FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th St. Suite 443
Denver, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

July 18, 2018

M-CLASS MINING, LLC, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST PROCEEDING Docket No. LAKE 2018-0188-R Order No. 9104295; 2/24/2018 Mine: MC #1 Mine ID: 11-03189

ORDER DENYING SECRETARY'S MOTION TO DISMISS

Before: Judge Simonton

This contest proceeding involves a §103(k) Order, No. 9104295 ("(k) Order"), issued to M-Class Mining, LLC ("M-Class" or "Contestant") on February 24, 2018.[1] Pursuant to an order of the court, the parties submitted briefs addressing, among other issues, whether the Court retains jurisdiction to review a terminated (k) Order and whether the termination action moots any residual factual disputes. The Secretary filed a motion for dismissal to accompany his brief. Based on the reasoning below, I deny the motion.

I. Factual and Procedural Background

M-Class Mining operates the MC#1 mine in Macedonia, Illinois. On February 24, 2018, M-Class miner Mitchell Mullens was admitted to the hospital after complaining of dizziness and nausea. The hospital detected elevated carbon monoxide levels in Mullens' blood and local police notified MSHA of the incident. M-Class and MSHA immediately opened investigations into the matter. Inspector Brandon Naas conducted the investigation on behalf of MSHA and

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[1] Section 103(k) of the Mine Act provides that:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

concluded that Mullens was operating the mine's No. 1 Diesel Air Compressor when the symptoms began to present. Naas issued a § 103(k) Order to remove the compressor from service pending completion of MSHA's investigation. The next day, MSHA modified the (k) Order to allow normal mining operations to continue while keeping the compressor out of service for the duration of its investigation. On March 1, 2018, M-Class submitted a proposal to terminate the (k) Order. MSHA denied that proposal and provided a list of requirements to be fulfilled for termination. M-Class submitted a second plan one week later but did not agree to implement MSHA's requirements.

On March 15, 2018, M-Class filed a Notice of Contest and Motion for Expedited Hearing. The court denied the motion and initially set the docket for hearing on May 16, 2018. On April 27, 2018, the Secretary notified the court via email that MSHA completed its investigation and terminated the (k) Order. Since the (k) Order did not carry an assessed penalty and the Secretary did not issue a corresponding § 104 citation, the Secretary assumed that M-Class would withdraw its notice of contest. However, M-Class declined to do so because it believed that the (k) Order was invalidly issued and should be vacated. On May 2, 2018, the court postponed the hearing and ordered the parties to submit briefs addressing the Commission's jurisdiction over a terminated (k) Order, whether termination renders the matter moot, and any other issues the parties deemed appropriate. The parties submitted briefs on June 18, 2018 and the Secretary concurrently submitted a Motion for Dismissal. The parties filed replies on June 29, 2018. The case is set for hearing on August 9, 2018.

II. Disposition

The Secretary contends that the court does not retain jurisdiction to review a terminated (k) Order because there is no accompanying citation, penalty assessment, or mine closure to adjudicate. Secretary's Brief in Support of Motion to Dismiss Notice of Contest, ("Sec'y Br.") at 6. The Secretary argues that Commission precedent ties its jurisdiction to review (k) Orders to a closure or withdrawal of a mine, and where, like here, the closure is no longer in effect, jurisdiction over the (k) Order ceases. *Id.* For these reasons, the Secretary also contends that the matter is moot because M-Class no longer has a legally cognizable interest in the outcome of the contest. *See* Sec'y Br. at 7-8.

M-Class contends that the court retains jurisdiction over a (k) Order that has not been vacated. Contestant's Brief in Support of Jurisdiction for Administrative Contest, ("Cont. Br.") at 4. Contestant argues that § 103(k) Orders are similar to other orders under the Mine Act, and therefore operators have the right to contest the issuance or modification of (k) Orders and the Commission has authority to affirm, modify, or vacate a (k) Order regardless of whether it has been terminated. *Id.* at 5. M-Class argues that the case is not moot because the termination of the (k) Order did not resolve the factual disputes surrounding its issuance. Contestant's Response in Opposition to the Secretary's Motion to Dismiss ("Cont. Resp.") at 5. Therefore, M-Class maintains a legally cognizable interest in having the (k) Order vacated and removed from its safety record. *Id.* at 3. In the alternative, M-Class cites the D.C. Circuit's decision in *Performance Coal Co. v. FMSHRC*, 642 F.3d 234, 239 (D.C. Cir. 2011), to argue that the terminated (k) Order falls within the "capable of repetition yet evading review" exception to the mootness doctrine. *Id.* at 7.

