FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 22, 2023

IMI AGGREGATES, LLC,	:	CONTEST PROCEEDING
Contestant,	:	
	:	Docket No. LAKE 2023-0249-RM
v.	:	Citation No. 9547190; 07/18/2023
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Cambridge City Pit
ADMINISTRATION (MSHA),	:	Mine ID 12-01034
Respondent,	:	

ORDER DENYING MOTION FOR EXPEDITED CONSIDERATION

This docket is before me upon the Notice of Contest filed by IMI Aggregates, LLC ("Contestant" or "the operator") under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(d). The Secretary timely filed her answer. Contestant has filed a Motion for Expedited Consideration, requesting an expedited hearing on this matter.

I. BACKGROUND

On July 18, 2023, MSHA Inspector Keith Duncan issued Citation No. 9547190 at the Cambridge City Pit mine under section 104(a) of the Mine Act alleging that "[t]he operator failed to provide nonconductive material at the E-stop button for the #1 conveyor," thus exposing miners to possible "fatal electrical shock injury" in violation of section 56.12020, 30 C.F.R. § 56.12020. (Mot., Ex. 1.) Inspector Duncan designated the citation as potentially fatal to one miner (though unlikely to significantly and substantially contribute to the cause and effect of a mine safety or health hazard) and as the result of low negligence on the part of the operator. (Mot., Ex. 1.) Contestant filed its notice of contest on August 7, 2023, denying any violation occurred and requesting the citation be vacated. (*See* Mot. at 2.)

The following day on August 8, 2023, Contestant filed its Motion for Expedited Consideration. On August 11, 2023, counsel for the Secretary filed the Response of Secretary of Labor in Opposition to Contestant's Motion to Expedite. Thereafter, Chief Judge Glynn Voisin assigned me this docket on August 17, 2023.

II. MOTION FOR EXPEDITED HEARING AND RESPONSE

In Contestant's Motion for Expedited Consideration, the operator requests an expedited hearing of its contest of Citation No. 9547190. (Mot. at 1.) Contestant asserts that in addition to the citation at issue in this case, MSHA "is threatening to write similar citations at its 21 other

mines," and, therefore, the operator "is being asked to correct this alleged hazard at its 22 locations or risk receiving high gravity/negligence 104(d) citations/orders." (Mot. at 2.) Contestant includes a declaration from Safety Manager Brad Wales and claims "this unnecessary abatement would entail roughly $40,000 in repairs, and each facility would be down 1 to 2 days if no issues arise with the repairs." (Mot. at 2; Mot., Ex. 2 at 2.) The operator's mines would supposedly need to be shut down for at least one day, resulting in approximately $1,540,000.00 in lost production while 300 miner employees would lose work. (Mot. at 2; Mot., Ex. 2 at 2.) The operator asserts that "[t]his alleged hazardous condition has existed for over 5 years and over 10 MSHA inspections." (Mot. at 2; Mot., Ex. 2 at 1.) Contestant also asserts that "Inspector Duncan stated that he agreed with [the operator's] position that there was no violation, but he had been told that he must write the citation." (Mot. at 2.) Contestant thus "seeks immediate review of this issue" through an expedited hearing and decision. (Mot. at 2.)

In response, the Secretary notes that the crux of Contestant's argument is theoretical—that MSHA may find similar conditions at other mines, that MSHA may issue violations of section 104(d), and that Contestant may have to do additional wiring to terminate any theoretical citations even though rewiring was unnecessary to abate the current citation. (Resp. at 2.) The Secretary points out that production was not stopped when the citation was issued or terminated, and that within five minutes of its issuance the operator abated the citation by placing a wooden pallet at the location with no further action to terminate the violation being ordered or taken. (Resp. at 2.) Thus, per the Secretary, "one of the traditional reasons for seeking an expedited hearing (i.e., to resolve a legal issue that has caused the cessation or curtailment of [mine] production) is not at issue in this matter." (Resp. at 2.) The Secretary emphasizes that Contestant is not being asked to correct this alleged hazard at its other mines to abate this citation, because "[n]o further abatement is required." (Resp. at 2–3.)

