

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 31, 2014

KINGSTON MINING, INC.,
Contestant

v.

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

CONTEST PROCEEDING

Docket No. WEVA 2014-812-R
Safeguard No. 9001627; 03/12/2014

Mine: Kingston No. 2
Mine ID: 46-08632

**ORDER DENYING SECRETARY OF LABOR'S MOTION
TO DISMISS SAFEGUARD CONTEST
ORDER DENYING CONTESTANT'S MOTION FOR EXPEDITED HEARING
AND
STAY ORDER**

Before: Judge Feldman

This matter is before me based on a Notice of Contest filed by Kingston Mining, Inc. ("Kingston"), regarding Safeguard No. 9001627 that was issued on March 12, 2014, by the Secretary of Labor ("Secretary") pursuant to section 314(b) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 874(b) (2006) ("Mine Act") or ("the Act").¹ On April 11, 2014, Kingston filed a motion seeking an expedited hearing of its safeguard contest. Thereafter, on April 30, 2014, the Secretary filed both a Motion to Dismiss Kingston's contest and an opposition to Kingston's request for an expedited hearing.

Disposition of the parties' motions has been held in abeyance to provide the Secretary with an opportunity to issue a justiciable notice of violation of the subject safeguard. To date, the Secretary has not issued a citation for the violation of the safeguard. Consequently, for the reasons set forth below, both the Secretary's Motion to Dismiss and Kingston's motion for an expedited hearing **ARE DENIED**. Kingston's contest **SHALL BE STAYED** pending the issuance of a citation that alleges a violation of the subject safeguard.

¹ Section 314(b) of the Mine Act authorizes the Secretary to issue safeguards that require remedial actions "to minimize hazards with respect to the transportation of men and materials" based on consideration of the specific conditions at the particular mine. *Southern Ohio Coal Co.*, 14 FMSHRC 1, 7 (Jan. 1992).

I. Background

Kingston operates two types of mobile coal haulage equipment at its No. 2 mine: traditional coal haulers, which are battery-powered; and shuttle cars, which are operated by trailing cables. Mot. to Expedite at 2. Following a mobile coal hauler accident, the Mine Safety and Health Administration (“MSHA”) concluded that camera systems must be installed on both types of haulage equipment. *Id.* Consequently, on March 12, 2014, MSHA issued Safeguard No. 9001627 pursuant to section 75.1403,² 30 C.F.R. § 75.1403, which states:

A mobile coal hauler was involved in an accident that injured a miner. The root cause of the accident was due to inadequate vision. This is a safeguard requiring that all mobile coal haulage equipment be equipped with a camera system that will provide adequate vision in all required directions to insure the safety of all miners.

Id. at 1.

Kingston asserts that it will be irreparably harmed and denied due process if it is obligated to install the camera systems required by the safeguard before it is given the opportunity to litigate the propriety of the safeguard in an expedited hearing. Mot. to Expedite at 3. As previously noted, to date, MSHA has not issued a citation for a violation of the safeguard.

In seeking to dismiss Kingston’s contest, the Secretary argues that the Commission lacks jurisdiction to review safeguard notices absent a relevant citation for an alleged violation of the safeguard issued pursuant to section 75.1403-1(b). The Secretary has filed a Motion to Dismiss Kingston’s contest and an opposition to Kingston’s request for an expedited hearing.

II. Discussion

Section 104(a) of the Act authorizes the Secretary to issue a citation for an alleged violation of the Act, or any mandatory health or safety standard. 30 U.S.C. § 814(a). The statutory authority in section 105(d), 30 U.S.C § 815(d), for the filing of contests by mine operators is limited to those pertaining to the issuance of a citation under section 104 of the Act.

² Section 75.1403 of the Secretary’s regulations repeats verbatim the provisions of section 314(b) of the Act that address hazards associated with the transportation of men and materials. The procedure for issuing citations for safeguard violations under section 75.1403 is described as:

The authorized representative of the Secretary shall in writing advise the operator of a specific safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a notice shall be issued to the operator pursuant to section 104 of the Act.

30 C.F.R. 75.1403-1(b).

It is well settled that a safeguard issued pursuant to section 314(b) of the Act is an interim mandatory safety standard,³ the violation of which constitutes a mandatory safety standard contestable under sections 104(a) and 105(d). *Wolf Run Mining Co.*, 32 FMSHRC 1228, 1236 (Oct. 2010). While it is clear that the Commission has the authority to adjudicate contests of citations for violations of safeguards, as noted by Judge Steele, “[t]here is no explicit grant of authority in the Mine Act empowering the Commission to consider the validity of safeguards” in the absence of a citation issued for its violation. *Elk Run Coal Co.*, 36 FMSHRC 805, 806 (Mar. 2014) (ALJ).

