FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 3, 2014

DICKENSON – RUSSELL COAL CO. LLC Contestant,	CONTEST PROCEEDING Docket No. VA 2014-163-R Citation No. 8208673-01; 01/15/2014
v.	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent	Cherokee Mine Mine ID 44-06864

ORDER OF DISMISSAL

Before: Judge William B. Moran

Contestant, Dickenson-Russell Coal Company ("Contestant" or "DRC"), has filed a Notice of Contest challenging the issuance of a notice to provide safeguard, pursuant to Section 314(b) of the Mine Safety and Health Act of 1977 ("Mine Act").[1] In turn, the Secretary filed an Answer, and Motion to Dismiss, together with a memorandum in support thereof ("Response").[2]

[1] A notice of safeguard is issued under the Mine Act pursuant to section 314(b) of the Mine Act, 30 U.S.C. § 874(b) which provides: "Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." Section 75.1403 of the Secretary's regulations repeats verbatim the provisions of section 314(b) of the Act. The procedure for issuing citations for safeguard violations under section 75.1403 is described as: The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act. 30 C.F.R. 75.1403-1(b). *See generally Southern Ohio Coal Co.*, 14 FMSHRC 1 (Jan. 1992), *Cyprus Cumberland Resources Corp.*, 19 FMSHRC 1781 (Nov. 1997).

[2] Also filed was DRC's Motion to Expedite and the Secretary's Opposition thereto; DRC's Opposition to the Secretary's Motion to Dismiss and its Notice of Additional Authority and the Secretary's Reply to DRC's Opposition. All filings were considered.

Contestant's Contest and Associated Filings

In its Statement in Opposition to the Secretary's Motion to Dismiss its Notice of Contest ("Contestant's Opposition"), Contestant first mentions some history with a prior safeguard at this mine,[3] which background the Court considers to be immaterial as, at the end of the day, this matter still comes down to the safeguard issued on January 21, 2014, to Dickenson-Russell.[4]

No citation has been issued in connection with this safeguard notice but the Contestant still maintains that the Commission has jurisdiction over the matter as soon as such a notice is issued, regardless of whether a citation has been issued. With no Commission level decision addressing its claim, the Contestant points particularly to the decision issued by administrative law judge William Steele in *Affinity Coal Co. v. Secretary*, Unpublished Order (Aug 29, 2013). Essentially, and fairly characterizing its argument, the Contestant's Opposition mirrors the points made by Judge Steele in his decision, citing cases such as *Drummond Co., Inc.*, 14 FMSHRC 661 (May 1992), involving review of a program policy letter ("PPL"). Referencing *Drummond*, Contestant's position is that since the Commission has, in other contexts, broadly interpreted its jurisdiction, it may therefore do so whenever the Secretary's actions adversely affect an operator. Opposition at 5. Contestant also maintains that section 314(b) of the Mine Act, "which was published under Title III of the Act, is an interim mandatory safety standard applicable to all underground coal mines, and because a 'mandatory health or safety standard' is defined to include interim mandatory health or safety standards under Title III, section 314(b) is a mandatory safety standard. 30 U.S.C. § 803(l)." Opposition at 6. Contestant then continues that, "when an inspector . . . issues a notice of safeguard, the inspector is, *in effect*, issuing a citation under section 104(a) for the violation of a mandatory safety standard." *Id.* (italics added).

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[3] It is questionable whether the history offered by the Contestant actually creates a sympathetic picture. Apparently intended to show that MSHA erred by originally relying on an earlier-issued safeguard, which applied to personnel carriers transporting *six or more* miners, the personnel carrier cited in January 2014 carried less than *six* miners. The new safeguard was then issued to cover personnel carriers transporting *five or less* miners. It is true that a new safeguard had to be issued but, that said, it should not be lost that both safeguards addressed MSHA's perceived need for sanding devices on those personnel carriers and that both originated from a perceived hazard of losing control on a slippery and wet track.

[4] "The condition or practice on this citation should have read: The Co. #DM39 Brookeville track mounted personnel carrier, used at this mine to transport miners, was not equipped with sanding devices. This personnel carrier was in the motor barn and available for immediate use by the miners. This is a notice to provide safeguard(s) requiring that the Brookeville Co. #DM39 personnel carrier and all other track mounted personnel carriers that transport 5 men or less be equipped with properly installed and well maintained sanding devices. This mine has a slope which runs from the motor barn on the surface to the mine portal, with a sharp curve at the bottom. This slope is outside and exposed to rain, snow, ice and other inclement weather. An accident has previously occurred on this slope. The track entry at this mine has several dips and hills and was wet at the time of inspection. The foreman stated that when this ride is used, miners carry sand in the front passenger compartment and reach out and sand the track as needed. The hazard exist of loosing [sic] control of the personnel carrier due to slick track conditions, and loss of braking ability, resulting in de-railing, colliding with other personnel carriers and/or running over miners on foot." Contestant's Opposition at 2-3, quoting from January 21, 2014, condition or practice identified in safeguard.

