on rare occasions. I hold that the contested roof control plan provision requiring immediate notification[8] is "reasonable and neither overly broad nor burdensome." *See Big Ridge*, 34 FMSHRC at 1022.

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[7] UEI also contends that the Secretary's regulation at 30 C.F.R. § 75.223 already addresses how "unplanned roof fall and rib fall and coal or rock burst that occurs in the active workings" must be reported to MSHA. (UEI Reply at 4 quoting section 75.223(b)). That regulation applies to all coal mines whereas the proposed amendment to the roof control plan applies to the Lila Canyon Mine only because of its depth of cover. Roof control plans are designed to take account of conditions applicable to the mine in question. The additional reporting requirement in the roof control plan is consistent with the Secretary's regulation and is an additional requirement imposed due to the depth of the working sections of the mine.

[8] The issue of what is meant by the phrase "immediately notified" is not before me. The notification requirement in section 103(j) of the Mine Act does not automatically apply to the proposed roof control plan provision. Consequently, it does not follow that the roof control plan is necessarily violated if the time between the outburst and the notification is greater than 15 minutes. UEI and the Secretary should attempt to negotiate a workable reporting protocol.

B. Proposed Requirement that Production Cease Until Affected Area Restored

I hold that the Secretary's legal authority to require the cessation of production can be resolved under the first step of *Chevron*. Section 302(f) of the Mine Act requires mine operators to "examine and test the roof, face, and ribs before any work or machine is started" in areas where miners are exposed to dangers from falls or roof, face, and ribs. 30 U.S.C. § 862(f). That section also requires operators to perform such examinations and testing "as frequently thereafter as may be necessary to insure safety." *Id.* Finally, it provides that when dangerous conditions are found, they must be corrected immediately. *Id.* An "abnormally violent or more frequent than normal forcible ejection of coal or rock" certainly qualifies as a dangerous condition if it causes a reportable injury, disables equipment, impedes passage in a working face or escapeway or impairs ventilation. Consequently, the requirement to temporarily cease production and withdraw miners is fully supported by the language of the Mine Act.

The contested provision of the roof control plan recognizes that when there has been a violent outburst or frequent outbursts that meet the requirements stated therein, the conditions in the area must be evaluated. To perform this evaluation, production in the affected area must stop and miners not involved in the evaluation need to be removed from the immediate area. The plan provision allows those miners necessary to (1) restore damaged ventilation devices, (2) pump water, (3) mitigate hazards, and (4) secure the area from further deterioration to access the affected working area under the direction of a certified foreman. Once mine management determines that the area is safe, normal work may continue in the affected area. Unlike the original proposal suggested by the Secretary, the operator independently determines when conditions are safe and normal mining operations may resume.

UEI argues that MSHA is only authorized to withdraw miners in situations covered by sections 103(j) and (k), 107(a), and 104. I agree that MSHA does not have the authority to issue a withdrawal order except as specifically authorized by the Mine Act. The Secretary is not seeking to issue a withdrawal order when one of the specified outbursts occurs. Instead, as stated above, the Secretary is seeking to require the operator to take a few reasonable steps to ensure the safety of the area around an outburst before the area is returned to normal operations. This requirement bears no relationship to the issuance of a withdrawal order by an MSHA inspector. Under the Secretary's proposal, the operator determines what areas are affected by the outburst, what steps need to be taken to ensure the area is safe, and when the area can return to normal operations. The operator's actions can be proportional to the seriousness of the conditions.[9]

I conclude that the language contained in section 302(f) provides the Secretary with the authority to require UEI, through a roof control plan amendment, to cease production in an area

[9] It is possible that one of the concerns of UEI is that, with the required notification, MSHA may determine that the conditions at the mine merit an order under sections 103(j), 104 or 107(a). I agree that a mine operator may be subject to greater scrutiny by MSHA when it notifies the district manager of an outburst. As discussed above, an abnormally violent or a series of more frequent than normal outbursts may indicate that a more serious problem is present that could endangers the lives of miners.

affected by an abnormally violent or more frequent than normal forcible ejection of coal or rock until it conducts an assessment of the conditions and determines that the area can be safety returned to production.

