

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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June 11, 2014

POCAHONTAS COAL COMPANY, LLC,  
Contestant,

v.

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

**CONTEST PROCEEDINGS**

Docket No. WEVA 2014-642-R  
Safeguard No. 7169714; 01/30/2014

Docket No. WEVA 2014-646-R  
Safeguard No. 9002753; 02/04/2014

Docket No. WEVA 2014-647-R  
Safeguard No. 9002751; 02/04/2014

Docket No. WEVA 2014-648-R  
Safeguard No. 9002752; 02/04/2014

Docket No. WEVA 2014-649-R  
Safeguard No. 9002750; 02/04/2014

Affinity Mine  
Mine ID: 46-08878

**ORDER OF DISMISSAL**

These cases are before me on Notices of Contest filed by Pocahontas Coal Company pursuant to Section 105(d) of the Federal Mine Safety and Health. These contests are directed not at a particular citation or order but, rather, at five written notices to provide safeguard issued by MSHA pursuant to Section 314(b) of the Act. On March 24, 2014 the Secretary filed a motion to dismiss for lack of jurisdiction. Sec’y Mot. 1. Pocahontas raises a number of arguments in its notice of contest and its response to the motion to dismiss, however, for reasons that follow, I find that the Commission is without jurisdiction to consider these arguments in the context of these proceedings and, accordingly, I **DISMISS** these cases.

On January 30<sup>th</sup> and February 4<sup>th</sup>, 2014 MSHA issued the five safeguards that are disputed in these dockets. In each case, MSHA notified Pocahontas that a mine specific requirement for safety, which related to the transportation of men and materials at the Affinity Mine, needed to be put in place. The “Condition or Practice” sections of the respective safeguards state that the documents are notices to provide safeguard and set forth the requirements MSHA seeks to impose. On February 27, 2014, Pocahontas filed these notices of contest pursuant to Section 105(d) of the Act to contest the issuance of each of the five safeguards.

The Secretary argues in its motion to dismiss that the jurisdiction of the Commission does not extend to an independent review of a notice to provide safeguard. The Secretary relies on the language in Section 105(d) of the Mine Act and asserts that 105(d) does not confer specific

jurisdiction to hear a contest arising from a notice to provide safeguard and, instead, jurisdiction attaches only once a citation or order has been issued for a violation of the underlying safeguard. In its response the mine operator argues that, pursuant to 105(d) of the Act, the Commission does have jurisdiction to hear arguments on the initial notice to provide safeguard, and that to deny jurisdiction is a violation of the mine's right to due process.

While the Commission has acknowledged a mine operator's right to contest the validity of a safeguard in the context of contest to a citation issued pursuant to a violation of the underlying safeguard, *see e.g., Southern Ohio Coal Co.*, 14 FMSHRC 1 (Jan. 1992), it has not addressed the question of whether it has jurisdiction to hear a contest of a notice to provide safeguard in the context of a separate proceeding prior to the issuance of a citation or order for a violation of the safeguard. Nevertheless, Commission judges have declined to review the validity of an underlying safeguard prior to the issuance of a citation for a violation of the underlying safeguard. *Beckley Coal Mining Co.*, 9 FMSHRC 1454 (Aug. 1987) (ALJ); *Colorado Westmoreland, Inc.*, 10 FMSHRC 1236 (Sep. 1988) (ALJ); *Jim Walters Resources, Inc.*, 18 FMSHRC 380 (Mar. 1996) (ALJ); *Jim Walters Resources, Inc.*, Unpublished Order of Dismissal dated April 22, 1996, Docket No. SE 96-118-R (ALJ). I am aware that there is an ALJ decision that reaches an opposite conclusion, but I am not bound by that case, nor do I agree with the reasoning set forth in that matter. *Affinity Coal Co., LLC*, Unpublished Order Denying Motion to Dismiss dated August 29, 2013, Docket No. WEVA 2013-700-R et al. (ALJ).

