

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 Pennsylvania Avenue, NW, Suite 520N  
Washington, DC 20004

August 6, 2015

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

v.

CONSHOR MINING, LLC,  
Respondent.

**CIVIL PENALTY PROCEEDINGS**

Docket No. KENT 2008-90  
A.C. No. 15-18861-128273

Docket No. KENT 2008-481  
A.C. No. 15-18861-135978

Docket No. KENT 2008-560  
A.C. No. 15-18861-137279

Docket No. KENT 2008-561  
A.C. No. 15-18861-137261

Docket No. KENT 2008-562  
A.C. No. 15-18861-137278

Docket No. KENT 2008-782  
A.C. No. 15-18861-143281

Docket No. KENT 2008-1082  
A.C. No. 15-18861-149206

Mine: No. 1

**ORDER OF DISMISSAL**

Before: Judge Feldman

The captioned civil penalty proceedings are before me based upon petitions for assessment of civil penalty filed by the Secretary of Labor (“Secretary”) under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended (“the Act”), 30 U.S.C. § 815(d), against the Respondent, Conshor Mining, LLC (“Conshor”). The captioned dockets concern a total of 16 citations, for which the Secretary proposes a total civil penalty of \$1,193,659.00.<sup>1</sup>

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<sup>1</sup> Ten of the 16 citations at issue were originally designated by the Secretary as repeated flagrant violations under section 110(b)(2) of the New Miner Act. Three alleged repeated flagrant violations at issue in Docket Nos. KENT 2008-562 and KENT 2008-782 were deleted by the Secretary, at which time the Commission vacated its interlocutory review concerning the evidentiary requirements for a repeated flagrant violation. *See Conshor Mining, LLC*, 34 FMSHRC 571 (Mar. 2012). The remaining seven alleged flagrant violations in Docket Nos.

Further action in these matters has been held in abeyance pending Commission resolution of the novel question of the evidentiary requirements necessary for demonstrating a repeated flagrant violation under section 110(b)(2) of the Act, as amended by the Mine Improvement and New Emergency Response Act of 2006, 30 U.S.C. § 820(b)(2). In this regard, the Commission vacated its interlocutory review of the issue of the evidentiary indicia necessary to demonstrate a repeated flagrant violation after the Secretary deleted the three alleged repeated flagrant designations at issue in Docket Nos. KENT 2008-562 and KENT 2008-782. *Conshor Mining, LLC*, 34 FMSHRC 571 (Mar. 2012). Action in these matters was further delayed pending Commission review of the requirements for a repeated flagrant violation in *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013). However, the Commission was deprived of the opportunity to delineate the evidentiary requirements for a repeated flagrant violation as a consequence of the Secretary's ultimate deletion of the subject repeated flagrant designations. *Id.* More recently, in *Oak Grove Resources, LLC*, 37 FMSRHC \_\_\_, slip op. (June 23, 2015), the Commission denied interlocutory review of the same question after the Secretary opposed interlocutory resolution of this long-standing and unresolved issue.

On June 8, 2015, the Secretary reported, albeit belatedly, that Conshor was the subject of a final Chapter 7 bankruptcy proceeding that culminated on December 10, 2014, which, in effect, dissolved Conshor as a corporate entity and discharged Conshor from its debts. *Sec'y Mot. to Consolidate and for Order to Show Cause*, Ex. 1 (June 8, 2015). The Secretary was well-aware that there was a pending Chapter 7 bankruptcy proceeding involving Conshor because the Mine Safety and Health Administration (MSHA) participated as a creditor against Conshor, having filed a proof of claim seeking to recover outstanding civil penalties for uncontested or adjudicated violations outside the scope of these proceedings. *Id.*, Ex. 1 at 7-9. The relevant undisputed facts are as follows:

- Conshor filed a petition for bankruptcy under Chapter 7 of the Bankruptcy Code on July 11, 2012. *Id.*, Ex. 1 at 1.
- The Trustee's Final Account and Distribution Report was submitted to the Bankruptcy Court on June 17, 2014. *Id.*, Ex. 1 at 3.
- The Trustee's Report listed Conshor's creditors, along with claims asserted, claims allowed, and claims paid to those creditors. *Id.*, Ex. 1 at 7-9.
- Any claims not paid were discharged. *Id.*, Ex. 1 at 3.
- MSHA was listed as a creditor in the bankruptcy proceeding, asserting \$1,664,142.59 in claims. *Id.*, Ex. 1 at 7-9.
- The Trustee's Report indicates that \$697.43 was paid to MSHA, with the remainder discharged. *Id.*, Ex. 1 at 9.
- The total claims discharged without payment totaled \$3,983,573.10. *Id.*, Ex. 1 at 3.

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(fn. 1 cont.) KENT 2008-481, KENT 2008-560, and KENT 2008-561, were designated by the Secretary as "repeated" based on the Secretary's reliance on alleged "predicate violations." Although the Commission in *Wolf Run* has concluded that a prior history of violations is a relevant consideration, neither the Commission nor the Secretary, have definitively identified the necessary parameters for predicate violations that can serve as a basis for a repeated flagrant designation. *See Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013).

- On March 20, 2014, Conshor filed Articles of Dissolution with the Commonwealth of Kentucky. The dissolution became effective retroactively as of December 31, 2012. *Response o/b/o Conshor to Order to Show Cause*, Ex. F (July 17, 2015).