C. Formal Rulemaking Was Not Required For Proposed Roof Control Provision

UEI also contends that "[e]ven if the Court finds that the Secretary's proposed requirements are lawful under *Chevron*, the Court should nevertheless hold that the requirements constitute substantive rules subject to formal notice and comment rulemaking requirements of the Administrative Procedure Act ("APA"). (UEI Mem. at 20-21). UEI argues that the disputed provision is a substantive rule that is subject to formal rulemaking under section 4 of the APA. 5 U.S.C. §553.

I reject UEI's argument. The process of negotiating and adopting a roof control plan "is essentially one of setting standards, not, in many ways, substantially different from setting more lasting and general standards through the rulemaking process." *Mach Mining LLC v. Sec'y of Labor*, 728 F.3d 643, 650 (7th Cir. 2013). Congress created a special procedure for mine plans and, as a general matter, the Secretary is not required to provide for notice and comment rulemaking when including a new provision in a roof control plan. The process of negotiating a roof control plan provision is a congressionally authorized procedure for setting roof control standards for a mine that is outside the normal notice and comment process.

UEI maintains that the requirement to immediately report certain outburst events is a new substantive rule that must be subjected to notice and comment rulemaking. (UEI Mem. at 25). It argues that the sole statutory basis for immediate notification is section 103(j) of the Mine Act, "which unequivocally does not require immediate notification of coal or rock outbursts that do not rise to the level of accidents." *Id.* The "Secretary effectively and significantly has added a new provision to Section 103(j) and to the reporting requirements of 30 C.F.R. Part 50[.]" *Id.* This new immediate notification requirement "imposes affirmative obligations requiring the time and effort of the mine operator and also subject[s] the mine operator or its personnel to enforcement actions in the event of a failure to comply with such obligations." *Id.*

As stated above, section 103(h) together with section 302 provide a legal basis to support the Secretary's proposed requirement in the roof control plan. The proposed roof control plan provision imposes affirmative responsibilities upon UEI, but the Mine Act supports the imposition of these responsibilities. The Secretary was not required by the APA to engage in notice and comment rulemaking before requiring immediate notification of the specified outburst events. *Id.* at 24-25, 27.

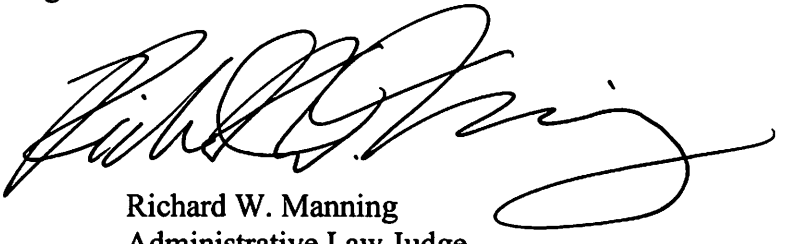
In addition, UEI argues that the requirement in the proposed roof control plan amendment to cease production and withdraw miners cannot be validly enforced by the Secretary without first following the notice and comment requirements of the APA because the provision is a substantive rule.

As discussed above, the Secretary is relying upon section 302(f) of the Mine Act, which provides that if miners are exposed to dangers from falls of roof, face and ribs, then the operator

shall examine and test the area "before any work or machine is started and as frequently thereafter as may be necessary to ensure safety." 30 U.S.C. §862(f). That section also requires that when dangerous conditions are found, they shall be corrected immediately. As stated previously, an "abnormally violent or more frequent than normal forcible ejection of coal or rock" qualifies as a dangerous condition if it causes a reportable injury, disables equipment, impedes passage in a working face or escapeway or impairs ventilation. Thus, the proposed amendment to the roof control plan does not constitute a new substantive rule requiring notice and comment because a substantially similar requirement is already present in the Mine Act.

IV. ORDER

For the reasons set forth above, the motion for summary decision filed by UtahAmerican Energy, Inc., is **DENIED**. I find that UtahAmerican Energy is not entitled to summary decision as a matter of law. This case will proceed to hearing on September 3, 2015, as previously scheduled, unless the parties reach an agreement as to an alternative resolution.



Richard W. Manning
Administrative Law Judge

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