

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 10, 2014

AFFINITY COAL COMPANY, LLC,
Contestant,

v.

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

CONTEST PROCEEDINGS

Docket No. WEVA 2013-700-R
Safeguard No. 3575542; 02/28/2013

Docket No. WEVA 2013-701-R
Safeguard No. 3575543; 02/28/2013

Docket No. WEVA 2013-702-R
Safeguard No. 3575544; 02/28/2013

Docket No. WEVA 2013-703-R
Safeguard No. 3575545; 02/28/2013

Docket No. WEVA 2013-704-R
Safeguard No. 8155075; 03/04/2013

Mine: Affinity Mine
Mine ID: 46-08878

ORDER STAYING PROCEEDINGS

These cases are before me on Notices of Contest filed by Affinity Coal Company, LLC, pursuant to Section 105(d) of the Federal Mine Safety and Health. These contests are directed not at a particular citation or order but, rather, at five written notices to provide safeguard issued by MSHA pursuant to Section 314(b) of the Act. For reasons that follow, these cases are **STAYED** until the Commission rules on the issue of whether the Commission judges have jurisdiction to undertake an independent review of notices to provide safeguard issued pursuant to section 314(b) of the Mine Act.

On April 15, 2013 the Secretary filed motions to dismiss these five contests. The Secretary, in each of the motions to dismiss, argued that, in the absence of a citation or order issued for violation of a safeguard, the Commission lacks jurisdiction under the Mine Act to hear contests of notices to provide safeguard. Subsequently, on April 25, 2013, Contestant filed a statement in opposition to the motions, arguing that notices to provide safeguard should be treated as section 104(a) citations and, as a result, section 105(d) of the Act confers jurisdiction on the Commission to hear independent contests of notices to provide safeguard. Further, Contestant argued that due process concerns demand that mine operators be able to contest notices to provide safeguard at the time they are issued, and not have to wait until a citation or order is issued for violation of the safeguard. On August 29, 2013 Judge William Steele denied the Secretary's motion and found that section 105(d) of the Act granted the Commission jurisdiction to hear contests of notices to provide safeguard prior to the issuance of a citation or

order for an alleged violation of the safeguard. *Affinity Coal Co., LLC*, Unpublished Order Denying Motion to Dismiss dated August 29, 2013, Docket No. WEVA 2013-700-R et al. (ALJ).

On June 11, 2014 this court dismissed a separate, but similar matter. *Pocahontas Coal Co.*, 36 FMSHRC __, slip op. (Docket Nos. WEVA 2014-642-R, WEVA 2014-646-R through 679-R) (June 11, 2014) (ALJ). In *Pocahontas*, the parties raised essentially identical arguments to those raised in the instant proceeding. There I found that, while the Commission had acknowledged a mine operator's right to contest the validity of a safeguard in the context of contest to a citation issued pursuant to a violation of the underlying safeguard, it had not addressed the question of whether it has jurisdiction to hear a contest of a notice to provide safeguard in the context of a separate proceeding prior to the issuance of a citation or order for a violation of the safeguard. *Id.* (citing *Southern Ohio Coal Co.*, 14 FMSHRC 1 (Jan. 1992)). In dismissing the cases I relied upon the absence of any legal authority to hear contests of notices to provide safeguard within the context of a dedicated proceeding, the unique nature of safeguards that prevents them from being considered a citation or order, other avenues which the contestant could have utilized to properly challenge the notices to provide safeguard, and the current protections in place which negate any due process concerns. *Id.* On July 16, 2014 the Commission granted *Pocahontas*' petition for discretionary review. Clearly the decision issued in *Affinity* is directly opposite the decision in *Pocahontas*. Additionally, in the time since these cases were reassigned at least one Commission judge has dismissed a similarly situated matter for many of the same reasons cited in my June 11th order. *Dickenson-Russell Coal Co.*, 36 FMSHRC __, slip op. (Docket No. VA 2014-163-R) (Sept. 3, 2014) (ALJ).

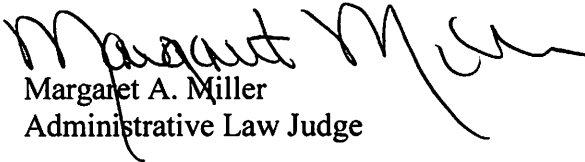
On August 14, 2014 these five cases were reassigned to this court.¹ The Secretary has represented that, as of August 28, 2014, no citations or orders have been issued for violations of the safeguards that are contained in these cases. The reassignment of these cases presents a novel issue, namely that an order finding jurisdiction is presently in place, however the currently presiding judge believes that there is no jurisdiction and these cases should not be before the Commission. Judge Steele's determination that jurisdiction exists directly contradicts my finding in the similarly situated *Pocahontas* case. While the instant proceeding involves *Affinity Coal Company*, and my June 11th order related to *Pocahontas Coal Company*, the two entities are one and the same, sharing the same mine identification number. While the court recognizes that Judge's Steele order remains in place, it disagrees with his ultimate finding and, in an effort to avoid confusion by issuing a contradictory order, the court believes that the question of jurisdiction should be stayed until the Commission issues an order in the *Pocahontas* case presently before it.

ORDER

Consequently, these cases are **STAYED** until the Commission issues a decision in the *Pocahontas* case, after which time, this matter will either be dismissed or set for hearing. Further, should the Secretary believe it necessary, he may request that this matter be put before the Commission on interlocutory review.

¹ Judge Steele retired and his cases have been reassigned to other Commission judges.

The parties are **ORDERED** to notify the Court immediately should the status of these cases change or the *Pocahontas* case is decided.


Margaret A. Miller
Administrative Law Judge

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