III. PRINCIPLES OF LAW

Commission Procedural Rule 52, 29 C.F.R. § 2700.52, sets forth the procedures for requesting and scheduling expedited proceedings, but it does not address the criteria under which such requests are to be evaluated. However, this rule contemplates circumstances exigent enough to permit scheduling a hearing on as little as five days of notice. 29 C.F.R. § 2700.52(b). Under Commission case law, Commission Judges are tasked with using "informed discretion" and considering all the facts when determining whether an expedited hearing is appropriate. *Wyo. Fuel Co.*, 14 FMSHRC 1282, 1287 (Aug. 1992). In *Wyoming Fuel*, the Commission held that the Mine Act does not mandate immediate hearings in all circumstances, nor does it require that a party's motion to expedite proceedings be granted on the terms sought. *Wyo. Fuel Co.*, 14 FMSHRC at 1287. Rather, a hearing by a Commission Judge must only be held "within a period of time reasonable under the circumstances of each case." *Id.*

Commission Judges have generally held that an expedited hearing is warranted upon a showing of "extraordinary or unique circumstances resulting in continuing harm or hardship." *Southwestern Portland Cement Co.*, 16 FMSHRC 2187, 2187 (Oct. 1994) (ALJ). Commission Judges have determined, however, that the mere threat of mine closure is not an extraordinary or unique circumstance warranting an expedited hearing. *See, e.g.*, *Wis. Indus. Sand Co.*, 36 FMSHRC 2789, 2789–90 (Oct. 2014) (ALJ) (denying motion for expedited hearing where only

a section 104(a) citation, and no section 104(d) withdrawal order or section 104(b) order, was at issue); *Consolidation Coal Co.*, 16 FMSHRC 495, 495–96 (Feb. 1994) (ALJ) (noting contestant's request for an expedited hearing was speculative where no closure order was in effect and the alleged citations and withdrawal order were promptly abated); *Energy West Mine Co.*, 15 FMSHRC 2223, 2223–24 (Oct. 1993) (ALJ) (denying expedited hearing because the operator contesting the section 104(d)(1) order was "not in a unique position," as every operator receiving such an order is under a continuing threat of closure and faces the possibility of a subsequent withdrawal order).

IV. ANALYSIS

First, Contestant's primary argument for its need to hold an expedited hearing is the parade of horribles, including financial hardship and work disruption, that will occur if its request is not granted. (Mot. at 2–3; Mot., Ex.2 at 2.) Contestant argues that an expedited hearing is appropriate because correcting similar violations at its other mines will be expensive and/or unnecessary. (Mot. at 4.) Indeed, Contestant asserts that MSHA "is threatening to write similar citations at its 21 other mines," and, therefore, Contestant "is being asked to correct this alleged hazard at its 22 locations . . . ." (Mot. at 2.)

Although Contestant worries about the *threat* of section 104(d) orders at its other mines, such worries are speculative when considering all the facts before me. Here, the evidence establishes that Contestant abated, and MSHA Inspector Duncan terminated, the citation within seven minutes after its issuance without shutting down the mine by placing a dry wooden pallet at the location for miners to stand on when operating the E-stop switch. (Mot., Ex. 1.) Indeed, these facts run counter to the assertions made by Brad Wales. In Wales's declaration nothing indicates Contestant is being compelled to fix the grounding issue under any section 104(d) citations or orders. (Mot., Ex.2 at 2.) And Contestant provides no evidence why its other mines would need to be shut down to perform the same work that only took seven minutes to abate. As the Secretary points out, nothing—other than the operator's unsubstantiated assertion that a shutdown would be required—suggests that Contestant would need to stop production for 1–2 days. (Resp. at 2.) As the Secretary correctly points out regarding Citation No. 9547190 which is the only alleged violation before me, "[n]o further abatement is required." (Resp. at 2–3.)