A. Jurisdiction

I find that the court retains jurisdiction over terminated § 103(k) Orders that no longer impose restrictions on mine operations.

The parties do not dispute that the Mine Act's structure and legislative history grant the Commission authority to review active § 103(k) Orders. *See Pocahontas Coal Co., LLC*, 38 FMSHRC 176 (Feb. 2016) (hereinafter "*Pocahontas I*"). The Act's legislative history states that "an operator...may appeal to the Commission the issuance of a closure order." *Pocahontas Coal Co., LLC*, 38 FMSHRC 157, 162 (Feb. 2016) (hereinafter "*Pocahontas II*") citing *American Coal Co. v. Dep't of Labor*, 639 F.2d 659 (10th Cir. 1981). The Act's structure authorizes review of citations and abatement orders under § 104 and imminent danger orders under § 107(a), and thus similarly grants the Commission authority to affirm, vacate, or modify § 103(k) Orders. *See Pattison Sand Co., LLC v. FMSHRC*, 688 F.3d 507, 515-16 (8th Cir. 2012) citing *Am. Coal Co. v. U.S. Dep't of Labor*, 639 F.2d 659, 660-61 (10th Cir. 1981). As such, the Commission may and in fact has reviewed the validity and scope of a (k) Order, as well as whether an operator violated the terms of such an Order. *See Jim Walter Res., Inc.*, 37 FMSHRC 1868 (Sept. 2015); *Kentucky Fuel Corp.*, 38 FMSHRC 2905 (Dec. 2016) (ALJ).

It follows that the Commission's authority to affirm, modify, or vacate a (k) Order extends to the review of terminated (k) Orders. As with § 104 Orders, termination does not resolve or address the factual disputes surrounding the initial issuance of the Order. The Secretary's decision to terminate rests upon the end of the action or condition that prompted its issuance and not a determination of whether the issuance was supported by fact and law. Commission judges have reviewed whether the Secretary abused his discretion in issuing (k) Orders on multiple occasions. Although none of those cases appear to have directly addressed a terminated (k) Order, the court sees no compelling reason to restrict its review in this context. Since Contestant is seeking vacatur, this court has jurisdiction to review whether the circumstances surrounding the alleged incident support the issuance of the (k) Order. [2]

The Secretary argues that the termination of (k) Orders is dissimilar to the termination of § 104 orders because (k) Orders do not allege a violative condition and cannot be abated. Secretary's Response to Contestant's Memorandum ("Sec'y Rep.") at 4-5. He proceeds to contend that this difference restricts review of terminated (k) Orders because, once terminated, these Orders no longer affect the "closure" of a mine. *Id.* at 5. While true, the court does not believe that this difference strips the Court of jurisdiction. Even if "termination" carries a different meaning in the context of (k) Orders, a distinction between the termination and the vacatur of a (k) Order must remain. The elimination of the "closure" requirement of a (k) Order does not eliminate the Order from the mine's record and does not address whether the Order was validly issued, just as the termination of a § 104 citation or order through abatement does not resolve the validity of its issuance. The Secretary's argument effectively treats the termination of (k) Orders as similar if not identical to vacatur. However, the Secretary's refusal to vacate the (k) Order in this circumstance highlights that this cannot be the case. The Secretary does not

[2] At this time, the Court passes no judgment on the appropriate standard of review for (k) Orders or the validity of the (k) Order at issue.

provide and the court is unable to determine any other reason for the Secretary's refusal to do so save to protect the validity of its initial issuance, which is the crux of M-Class's contest.[3] To preclude such a contest from review deprives the operator of its right to challenge the (k) Order's legitimacy regardless of whether it remains in effect.

Accordingly, the court retains jurisdiction to review the terminated (k) Order.

B. Mootness

I next turn to the related issue of whether the Secretary's termination of the (k) Order rendered M-Class's contest moot. The Commission has recognized that a case is moot when "the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome." *North American Drillers, LLC*, 34 FMSHRC 352, 358 (Feb. 2012), citing *Climax Molybdenum Co.*, 703 F.2d 447, 451-52 (10th Cir. 1983). When there is a substantial likelihood that an allegedly moot question will recur, the matter remains justiciable, and administrative orders remain justiciable if they are short term orders capable of repetition, yet evading review. *Id.*

I find that a live case or controversy exists over the validity of the (k) Order. While the Secretary's decision to terminate the (k) Order allowed M-Class to resume using the diesel compressor, the termination did not resolve any of the issues outlined in its notice of contest. *See* Cont. Resp. at 7. The termination does not vacate the (k) Order, does not resolve whether the Secretary abused his discretion in issuing the Order, and does not determine whether an "accident" occurred that was necessary to justify the issuance of the (k) Order. *Id.* M-Class also notes that the (k) Order remains present on its safety record. *Id.* at Ex. 1. Mine operators have a right to challenge Orders issued against it and have a clear interest in maintaining a clean safety record in the context of the Mine Act and public opinion. It therefore follows that these unresolved issues sustain M-Class's legally cognizable interest in the outcome of its contest.

