FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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December 5, 2014

POCAHONTAS COAL COMPANY, INC., Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. POCAHONTAS COAL COMPANY, INC., Respondent.	CONTEST PROCEEDINGS Docket No. WEVA 2014-395-R Order No. 3576153; 12/19/2013 Docket No. WEVA 2014-711-R Order No. 7169717; 2/10/2014 Mine: Affinity Mine Mine ID: 46-08878 CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2014-1112 A.C. No. 46-08878-353252 Docket No. WEVA 2014-1160 A.C. No. 46-08878-354868 Mine: Affinity Mine

ORDER DENYING POCAHONTAS' REQUEST TO WITHDRAW

Before: Judge Miller

These cases are before me upon notices of contest filed by Pocahontas Coal Company and petitions for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On November 17, 2014 Pocahontas filed a request to withdraw. The Secretary opposed the request, but opted to not file a formal written response. For reasons that follow, I **DENY** Pocahontas' motion.

On September 30, 2014 the court requested that the Secretary provide the roof control and ventilation plans in place when five 104(e) orders[1] that are contained in these dockets were issued, and identify the plan provisions that had allegedly been violated. Counsel for Pocahontas was copied on the email. Pocahontas objected to the Secretary's submission of the requested materials and argued that the materials should only be presented to the court in the context of a hearing. On October 15, 2014 the court clarified, by email, that only the plan cover pages and the plan provisions which were alleged to have been violated were being sought from the

[1] The orders at issue are Order No. 9002712, 9002713, 9002715, 7169717 and 3576153. The Secretary's submission explained that Order Nos. 9002712 and 9002713 had been modified post-issuance to reflect violations of other standards, and were no longer alleged to be violations of the mine's roof control plan.

Secretary. The court explained that requesting the materials is a practice that allows the court to prepare for hearing and help the parties narrow the issues. Further, if Pocahontas did not agree that the proper plans were submitted, it could advise the court and submit the plans that it believes were in place at the time the orders were issued. Finally, the court made clear that the submissions would not become part of the record at the time of submission, and that the parties would need to enter the plans into evidence at the hearing. On October 23, 2014 the Secretary, via email, submitted the requested materials to the court, with a copy sent to Pocahontas' counsel. On November 3, 2014, Pocahontas submitted a response in which expressed its concern with the Secretary's submission. Subsequently, on November 17, 2014, Pocahontas filed this request to withdraw in which it seeks to have the ALJ recused.

Pocahontas requests that the undersigned judge withdraw as the presiding judge in these cases and argues that the judge improperly requested, and viewed, documents from the Secretary which are not part of the record, thereby placing herself in the "dual role as both an investigator and adjudicator." Mot. 7. Rather, the judge should have reviewed the requested documents only in the context of a stipulation by the parties or a hearing where the documents could be properly introduced into evidence. In failing to do so, the presiding judge's conduct evidenced bias, or at least the appearance of bias, and deprived Pocahontas of a fair and impartial hearing. In other words, Pocahontas filed this motion, seeking to have the ALJ withdraw, based upon a request, made to both parties, for a copy of the roof control plan that was alleged as the basis for a number of citations. Because that plan was sought, Respondent argues that it cannot now receive a fair and impartial hearing on the many citations included in these dockets. I disagree.

Commission Procedural Rule 81, states that "[a] party may request a . . . Judge to withdraw on grounds of personal bias or other disqualification. A party shall make such a request by promptly filing an affidavit setting forth in detail the matters alleged to constitute personal bias or other grounds for disqualification." 29 C.F.R. § 2700.81(b). In *Medusa Cement Co.*, the Commission, in affirming a judge's decision to not recuse himself, explained that, while the role of its judges' is to adjudicate, and not litigate cases, the judges are active participants in the proceeding with a duty to conduct those proceedings in a manner that yields a just and true result. 20 FMSHRC 144, 148 (Feb. 1998) (citing *Secretary of Labor on behalf of Clarke v. T.P. Mining, Inc.*, 7 FMSHRC 989, 993 (July 1985), and *Lonnie Jones v. D&R Contractors*, 8 FMSHRC 1045, 1053 (July 1986)). The Commission further explained, citing its decision in *Canterbury Coal Co.*, 1 FMSHRC 1311 (Sept. 1979), that while its judges are afforded "considerable leeway" in conducting proceedings and developing a record, the judge must not intervene so much that the parties are unable to develop their case. *Id.*