Here, the section 104(a) citation before me has already been abated and the mine continues production, so the mere possibility of a section 104(d) withdrawal order being issued to Contestant at the Cambridge Clay Pit mine or any of its other 21 mines is not an extraordinary or unique circumstance resulting in continuing harm or hardship. *See Wis. Indus. Sand Co.*, 36 FMSHRC at 2790; *Southwestern Portland Cement Co.*, 16 FMSHRC at 2187; *see also Mountain Cement Co.*, 23 FMSHRC 694, 694 (June 2001) (ALJ) (ruling that "[t]he possibility that an operator could be subject to future withdrawal orders under section 104(d) is neither extraordinary nor unique under the Mine Act."). Stripped down to its essence, this matter simply involves a run-of-the-mill section 104(a) citation, which does not warrant the extraordinary remedy of an expedited hearing.

Second, Contestant argues that an expedited hearing is proper because of a possibility that MSHA abused its discretion. Specifically, Contestant asserts that "Inspector Duncan stated

that he agreed with our position that there was no violation, but he had been told that he must write the citation"; thus, Contestant believes the inspector abused his discretion. (Mot. at 2; Mot. Ex.2 at 2.) In support, Contestant cites to *Mountain Cement* arguing that "the court granted the operator's request for an expedited hearing after finding, as it should in this case, that there was 'a very real possibility that the MSHA inspector abused his discretion or seriously misapplied the law . . . .' and that the operator would experience substantial economic hardship if required to comply with the citations." *Mountain Cement Co.*, 23 FMSHRC 694–95 (June 2001) (ALJ).

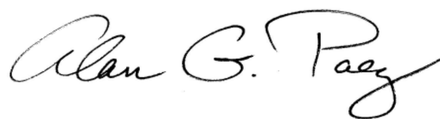
The alleged statement by Inspector Duncan, if true, is troubling but these circumstances are substantially different from the facts in *Mountain Cement*. In *Mountain Cement* the Commission Judge was concerned that MSHA abused its discretion because 20 violations were issued as section 104(d)(2) orders, yet most were subsequently modified to section 104(a) citations during a subsequent conference. *Mountain Cement Co.*, 23 FMSHRC at 695. Unlike the 20 withdrawal orders in *Mountain Cement*, I have before me a single section 104(a) citation. More importantly, despite MSHA Inspector Duncan's alleged statement, the operator does not contradict the underlying factual allegations that led to the issuance of Citation No. 9547190, as the Secretary points out. (Resp. at 3.) The operator's disagreement with MSHA citing it for an alleged electrical grounding violation does not rise to the level of extraordinary or unique circumstances resulting in continuing harm or hardship.

Lastly, Contestant argues this citation should be vacated both because the Secretary is estopped from citing this condition because she did not cite it in the prior five years, and because the condition did not violate the regulations. (Mot. at 2.) Contestant's estoppel argument is unpersuasive given recent Mine Act case law. *See Cactus Canyon Quarries, Inc. v. Fed. Mine Safety and Health Rev. Comm'n*, 64 F.4th 662, 666 (5th Cir. 2023). Likewise, Contestant's argument that it did not violate section 56.12020 is unpersuasive because, as the Secretary points out, Contestant fails to provide evidence to support this. (Resp. at 3.) In any event, neither of these arguments are relevant to the issue of an expedited hearing, as they do not rise to the level of unique or extraordinary circumstances.

For the above reasons and upon considering all the facts in exercising my informed discretion, I determine that Contestant alleges no extraordinary or unique circumstances resulting in continuing harm or hardship. Therefore, I conclude an expedited hearing is not warranted.

V. ORDER

In light of the foregoing, Contestant's Motion for Expedited Consideration is **DENIED**. The parties will alert my Law Clerk when both the penalty petition and answer have been filed, so I can consolidate this contest case with the penalty case for hearing and decision.



Alan G. Paez
Administrative Law Judge

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