As a separate basis for its position, Dickenson-Russell contends that due process also requires that a mine operator be able to immediately contest a notice of contest upon its issuance. For this portion of its argument, Contestant points to *Mathews v. Eldridge*, 424 U.S. 319 (1976), for support, noting that "three distinct factors are considered: [ ] the private interest that will be affected by the official action; [ ] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [ ], the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Opposition at 7 (quoting *Mathews v. Eldridge*, 424 U.S. at 335).

Applying those factors, Contestant asserts that its affected interests are substantial: "[t]he instant Safeguard will require three personnel carriers to be retro-fitted with sanding devices, at considerable expense to the mine. [ ] These three personnel carriers are used on a daily basis. As a result of the Safeguard, however, all three are currently out of service and cannot be used. This unnecessarily and negatively impacts the mine's operations and employees." Opposition at 7-8, citations to declaration omitted). Nor, it contends can it wait to receive a citation, because there is no "guarantee of when a citation will be issued" and that route also exposes it to civil penalties. Finally, Contestant contends that allowing operators to contest notices of safeguard upon issuance will not unduly burden the Secretary. Opposition at 7-8.

As noted, a particular case cited by the Contestant as authority is *Affinity Coal Co. v. Secretary*, Unpublished Order (Aug 29, 2013). That case does involve the same issue[5] but, as the parties well know, the decision of another administrative law judge has no precedential effect. Its value is limited to the persuasiveness of the reasoning in the decision upon another judge who is presented with a similar situation. The judge in *Affinity* was persuaded by the argument that a mine need not wait for a citation to be issued, on the basis that section 105(d) allows an operator to contest an order or a citation upon the view that "[a] notice of safeguard is just that – a violation of a provision of the Mine Act." This Court does not share that perspective because a notice to provide a safeguard is plainly not a violation. Instead, it is analogous to the promulgation of a safety and health standard, albeit it comes into existence through a different, but Congressionally prescribed, procedure to address hazards with respect to the transportation of men and materials.[6]

In short, this Court believes that, so to speak, the other shoe must drop before litigation of a safeguard can commence. Accordingly, this Court cannot adopt the rationale expressed in the

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[5] In *Affinity*, five safeguard notices had been issued following a fatality and the mine then filed notices of contest. The Secretary took the same stance as here: the Commission's jurisdiction is limited under section 105(d) and as such it does not extend to notices of contest. Instead, a mine must wait until a citation is issued for not complying with the safeguard notice.

[6] Although the judge in *Affinity* also stated that "the Commission has jurisdiction to hear all disputes arising out the Mine Act . . . and make a determination upon, any proceeding instituted before the Commission," the Court believes that jurisdiction must exist first and that instituting a proceeding does not by itself confer jurisdiction.

Affinity decision that "jurisdiction is conferred in the Commission because Affinity is specifically alleged to have violated a mandatory health or safety standard." *Affinity* at 6. This is because in point of fact the Secretary has not made such an allegation at the point in time the safeguard notice is created and issued. For this reason, the Contestant's claim that a notice to provide safeguard is *in effect* the equivalent as issuing a citation or order, does not mean that the two are the same.

Although the judge in *Affinity* rested his conclusion on the theory that Section 105(d) confers jurisdiction, he also rested his view on due process grounds. The example offered by the judge was a mine operator having to wait twenty-two years before having the ability to challenge the validity of an underlying safeguard notice. However, while that recounting is a dramatic characterization of such an instance, it is misleading in a sense because there is nothing to prevent a mine operator from simply refusing to comply with a safeguard notice. Once that refusal happens and a citation then follows, the mine can then challenge the validity of the safeguard, together with the citation and the appropriateness of the penalty proposed by the government for that citation. Such a challenge can occur immediately after the citation is issued, putting all issues on the table.

The Secretary's Response

The Secretary's central contention is that the Mine Act does not give the Commission jurisdiction to review a safeguard notice until there has first been a subsequent citation or order issued in connection with that notice. The basis for its position is simple and direct, noting that the section of the Act addressing the Commission's jurisdiction, section 105(d), pertains to "MSHA's issuance or modification of orders, (2) MSHA's issuance or modification of citations and proposed assessments of penalties; and (3) the reasonableness of the length of time that MSHA sets for abatement."[7] Response at 4. Thus, the Secretary contends that as section 105(d) makes no mention of a safeguard notice, nor the provision from which it is derived, section

[7] The full text of section 105(d) provides: (d) 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 of 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.