The court has not displayed any personal bias or other grounds which would justify withdrawal, nor has there been any intervention that would hinder the parties in developing their case. Here, the only action taken by the court was to request that the Secretary provide the roof control and ventilation plans that he believed were in force at the time the 104(e) orders were issued, and identify the plan provisions alleged to have been violated. The request was made with the knowledge of Pocahontas. The court advised the parties that, should Pocahontas dispute what was submitted, it would be given ample time to submit the plans it believed were in place when the orders were issued. Further, the court clarified that the material would not become part of the record until it was either stipulated to, or introduced at hearing. The court has not

engaged, and will not engage, in any decision making on the issue of what plans were in effect and which provisions were allegedly violated prior to a stipulation by the parties or a hearing where the plans are submitted into evidence. However, it is incumbent upon the court to utilize the powers afforded it to promote judicial economy by preparing for hearing and narrowing the issues. *See* 29 C.F.R. § 2700.55. The request for the plans relates to matters alleged in the orders issued by MSHA. By submitting the plans, the parties and the court are better able to understand what disputes may arise with regard to those plans, and how much time will be needed to hear arguments regarding the plans. I find that the arguments made by Pocahontas regarding the nature of the roof control plan and its use by the court are not only over-reaching but are histrionic. This is not a case of drama, but a case of fact, and each party has and will continue to have, the opportunity to present the facts so that the law may be applied as appropriate.

A proceeding involving an alleged violation of a mine plan presents a unique situation with regard to what legal standard will be applicable when deciding whether a violation exists. Unlike a typical proceeding where a citation or order alleges a violation of a mandatory standard promulgated by the Secretary or statutory provision constructed by Congress, citations and orders involving mine plans allege violations of the actual provisions in the plan. The language of those provisions is proposed by the mine operator, and approved by MSHA. The Commission has explained that plan provisions are enforceable as mandatory standards. *Martin County Coal Corp.*, 28 FMSHRC 247, 254 (Mar. 2011) (ALJ) (citing *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 907 (May 1987). In order to properly prepare for this hearing, the court should know what legal standard the parties believe is at issue. While Pocahontas argues that the Commission judges should do no research or prepare for hearing, the court disagrees. Rather, it is in both the court's and parties' best interests for there to be some clarity as to what the legal standard is, or could be, prior to hearing and what issues might be litigated. The court need not, and has not, reached any conclusion regarding what standard will be applied. However, the court has conducted, and will continue to conduct, research into the provisions advanced by the parties.

Judges listen closely, read carefully and research thoroughly, before issuing a reasoned, well-thought-out and impartial decision. Throughout the stacks of motions filed in these, as well as related cases, I have always listened, read and researched and intend to do so as the case proceeds. The fact that the Secretary was asked to produce, and the Respondent asked to comment on, a roof control plan, does not change that practice. Nor does it offer anything to the case except to narrow the issues and to present an opportunity for the court and the parties to understand what will be litigated and how much time that will take. Neither in intent or appearance has the Respondent been slighted or somehow been put at a disadvantage. If anything, it now has the advantage of having a better understanding of the allegations against it and can better prepare for those allegations.

Here, the Secretary has provided what he alleges are the proper plans and cited provisions. Pocahontas, has not provided plans or provisions and, rather, has only raised concerns that some of the 104(e) orders did not specify which plan provisions were allegedly violated, that it needs to depose the issuing inspector to determine whether the Secretary's submissions are accurate, and that the court should only review the plans and plan provisions on

the record in the context of direct and cross examination testimony. While Pocahontas' concerns are noted by the court, the court's request was harmless. The materials submitted are being used only for purpose of preparing for hearing and initial prehearing research of the issues in this matter. The court is aware of fact that, in order for the Secretary to prove a violation of a mine plan, he must identify a mine plan provision that has allegedly been violated, establish that the provision allegedly violated is part of the approved and adopted plan, and demonstrate that the condition cited actually did violate the plan provision. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1281 (Dec. 1998) (citing *Jim Walter Resources, Inc.*, 9 FMSHRC 903, 907 (May 1987). Nothing that the court has done relieves the Secretary of the burden that he will be required to satisfy at hearing, nor does it preclude Pocahontas from exercising its right to dispute the Secretary's case and put on evidence to the contrary. Accordingly, Pocahontas's motion to withdraw is **DENIED**.

Margaret A. Miller
Administrative Law Judge

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