FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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March 23, 2017

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2016-0305
Petitioner,	:	A.C. No. 12-02295-409606
v.	:	
	:	
PEABODY MIDWEST MINING LLC,	:	Mine: Francisco Underground Pit
Respondent.	:	

ORDER OF STAY

Before: Judge Moran

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The Respondent, Peabody Midwest Mining LLC ("Respondent" or "Peabody"), has filed a motion in limine ("Motion") to preclude the Secretary's use of several non-final orders in support of the flagrant designation for Order No. 9036925. The Secretary opposed the Motion, requesting instead that this matter be consolidated in order to promote judicial efficiency. For the reasons that follow, the Court **GRANTS** Peabody's alternative request that the Court stay this matter until Order Nos. 9036623, 9036625 and 9036922 are adjudicated.[1]

The Respondent's Motion is captioned, "Motion in Limine to Preclude Use of Order Nos. 9036623, 9036625 AND 9036922 as Non-Final Orders in Support of the Secretary's Flagrant Designation for Order No. 9036925." Understanding the basis for the Motion must begin with the single matter involved in Docket No. LAKE 2016-0305, a section 104(d)(2) Order alleging a violation of 30 C.F.R. § 75.202(a). That section, titled, "Protection from falls of roof, face and ribs," provides in subsection (a) "The roof, face and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof, face or ribs and coal or rock bursts." 30 C.F.R. § 75.202(a).

The Secretary, having "specially assessed" the alleged violation, is seeking a civil penalty of $60,613.00. It is true, per the Secretary's "Narrative Findings for a Special Assessment" that

[1] The Respondent's alternative request seeks a stay until those Orders "are adjudicated and may become final." Motion at 6. The Court is uncertain about the duration sought in the Respondent's Motion with its use of the phrase "may become final." The Court's intention is to continue the stay until it has issued a final decision in LAKE 2016-140 and LAKE 2016-269.

the Secretary contends that the alleged violation was "flagrant."[2] Narrative. The same document elaborates that by "flagrant," the Secretary means,

> a reckless failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that reasonably could have been expected to cause death or serious bodily injury. The operator failed to correct the cited hazardous conditions over an extended period of time, displaying a complete disregard for the safety of the miners required to work or travel in the area. In addition, management permitted production to resume with knowledge that exposure to the hazardous ribs would increase.

Narrative at 2.

The Narrative essentially echoes the Mine Act's statutory provision regarding flagrant violations. 30 U.S.C. 820(b)(2). While reckless and repeated violations are within the ambit of that section, in this instance the Secretary is asserting that the alleged violation is of the "repeated" variety, and for that proposition the Secretary intends to draw upon Order Numbers 9036623, 9036625 and 9036922. Each of these Orders is in contest, contained within other dockets, and none are final orders. Order Nos. 9036623 and 9036625 are at issue in Docket LAKE 2016-140.[3] Order No. 9036922 is at issue in Docket LAKE 2016-269. That latter docket is set for a hearing commencing on May 31, 2017.[4]

Given the foregoing, Peabody requested that the Court preclude the Secretary from relying on Order Nos. 9036623, 9036625, and 9036922 to support the flagrant designation of the Order at issue here, as those Orders are not final. Motion at 6. However, in the alternative, Peabody requested that the Court stay these proceedings "until Order Nos. 9036623, 9036625 and 9036922 are adjudicated and may become final." *Id*.

In its Response in Opposition, the Secretary admits that he "intends to introduce evidence of Respondent's *past violation history* to support the flagrant and unwarrantable failure designations, as well as the 'high' negligence determination, for this Order, [Order No. 9036925,]" and toward that end looks to Order Nos. 9036922, 9036623 and 9036625 as support for its claims. Response at 2 (emphasis added).

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[2] The Special Assessment also asserts that the violation "resulted from the operator's unwarrantable failure to comply with mandatory standards and resulted from the operator's high negligence and [ ] [that] the cited standard is a 'Rules to Live by' standard." Narrative Findings at 1.

[3] Docket LAKE 2016-140 has been stayed at the Secretary's request, pending a Section 110(c) investigation related to Order No. 9036623.

[4] Both Dockets LAKE 2016-140 and LAKE 2016-269 are assigned to this Court.

The Secretary contends that Respondent's "repeated" failure to eliminate the known "rib hazard" meets the statutory criteria under both the "narrow" and "broad" applications for claims of flagrant violations. *Id.* at 3. The "narrow," application is a stand-alone approach under which a flagrant violation can be established within the four corners of the cited violation itself, whereas the latter approach looks to "the operator's violation history to be taken into account in determining whether its failure was 'repeated' in nature." *Id*. Although the Secretary asserts that it can establish the alleged violation in Order No. 9036925 under both applications, it contends that it may prove a flagrant violation under the broad approach by "introduc[ing] evidence *of the conditions alleged in non-final Order Nos*. 9036623, 9036625, and 9036922." *Id*. (emphasis added). The Secretary asserts it is "entitled" to offer evidence "using the operator's violation history" to prove a repeated flagrant violation. *Id.* at 5. And, while the Secretary admits that Part 100's history of previous violations "stands for the proposition that only final orders will be included in determining an operator's history," he then discordantly asserts it is "merely and appropriately [ ] recognizing a history of repeated failures to make reasonable efforts to eliminate a known violation to support a 'repeated' flagrant violation determination." *Id*.

In the Court's view, this line of thinking from the Secretary follows the "conviction and sentencing, followed by a trial," school of thought. In advocating such an approach, the Secretary conflates the *issuance* of citation or order, with the establishment of the underlying violation. The judicial process doesn't work in that manner. A flagrant violation claim is among the more serious allegations for a mine operator to face, and this observation guides the Court in evaluating the present motion. Peabody contends, and the Court agrees, that "[i]t is inappropriate and contrary to principles of due process to predicate a flagrant violation upon alleged violations that are not final," as they are presently only unproven assertions.[5] Motion at 3. Further, while the Secretary complains that "the Respondent should not be given a *windfall* ([as] the Secretary's ability to prove his allegation [would] be hampered significantly) because the cases are pending," it is the Secretary who acted to forestall the resolution of the Order Nos. 9036623, 9036625 from Docket No. LAKE 2016-140, until it completes the Section 110(c) investigation related to those matters.[6] Response at 6 (emphasis added). Those Orders, it should be noted, were issued nearly 17 months ago, in October 2015.

[5] Respondent also points out that the Part 100 Criteria and Procedures for Proposed Assessment of Civil Penalties "provides that when considering history of previous violations for a penalty determination, '[o]nly assessed violations that have been paid or finally adjudicated or have become final Orders of the Commission will be included in determining an operator's history.'" Motion at 4, citing 30 C.F.R. §100.3(c). Therefore, considering these non-final orders also runs afoul of the penalty computation.

[6] The last of the three orders the Secretary would like to employ, Order No. 9036922, which is within Docket No. LAKE 2016-0269, is also non-final and is among dockets scheduled for hearing before this Court commencing in late May 2017.

Accordingly, for the foregoing reasons, the Court GRANTS Peabody's alternative request, that this matter be stayed until Order Nos. 9036623, 9036625 and 9036922 are adjudicated. While stayed, there is no reason that discovery should be held up for Order Nos. 9036623, 9036625 and 9036922. In that way, once the Section 110(c) investigation is concluded, the hearing for those Orders may proceed expeditiously.

SO ORDERED.

William B. Moran
Administrative Law Judge

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