

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

OCT 09 2014

WISCONSIN INDUSTRIAL SAND CO.,
Contestant

v.

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

CONTEST PROCEEDING

Docket No. LAKE 2014-0692-M
Citation No. 6556664; 07/31/2014

Mine: Maiden Rock
Mine ID 47-03110

ORDER DENYING MOTION FOR EXPEDITED HEARING

Before: Judge McCarthy

This case is before me upon a notice of contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Section 104(a) Citation No. 6556664 was issued to Respondent on July 31, 2014 for an alleged violation of 30 C.F.R. § 57.11050(a). On August 29, 2014, Respondent filed a Notice of Contest and a Motion for Expedited Hearing. 2014. The Secretary filed a Response in Opposition to Respondent’s Motion on October 3, 2014.

On September 29 and October 8, 2014, I held conference calls with the parties. During the latter conference call, I granted the Secretary’s motion, absent objection from Respondent, to plead 30 C.F.R. § 57.11050(b) in the alternative.

For the following reasons, I deny the Respondent’s Motion for Expedited Hearing.

The Commission’s Procedural Rule that addresses motions for expedited hearings is silent about criteria to guide when a motion for expedited hearing should be granted or denied. See 29 C.F.R. § 2700.52. Accordingly, Commission Administrative Law Judges are allowed “informed discretion” to determine whether an expedited hearing is necessary, and are directed to schedule a hearing within a *reasonable* time. *Secretary of Labor (MSHA) v. Wyoming Fuel Co.*, 14 FMSHRC 1282 (Aug. 28 1992) (emphasis added). Generally, Commission Judges have held that an expedited hearing is warranted upon a showing of “extraordinary or unique circumstances resulting in continuing harm or hardship.” *Southwest Portland Cement Co.*, 16 FMSHRC 2187 (Oct. 4, 1994) (ALJ); *Mountain Cement Co.*, 23 FMSHRC 694 (June 25, 2001)(ALJ); *Consolidation Coal Company*, 16 FMSHRC 495 (February 1994) (ALJ).

Respondent argues that an expedited hearing is appropriate here because abatement is expensive and/or unnecessary. Respondent miscites *Getchell Gold Corp.*, properly found at 21 FMSHRC 507 (May 1999) (ALJ), in support of this proposition. That case involved a withdrawal order under Section 104(d)(2). Section 105(d) of the Act requires the Commission to “take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104.” 30 U.S.C. § 815(d)(2014). This statutory requirement evinces “a congressional concern that contests of withdrawal orders be expeditiously heard, at least where . . . the underlying violation has not been abated.” *Southern Ohio Coal Co.*, 1 FMSHRC 1470, 1472 (Oct. 1979).

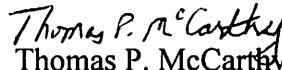
In this case, no withdrawal order has issued. Furthermore, the Section 104(a) Citation has already been abated and no Section 104(b) Order is before me. The mine continues production, but has stopped developing an exhaust shaft until this matter is resolved.

Respondent also argues that an expedited hearing is proper because there is a strong possibility that MSHA abused its discretion. Respondent relies on *Mountain Cement*, 23 FMSHRC 694 (ALJ). In *Mountain Cement*, the judge was concerned that MSHA abused its discretion because 20 violations were issued as 104(d)(2) orders, and most were subsequently modified during conference to 104(a) citations. Here, a single 104(a) Citation is at issue because the parties posit conflicting interpretations of MSHA's standard. The operator's disagreement with MSHA's regulatory interpretation does not rise to the level of an extraordinary or unique circumstance under the facts presented.

In sum, Respondent has not presented any extraordinary or unique circumstances that warrant an expedited hearing.

Per my October 8 conference call with the parties, a Notice of Hearing will issue under separate cover setting this matter for hearing at 1 p.m. CST in Minneapolis, Minnesota on November 24, 2014 and continuing dates thereafter until completed.

Respondent's Motion for any further expedited hearing is **DENIED**.


Thomas P. McCarthy
Administrative Law Judge

Distribution:

Barbara Villalobos, Esq. U.S. Department of Labor, Office of the Solicitor, 230 South Dearborn Street, 8th Floor, Chicago, IL 60604

Joshua Schultz, Esq., Office of Adele Abrams, 4740 Corridor Place, Suite D, Beltsville, MD 20705

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