314(b) of the Act, the Commission lacks jurisdiction.[8] Unlike a reviewable citation under section 105(d), which stems from the Secretary's allegation that a mine operator has violated the Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to the Act, the safeguard notice is analogous to a mine-specific mandatory standard. Both, the Secretary notes, establish required conduct, and both, when violated can be cited for failing to comply with such conduct.[9]

Perhaps more importantly, at least from the Court's perspective, as the Secretary notes, the issuance of a safeguard notice does not assert that a mine operator has committed any violation.[10] Instead, a violation can only occur *later* in time, upon a mine operator's subsequent failure to comply with the safeguard notice. Naturally, this also means that there is no civil penalty proposed either. That too only occurs upon a *subsequent* failure to comply with the safeguard notice. It is true that, upon issuance of the notice to provide a safeguard, a standard is created, but as with every other safety standard, no civil penalty occurs when the standard is created; rather it is only when the standard, however it comes into being, is thereafter violated. Accordingly, it is the Secretary's contention that no Commission jurisdiction attaches until after the safeguard notice comes into existence and then, following that, there is issued a citation or order asserting that the safeguard was violated.[11]

In *Pocahontas Coal Company, LLC v. Secretary of Labor*, 2014 WL 2809893 (June 11, 2014) ("*Pocahontas*"), another administrative law judge addressed the same issue. As in the case presently before this Court and in the *Affinity Coal* matter (*supra*), notices to provide safeguards were issued to Pocahontas pertaining to the transportation of men or materials, and the mine filed notices of contest for each notice. The Secretary, again as in this case, filed a motion to dismiss on the grounds that the Commission lacks jurisdiction to hear such a contest until after a citation or order is issued for a violation of the underlying safeguard notice. The judge in *Pocahontas* noted that the Commission has addressed a safeguard challenge only in the

[8] The Secretary has also taken note that the Contestant, DRC, did not cite to any specific provision of the Mine Act as supplying jurisdiction to the Commission in DRC's Notice of Contest. Response at n.1.

[9] Nor, the Secretary notes, is a safeguard analogous to an Order issued under section 104, as the latter requires withdrawal from an area of a mine, but the former does not. Response at 5.

[10] A reply was also filed by the Secretary. Much of the Secretary's reply echoes the points it already made but it emphasizes that without jurisdiction first being present to hear the challenge the Commission cannot reach a due process claim. Jurisdiction, then, is a condition precedent to addressing a due process claim.

[11] If the Contestant's action is a request for declaratory relief, which it appears to be, the Secretary also notes that the Commission provides such "relief *only* 'where jurisdiction otherwise exists' based on Section 105(d) or another one of the Mine Act's delegations of authority to the Commission. Response at 8 (citing *Kaiser Coal*, 10 FMSHRC 1165, 1170-71 (Sept. 1988); *Drummond Company, Inc.*, 14 FMSHRC 661, 671-76 (May 1992)). Thus, the Secretary argues that jurisdiction is a condition precedent to declaratory relief.

context of when it has been accompanied by a citation alleging a violation of that safeguard.[12] Reduced to its essential conclusion, the judge in *Pocahontas* concluded that the Commission's jurisdiction is limited under section 105(d) of the Mine Act to particular challenges, but that challenging a safeguard notice itself, unaccompanied by citation or order alleging a violation of that safeguard notice is not one of those bases for Commission jurisdiction. The judge in *Pocahontas* also concluded that the ability for a mine to challenge a safeguard notice, once the triggering event of a citation or order occurs, also answers the claim that due process demands review prior to the allegation that the notice has been violated. In that regard, the judge noted that it "cannot create jurisdiction where none exists . . . [and that] less formal mechanisms, such as a request for a technical citation, . . . could seemingly be used to immediately contest the issue on an expedited basis . . . [and also that] the operator [could] bring a facial challenge [to that safeguard notice] in Federal District Court." *Id.* at *4. Last, the judge in *Pocahontas* observed that "the government interest in flexibly and quickly addressing hazards related to the transportation of men and materials is an extremely compelling one." *Id.*

This Court agrees with both conclusions by the judge in *Pocahontas*; section 105 review of a challenge to a safeguard is limited to instances when a citation or order has been issued alleging a violation of that safeguard notice; and due process is achieved through that challenge mechanism.[13]

As this docket contains no citations or orders, but only the notice to provide safeguard that was issued to the mine, the above captioned contest proceeding is DISMISSED.

William B. Moran

William B. Moran
Administrative Law Judge

[12] The judge also noted that it is not bound by the opinion of another administrative law judge and that she did not concur with the reasoning of the judge decision in *Affiinity*. On both those points, this Court shares the views of the decision in *Pocahontas.*

[13] It is also noted that the Court's conclusions regarding reviewability and due process are fully consonant with the Commission's most recent observations on these subjects, as reflected in *Secretary of Labor (MSHA) v. Brody Mining, LLC*, 36 FMSHRC ___, slip op., No. WEVA 2014-82-R (Aug. 28, 2014).

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