Since a live case or controversy remains, I need not address whether M-Class's contest escapes mootness because it falls under the "capable of repetition but evading review" exception to the mootness doctrine as discussed in the D.C. Circuit's decision in *Performance Coal Co.*, 642 F.3d 234 (D.C. Cir. 2011). Cont. Br.at 7. Nonetheless, I take the time to discuss that decision in order to demonstrate that, even if no live case or controversy exists, the exception likely applies here.

In *Performance Coal Co. v. FMSHRC*, the Court rejected the Secretary's argument that the operator's challenge to certain terms of a § 103(k) Order was moot because the Secretary had

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[3] Even if "vacatur" and "termination" were interchangeable terms in the context of § 103(k) Orders, the Commission has noted that the Secretary's exercise of his discretion to vacate a citation or order does not necessarily divest the court of its jurisdiction over that matter. *See North American Drillers, LLC*, 34 FMSHRC 352, 355-56 (Feb. 2012). It follows that the Commission's jurisdiction would not necessarily cease upon the termination of any citation or order, especially if "legal and procedural requirements after the vacatur of a citation or order, such as questions of mootness or the appropriateness of declaratory relief," remain. *Id.* at 356.

since changed the terms of the Order. 642 F.3d at 237-39. The Court noted that a party can escape mootness where it can establish that the duration of the challenged action is too short to be litigated fully before it expires and there is the a reasonable expectation the party will be subjected to the same action. *Id.* at 237. The Court held that the case was not moot under this exception because (1) the Secretary modified the challenged terms of the (k) Order well before Performance Coal's challenge could be fully litigated, and (2) there was a reasonable expectation that the operator would be subjected to the similar actions in the future. *Id.* at 238. M-Class contends that this exception applies to the instant case.

M-Class clearly satisfies the first prong of the analysis because MSHA terminated the (k) Order while the notice of contest was still in the prehearing phase. *See Performance Coal Co.*, 642 F.3d at 237 ("This court's jurisprudence recognizes that agency actions which tend to expire within two years are too fleeting to be litigated fully") (citations omitted). Here the (k) Order was issued in February of 2018 and terminated in April, a month before the set hearing date, and M-Class had no opportunity to bring its challenge before the court.

Analysis of the second prong requires further examination. In *Performance Coal*, MSHA clearly articulated to the court and the operator that it would continue to modify the (k) Order during its investigation process. *Id.* at 237. Contestant would therefore continue to be subjected to the different terms of the same (k) Order. Unlike that case, there is no indication here that MSHA intends to reissue a similar (k) Order to M-Class or otherwise restrict the use of the compressor in the future. The Secretary argues that this difference defeats Contestant's mootness claim and renders the *Performance Coal* decision irrelevant. *See* Sec'y Br. at 8-9; Sec'y Resp. at 5-7.

The Secretary construes the second prong too narrowly. In *Performance Coal*, the court noted that the proper question is not "whether [the operator] will again be subjected to the precise protocol at issue, but whether it will be subjected to further modifications from which it will seek temporary relief." *Performance Coal*, 642 F.3d at 237. Here, the court must therefore determine whether M-Class is likely to again be subjected to a (k) Order that is terminated before review can take place. MSHA's Mine Data Retrieval System shows at least three (k) Orders issued to M-Class at the MC#1 Mine since the (k) Order at issue. *See* MSHA Mine Data Retrieval System, *Mine Citations Orders and Safeguards*, https://arlweb.msha.gov/drs/ASP/MineAction.asp (last visited July 12, 2018). I find it reasonably likely that M-Class will again file a notice of contest against a (k) Order that is later terminated.

Accordingly, I find that the court has jurisdiction to review the validity of the terminated § 103(k) and the matter is not moot. The Secretary's motion is **DENIED**, and the parties are hereby **ORDERED** to comply with the terms of the May 3, 2018 Amended Notice of Hearing.

David P. Simonton
Administrative Law Judge

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Travis W. Gosselin, U.S. Department of Labor, Office of the Solicitor, 230 South Dearborn Street, Room 844, Chicago, IL 60604

Christopher D. Pence, Wm. Scott Wickline, and James P. McHugh, Hardy Pence PLLC, 500 Lee Street, East, Suite 701, P.O. Box 2548, Charleston, WV 25329