In view of the above, the Secretary filed a motion for an order to show cause “why Conshor’s notices of contest of the penalties assessed in these consolidated cases should not be dismissed and the penalties affirmed,” in light of Conshor’s bankruptcy. *Sec’y Mot. to Consolidate and for Order to Show Cause*, at 2 (June 8, 2015). I construe the Secretary’s motion as a request for a default judgment. Conshor’s former counsel in these proceedings opposes the Secretary’s motion, and instead seeks the dismissal of these dockets as moot. *Response o/b/o Conshor to Order to Show Cause*, at 2 (July 17, 2015).

To avoid the mootness sought by Conshor’s former counsel, the Secretary could have filed a motion for a default judgment at any time prior to June 17, 2014, when the bankruptcy trustee submitted her Final Account and Distribution Report to the bankruptcy court, which would have been granted. The Secretary then could have sought recovery of the civil penalties proposed in these matters by filing a proof of claim with the U.S. Bankruptcy Court for the Eastern District of Kentucky. In addition to the \$1,664,142.59 asserted by MSHA in Conshor’s bankruptcy proceeding, the Secretary could have filed a proof of claim for recovery of the proposed penalties in these matters. The Secretary, however, failed to do so.

As a consequence of his failure to pursue collection of these claims through bankruptcy, the Secretary, in effect, seeks to circumvent the bankruptcy process. However, bankruptcy is the sole means through which creditors can collect from an insolvent debtor.

Conshor filed Articles of Dissolution with the Commonwealth of Kentucky on March 20, 2014. *Id.*, Ex. F. The dissolution was retroactively effective as of December 31, 2012. *Id.* Conshor’s debts were discharged in bankruptcy on December 10, 2014. As a legal matter, the fact that the business entity Conshor Mining, LLC, was discharged in bankruptcy, renders any litigation against Conshor moot. For the federal courts have recognized that a case is moot “when it is impossible for the court to grant any effectual relief whatever to a prevailing party.” *In re Kurtzman*, 194 F. 3d 54, 58 (2nd Cir. 1999). Moreover, the “cases and controversies” language in Article III of the Constitution prohibits declaratory relief in moot cases. *E.g.*, *Mid-Continent Resources, Inc.*, 12 FMSHRC 949, 955 (May 1990). In addressing the question of mootness, the Commission has recognized:

The presence of a controversy must be measured at the time the court acts. It is not enough that there may have been a controversy when the action was commenced if subsequent events have put an end to the controversy or the opposing party disclaims the assertion of the countervailing rights. A case is moot when the issues presented no longer are “live” or the parties no longer have a legally cognizable interest in the outcome.

*Id.* (citing 10A *Wright & Miller* § 2727 (pp. 602-17) (footnotes omitted)).

Although the Commission has noted that the “case and controversies” requirement of Article III does not “literally apply to federal administrative agencies like the Commission,” the Commission has addressed its proper role in determining mootness:

[A]n agency possesses substantial discretion in determining whether the resolution of an issue before it is precluded by mootness. . . . However, in exercising this discretion, an agency receives guidance from the policies that underlie the “case or controversy” requirement of [A]rticle III. In particular, the agency’s determination of mootness is informed by an examination of the proper institutional role of an adjudicatory body and a concern for judicial economy. *See [Tennessee Gas Pipeline Co. v. FPC, 606 F.2d 1373, 1379-80 (D.C. Cir. 1979).]; Lucas Coal Co. v. Interior Board of Mines Operations Appeals, 522 F.2d 581, 587 (3d Cir. 1975)*. As a result, we conclude that an agency acts within its discretion in refusing to hear a case that would be considered moot if tested under the [A]rticle III “case or controversy” requirement.

*Id.* (citing *Climax Molybdenum Co.*, 2 FMSHRC 2748, 2751-52 (October 1980), *aff’d sub nom. Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447, 452 (10th Cir. 1983)).

In the final analysis, the Secretary now seeks to extract civil penalties from the proverbial stone. Consequently, any attempt to recover civil penalties from Conshor must be dismissed as moot.<sup>2 3</sup>

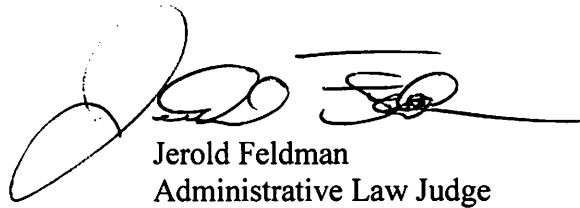
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<sup>2</sup> The mootness and impropriety of the Secretary’s desire to impose civil penalties through a post-dissolution default judgment, against a mine operator that cannot contest citations or engage in settlement negotiations in that it ceases to exist, is further evidenced by the overstated \$1,193,659.00 civil penalty sought to be imposed in these matters. For example, in the settlement reached in *CAM Mining, LLC*, 37 FMSRHC \_\_\_, slip op. (July 30, 2015), the Secretary agreed to delete the repeated flagrant designation for the subject citation that resulted in a reduction of the penalty initially sought by the Secretary from \$140,000.00 to \$4,000.00. In these proceedings, it is noteworthy that the Secretary’s has deleted three of the repeated flagrant designations alleged against Conshor, thus negating the imposition of enhanced civil penalties for at least three of the alleged subject violations.

<sup>3</sup> Summary disposition of a civil penalty proceeding requires an order to show cause prior to the entry of any order of dismissal in instances where a party fails to comply with an order of a judge or the Commission’s rules. 29 C.F.R. § 2700.66. In this instance, an order to show cause is not a prerequisite for the dismissal of this matter as the dismissal is not based on a failure of compliance.

**ORDER**

In view of the above, the Secretary's request for a default judgment **IS DENIED** and **IT IS ORDERED** that the captioned dockets **ARE DISMISSED** as moot.



Jerold Feldman  
Administrative Law Judge

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