In the instant matter, I am sensitive to Kingston’s due process concerns. Kingston asserts that it will be irreparably harmed and denied due process if it is obligated to install the camera systems required by the safeguard before it is given the opportunity to litigate the propriety of the safeguard in an expedited hearing. Mot. to Expedite at 3. Balancing the limited authority in section 105(d) of the Act to challenge only post-enforcement safeguards with a mine operator’s due process rights to challenge a pre-enforcement safeguard is, essentially, a matter of first impression. However, adherence to the terms of section 105(d) limiting contests to only post-enforcement safeguard matters, while protecting a mine operator’s due process rights, may be accomplished by utilizing procedures similar to those established for resolving disputed provisions during the approval process for roof control or ventilation plans.⁴

When mine operators and the Secretary are unable to resolve disputed roof and ventilation plan provisions, the Secretary issues a citation alleging a violation for operating without an approved plan, sometimes referred to as a “technical citation,” so that the operator can litigate the matter before the Commission, satisfying its due process rights. *Prairie State Generating Co., LLC*, 35 FMSHRC 1985, 1985 n.1 (July 2013). Under such circumstances, a de minimis civil penalty can be proposed along with a reasonable abatement period to allow disposition of the validity of the “technical citation” in an expedited Commission proceeding.

This technical violation approach, as it is used to resolve disputes over provisions in roof or ventilation plans, can be utilized to satisfy Kingston’s contest of the subject safeguard. Following this procedure, Kingston’s contest of the safeguard can be merged with any subsequent relevant contest Kingston may file if a violation of the safeguard is issued. Merger can be best accomplished by staying this matter pending potential consolidation of any relevant future contest Kingston may file under section 105(d). Under such circumstances, I trust that a de minimis penalty will be imposed, as well as a reasonable abatement period to allow for litigation. The propriety of a reasonable abatement period is evidenced by the fact that the Secretary has, to date, not yet issued a violation of the subject safeguard. Consequently, the Secretary’s Motion to Dismiss Kingston’s contest, as well as Kingston’s motion for an expedited

³ Section 3(l) of the Act defines “mandatory health or safety standard” as “the interim mandatory health or safety standards established by titles II and III of this Act, and the standards promulgated pursuant to title I of this Act.” 30 U.S.C. § 802(l).

⁴ Analogous to safeguards, roof or ventilation plans are considered mandatory safety standards under section 104(a). *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 382 (D.C. Cir. 1976).

hearing, shall be denied in favor of staying this matter pending consolidation with a contest of any citation alleging a relevant violation of the safeguard.

In staying this matter, I am cognizant of Judge Steele's thoughtful decision in *Elk Run Coal Co.* that there is a "close nexus between a safeguard and a citation or order" that provides adequate implied authority under section 105(d) to hear pre-enforcement safeguard contests. 36 FMSHRC 805, 807 (Mar. 2014) (ALJ Steele). However, Judge Steele's decision was primarily predicated on due process concerns, which I have addressed above. Moreover, I decline to adopt Judge Steele's approach as it may result in unintended and undesirable consequences. Namely: (1) Adjudication of a pre-enforcement safeguard may result in an advisory opinion if a citation for a violation of the safeguard is never issued; and (2) the Commission's jurisdiction to adjudicate a pre-enforcement safeguard contest presents a controlling question of law that can only be resolved, in the absence of a relevant citation, through interlocutory review, a process that does not address the validity of the safeguard. *See* 29 C.F.R. § 2700.76 (a)(1)(i).

ORDER

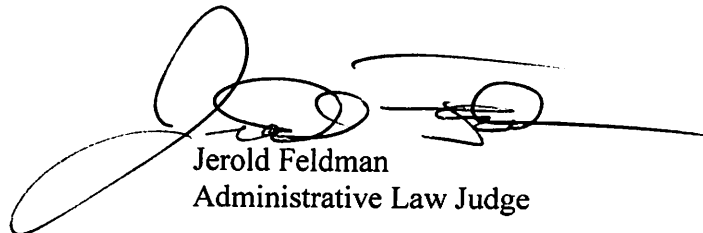
In view of the above, **IT IS ORDERED** that the Secretary's Motion to Dismiss Kingston Mining, Inc.'s contest of Safeguard No. 9001627 **IS DENIED**.

It is **FURTHER ORDERED** that Kingston Mining, Inc.'s Motion for Expedited Hearing **IS DENIED**.

It is **FURTHER ORDERED** that this contest proceeding **IS STAYED** pending consolidation with any relevant contest of a citation for a violation of Safeguard No. 9001627 filed pursuant to section 105(d) of the Act.

It is **FURTHER ORDERED** that the parties should file, with the undersigned, a joint motion for consolidation and to lift this stay **within 30 days** of the docketing of any relevant 105(d) contest proceeding.

I will entertain a motion to vacate Safeguard No. 9001627 by Kingston Mining, Inc. if a relevant citation for a violation of the safeguard is not issued on or before **October 1, 2014**, approximately seven months after the issuance of the subject safeguard.



Jerold Feldman
Administrative Law Judge

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