

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

September 16, 2015

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

v.

RANDALL H. FLEMING, employed by
CONSHOR MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. KENT 2009-189
A.C. No. 15-18861-164718A

Mine: No. 1

ORDER OF DISMISSAL

Before: Judge Feldman

This proceeding concerns the matter of the personal liability of Randall H. Fleming under section 110(c) of the Federal Mine Safety and Health Act of 1977, as amended (“Mine Act”), 30 U.S.C. § 820(c), for the violative condition cited in 104(d)(2) Order No. 7503263 issued to Conshor Mining, LLC, (“Conshor”) on July 17, 2007, for an alleged violation of the mandatory standard in 30 C.F.R. § 75.202. Section 75.202 prohibits miners from working or traveling under unsupported roof. 30 C.F.R. § 75.202. Order No. 7503263 was contested by Conshor in civil penalty Docket No. KENT 2008-481.¹ Un-adjudicated Order No. 7503263 was vacated on August 6, 2015, as a consequence of a Chapter 7 bankruptcy proceeding that dissolved Conshor as a corporate entity, effective December 31, 2012. *See Conshor Mining, LLC*, 37 FMSHRC ___, slip op., at 4-5 (Aug. 6, 2015). The Secretary did not appeal the vacation of Order No. 7503263 in Docket No. KENT 2008-481. Thus, the vacation of Order No. 7503263 has become final.

Remaining for disposition is the Secretary’s personal liability action against Fleming brought pursuant to section 110(c), alleging that Fleming, as an agent of Conshor, “knowingly authorized, ordered, or carried out [the] violation of 30 C.F.R. § 75.202” that was cited in Order No. 7503263. The Secretary has proposed a civil penalty of \$5,000.00 to be assessed against Fleming for the alleged violative condition cited in Order No. 7503263.

Section 110(c) liability is predicated upon prohibited conduct undertaken by an agent on behalf of a principal. This proceeding presents the issue of whether a personal liability case against an agent (Fleming) can survive the dismissal of the underlying citation issued against a principal (Conshor). In *Kenny Richardson*, the Commission was confronted with the question of

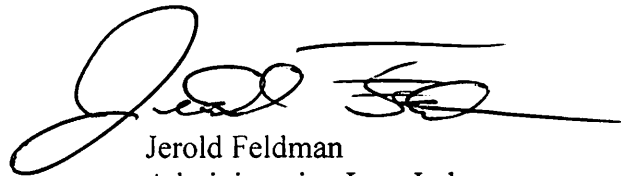
¹ KENT 2008-481 was stayed pending resolution of the novel question of the evidentiary criteria necessary for demonstrating a repeated flagrant violation under section 110(b)(2) of the Mine Act, as amended by the Mine Improvement and New Emergency Response Act of 2006, 30 U.S.C. § 820(b)(2). *See Conshor Mining, LLC*, 37 FMSHRC ___, slip op., at 2 (Aug. 6, 2015).

personal liability in a case where the mine operator's liability for the underlying citation *was not adjudicated* because of the operator's failure to contest the alleged underlying violation. The Commission held that "[w]hether or not the operator is found liable in a separate proceeding, the Secretary must still fully prove his case in a [personal liability] proceeding against the agent." *Kenny Richardson*, 3 FMSHRC 8, 10 (Jan. 1981). In *Kenny Richardson*, although the uncontested citation issued to the mine operator remained un-adjudicated, the underlying citation remained viable in that it was not formally dismissed by the Commission. In the instant case, unlike *Kenny Richardson*, the underlying citation against the operator is no longer viable because the Commission dismissal has become final.

Here, agency liability is based on a derivative liability—from the mine operator to the agent for violative conduct committed by the agent on behalf of the mine operator during the regular course of his employment. If the principle has been determined to not be liable for the agent's conduct by virtue of the Commission's *dismissal* of the underlying violation, so too, the agent cannot be found to be liable for the same conduct. See *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 270 (Feb. 1997) (vacating and remanding a 110(c) liability decision for further determination based on the Commission's vacation and remand of a judge's finding of liability against the operator for the underlying violation). Liability against the principal having been dismissed in Docket No. KENT 2008-481, there is no predicate liability of the mine operator that can serve as a basis for the personal liability of the agent. Consequently, the 110(c) proceeding seeking to impose personal liability on Fleming for the violation cited in Order. No. 7503263, which has previously been vacated, must be dismissed.

ORDER

In view of the above, **IT IS ORDERED** that the captioned matter seeking to impose 110(c) personal liability against Randall H. Fleming **IS DISMISSED**.



Jerold Feldman
Administrative Law Judge

Distribution: (Regular and Certified Mail)

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