Similarly, the Commission has not addressed whether it has jurisdiction to hear a dedicated contest of a written notice of pattern of violations, and its judges, when addressing arguments similar to those raised in these matters, have reached conflicting results on that question. *See Bledsoe Coal*, Unpublished Order dated Nov. 11, 2011 (ALJ) (Judge William Moran found that the Commission did have jurisdiction to hear a contest of a written notice of pattern of violations); *Brody Mining LLC*, 36 FMSHRC \_\_\_, slip op. at 4, Docket No. WEVA 2014-81-R (Jan. 30, 2014) (Chief Administrative Law Judge Robert Lesnick found that the Commission was without jurisdiction to adjudicate the mine operator's contest of the written notice of pattern of violations by itself).

The Mine Act does not grant the Commission unfettered jurisdiction. In *Rushton Mining Co.*, 11 FMSHRC 759, 764 (May 1989) the Commission stated that it "is an agency created under the Mine Act with certain defined and limited administrative and adjudicative powers." Given that the Commission is "an administrative agency created by statute, it cannot exceed the jurisdictional authority granted by Congress." *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1860 (Aug. 2012) (citing *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169 (Sept. 1988)). A review of the Mine Act reveals no statutory authority for the Commission to hear a contest to a notice to provide safeguard in the context of a dedicated proceeding. Pocahontas has brought this action pursuant to section 105(d) of the Act. Section 105(d) provides mine operators with the right to contest, among a limited number other things, the issuance or modification of citations and orders. 30 U.S.C. § 815(d). Notably, the section does not afford a right to contest notices to provide safeguard. Further, the legislative history, the Secretary's regulations, Commission case law, and the Commission's Procedural Rules do not reveal any language which could be interpreted to grant the Commission jurisdiction to hear a contest of a notice to provide safeguard.

Safeguards are a unique enforcement tool available to the Secretary. Section 314(b) of the Mine Act grants the Secretary authority to issue “[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials.” 30 U.S.C. § 874(b). A representative of the Secretary, generally an inspector, may issue a notice to provide safeguard only after “determin[ing] that there exists . . . an actual transportation hazard this is not covered by a mandatory standard.” *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (Jan. 1992). The Commission has held that, because a notice to provide safeguard is issued by an inspector and is not subject to the notice and comment procedural protections of section 101, the language of a notice to provide safeguard “must be narrowly construed” and is “bounded by a rule of interpretation more restrained than that accorded promulgated standards.” *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985). Further, a notice to provide safeguard “must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard.” *Id.*; *See also Cyrus Cumberland Resources Corp.*, 19 FMSHRC 1781, 1784-1785 (Nov. 1997).

Given their unique nature, Safeguards cannot be construed to be either citations or orders. The Commission has stated that “in considering the meaning of the Mine Act, we must ‘give effect to the unambiguously expressed intent of Congress.’” *Revelation Energy*, 35 FMSHRC 3333, 3337 (Nov. 2013) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). Here, the distinction between a notice to provide safeguard and a citation or order issued subsequent to that notice is clear. The language of the Act makes clear that the notice to provide safeguard is a separate document which must be issued prior to any citation or order issued pursuant to section 314(b). Even if one could read some ambiguity into the language of the Act, Congress clearly intended to distinguish written notices issued pursuant to section 314(b), which are meant to act similar to a mandatory standard and put the mine on notice that in the future, the act or omission may result in a citation or order, from those citations or orders. If Congress had intended the Commission to hear contests to notices to provide safeguard, it would have said so or at least equated the notice to provide safeguard with citations or orders, which are subject to contest proceedings. Instead, Congress differentiated the notice to provide safeguard from citations and orders.

