

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

May 15, 2023

DAVID A. ROSE FARM & AG SERVICES,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. SE 2023-0159-RM
	:	Order No. 9707523; 04/26/2023
	:	
v.	:	Docket No. SE 2023-0160-RM
	:	Citation No. 9707524; 04/26/2023
	:	
SECRETARY OF LABOR,	:	Docket No. SE 2023-0161-RM
MINE SAFETY AND HEALTH	:	Citation No. 9707525; 04/26/2023
ADMINISTRATION (MSHA),	:	
Respondent.	:	Docket No. SE 2023-0162-RM
	:	Citation No. 9707526; 04/26/2023
	:	
	:	Ortona Mine
	:	Mine ID 08-01452
	:	
GARCIA MINING, LLC,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. SE 2023-0165-RM
	:	Citation No. 9707527; 04/26/2023
	:	
v.	:	Docket No. SE 2023-0166-RM
	:	Citation No. 9707528; 04/26/2023
	:	
SECRETARY OF LABOR,	:	Docket No. SE 2023-0167-RM
MINE SAFETY AND HEALTH	:	Citation No. 9707529; 04/26/2023
ADMINISTRATION (MSHA),	:	
Respondent.	:	Caloosahatchee Mine
	:	Mine ID 08-01453

ORDER DENYING MOTION FOR EXPEDITED HEARING
AND
ORDER GRANTING MOTION TO CONSOLIDATE

The above-docketed contest cases are before me upon the four notices of contest filed by David A. Rose Farm & AG Services on April 28, 2023, and three notices of contest filed by Garcia Mining, LLC, on May 1, 2023, under section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815. On May 2, 2023, counsel for Contestants filed a

Motion for Consolidation and Expedited Proceedings. Thereafter, on May 8, 2023, the Secretary of Labor filed her Opposition to Motion for Expedited Hearing but did not address the motion to consolidate. Before me is one significant and substantial (“S&S”) section 104(g)(1) order for miner training and three non-S&S section 104(a) citations issued to David A. Rose Farm & AG Services, as well as three non-S&S section 104(a) citations issued to Garcia Mining, LLC, all of which were issued by the same MSHA inspector on April 26, 2023.

I. MOTION FOR EXPEDITED HEARING

In the motion, Contestants “request that their cases be consolidated, that all citations and orders listed above be vacated based on MSHA’s lack of jurisdiction, or in the alternative, that an expedited hearing be granted.” (Mot. at 3.) Contestants assert that an expedited hearing is appropriate because they will “suffer irreparable harm” from “financial costs[] and disruption of their work activities.” (Mot. at 2–3.) Contestants argue that “expedited proceedings are warranted because these employers will continue to be inspected and unduly subject to onerous MSHA requirements while performing work that is not under that agency’s jurisdiction and which is not performed on a permitted mine site, but at the dredging operation of the Corps.” (Mot. at 2.)

Commission Rules do not provide any guidance on prerequisites for granting a request for expedited hearing. *See* 29 C.F.R. § 2700.52. Under Commission case law, Commission Judges are tasked with using “informed discretion” considering all the facts when determining if an expedited hearing is appropriate. *Wyo. Fuel Co.*, 14 FMSHRC 1282, 1287 (Aug. 1992). I find persuasive cases where Commission Judges have held that to prevail on a request for expedited hearing, the moving party bears the “burden of showing extraordinary or unique circumstances resulting in continuing harm or hardship.” *Consolidation Coal Co.*, 16 FMSHRC 495, 496 (Feb. 1994) (ALJ).

The Commission suggests that a mine currently closed or under a withdrawal order due to MSHA action may warrant an expedited hearing. *See Wyo Fuel Co.*, 14 FMSHRC 1282, 1287 (Aug. 1992) (reversing ALJ’s finding that he did not have discretion to grant an expedited hearing on a closure order). Commission Judges have determined that simply the mere threat of mine closure or the need for miner training is not an extraordinary or unique circumstance warranting an expedited hearing, and I find these cases persuasive. *See Pennyrile Energy, LLC*, 38 FMSHRC 1886 (July 2016) (ALJ) (denying contestant’s motion for expedited hearing on an order issued for an alleged training violation, because “[m]iner training is not a hardship that necessitates an expedited hearing.”); *Energy W. Mine Co.*, 15 FMSHRC 2223, 2223–25 (Oct. 1993) (ALJ) (continuing threat of closure and the possibility of subsequent withdrawal order resulting from a section 104(d)(1) order is insufficient to warrant an expedited hearing). Here, Contestants are neither subject to a withdrawal order nor the threat of mine closure. Given the facts provided, I determine that the order issued to David A. Rose Farm & AG Services to train miners under section 104(g)(1) is not a hardship that necessitates an expedited hearing. And the issuance of the other six non-S&S section 104(a) citations is likewise insufficient.

Other than broad allegations of financial harm and disruption of work, Contestants fail to allege specific facts showing extraordinary or unique circumstances resulting in continuing harm or hardship if denied an expedited hearing. Contestants allege they were not engaged in mining activities or working upon a mine site but rather were working on river-widening and dredging which do not come under MSHA jurisdiction, based on an interagency memorandum. (Mot. at 2.) In essence, Contestants argue that they should be inspected by another federal agency—the Occupational Safety and Health Administration (“OSHA”)—rather than MSHA. However, I determine that such a jurisdictional issue is not an extraordinary or unique circumstance resulting in continuing harm or hardship that warrants an expedited hearing.

Consequently, upon considering all the facts in exercising my informed discretion, I determine that Contestants allege no extraordinary or unique circumstances that will result in continuing harm or hardship. Therefore, I conclude an expedited hearing is not warranted.

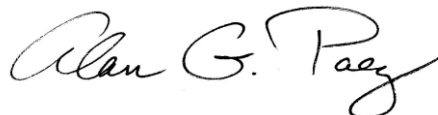
II. MOTION FOR CONSOLIDATION

Commission Procedural Rule 12 allows Commission Judges to consolidate cases involving similar issues. 29 C.F.R. § 2700.12. Commission Procedural Rule 55, 29 C.F.R. § 2700.55, also grants Commission Judges broad powers to issue orders and procedurally manage the cases before them. Contestants were issued several citations and an order by the same MSHA inspector on the same date, are alleging the same jurisdictional arguments involving the same work being done in proximate locations, and share the same counsel. The Secretary has not objected to consolidation of these dockets. Given the overlap of these matters and in the interest of judicial economy, I conclude that consolidating these dockets is appropriate.

III. ORDER

WHEREFORE, it is hereby **ORDERED** that the motion for an expedited hearing in the above-captioned dockets is **DENIED**.

It is further **ORDERED** that Contestants’ Motion for Consolidation is **GRANTED**. The parties are further **ORDERED** to notify my Law Clerk when they file their respective pleadings (petition and answer) in the penalty proceeding, so I may then seek to consolidate the contest and penalty cases for hearing and disposition.



Alan G. Paez
Administrative Law Judge

Distribution: (Via Electronic Mail & U.S. Mail)

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