Contestant is not without remedy on the issue and may properly challenge the notice to provide safeguard in the context of a contest to a citation or order issued for violation of the safeguard. Section 105(d), as mentioned above, provides mine operators with the right to contest the issuance or modification of citations and orders. 30 U.S.C. § 815(d). The section then charges the Commission with affording an opportunity for a hearing and then issuing “an order . . . affirming, modifying, or vacating the Secretary’s citation, order, or proposed penalty, or directing other appropriate relief.” *Id.* Section 105(d)’s “unambiguous[] . . . broad grant of . . . authority to direct ‘other appropriate relief’” allows the Commission to address a notice of pattern of violations in the context of a contest to a citation or order issued for violation of that safeguard. *See North American Drillers, LLC*, 34 FMSHRC 352, 356 (Feb. 2012). If and when a citation or order is issued that alleges a violation of the one of the safeguards herein, Pocahontas may file a notice of contest or contest any penalty that is assessed as a result of the citation, and at that time, also raise the validity of the safeguard as a defense to the violation. If

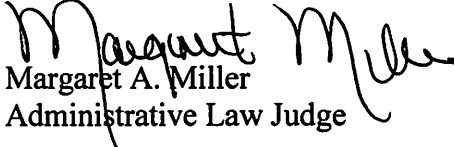
Pocahontas wishes to pursue the arguments set forth in its notice of contest, it may properly do so in the context of those proceedings.

The fact that the mine can contest any citation or order issued as a result of the notice to provide safeguard also negates the mine's due process argument. Due process claims require the Commission to consider three factors when a deprivation to a property interest occurs: (1) "the private interest that will be affected by the official action;" (2) the risk of an "erroneous deprivation of such interest through the procedures used" and the value of additional or substitute procedural safeguards; and 3) the Government's interest, including "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Due process, as described by the Court in *Mathews*, is "not a technical conception with a fixed content unrelated to time, place, and circumstances," and further, "is flexible and calls for such procedural protections as the particular situation demands." *Id.* (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961); *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)).

Here, Pocahontas argues that its property interest will be unjustly deprived should it not be able to immediately contest the notice to provide safeguard. It suggests that when a safeguard is issued it faces the "immediate choice" of spending "oftentimes large sums of money to comply with the safeguard" or accepting an order "effectively taking the equipment out of service or shutting down the mine." Pocahontas Resp. to Mot. to Dismiss. 17. Moreover, it argues that there are no current procedures in place which can protect Pocahontas from erroneous deprivation. Finally, Pocahontas argues that any government interest in having MSHA respond "flexibly and quickly to unsafe conditions" must be subjected to "some type of check and balance that affords protection to mine operators." *Id.* at 18.

I have already found that Mine Act does not provide the Commission with a formal mechanism to exert jurisdiction over this matter. I agree with the Secretary's argument that, because the Act does not provide the court with subject matter jurisdiction, it would amount to "bootstrapping" if the court could use an inquiry into whether constitutional due process has been violated to establish jurisdiction. Sec'y Reply. 5-6. Certainly I cannot create jurisdiction where none exists. Even so, I find that due process has not been violated. While a formal mechanism to immediately challenge the notice to provide safeguard may not exist, less formal mechanisms, such as a request for a technical citation, as is often used in the context of plan disputes, could seemingly be used to immediately contest the issue on an expedited basis. *See Mach Mining*, 34 FMSHRC 1784, 1787 n. 8 (Aug. 2012). Further, the Secretary concedes that, if the operator wishes to bring a facial challenge, it may properly do so in Federal District Court. Finally, I find that the government interest in flexibly and quickly addressing hazards related to the transportation of men and materials is an extremely compelling one. While Pocahontas asserts that no check and balance exists, I disagree, and find that the current system already does provide an opportunity for a check on the validity of the safeguard through the ability to contest the notice to provide safeguard following the issuance of citation or order for violation of such.

This docket contains no citations or orders, only the notice to provide safeguard that was issued to the mine, prior to the issuances of any 104(a) citation or order. Therefore, the above captioned contest proceedings are **DISMISSED**.

  
Margaret A. Miller  
Administrative Law Judge

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