

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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September 17, 2010

PERFORMANCE COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 2010-1190-R
v.	:	Order No. 4642503; 04/05/2010
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine: Upper Big Branch Mine-South
Respondent	:	Mine ID: 46-08436

**ORDER GRANTING SECRETARY’S  
MOTION FOR SUMMARY DECISION**

This matter was initiated by Performance Coal Company (“Performance”) in an effort to gain modification of, or temporary relief from, a 103(k) order issued by the Secretary of Labor (“Secretary”) at the Upper Big Branch Mine (the “mine”). The order set forth protocols for entry into the mine for the accident investigation conducted by MSHA in cooperation with the West Virginia Office of Miners’ Health, Safety and Training (“OMHST”). Prior to the entry of the order, Performance submitted suggested protocols for the investigation which were rejected by both MSHA and OMHST. Performance subsequently filed an Emergency Application to Modify, or Alternatively for Temporary Relief. The motion for temporary relief was denied on July 7, 2010. Following the filing of additional motions, an order denying a request for an expedited hearing was entered on July 21, 2010. Shortly thereafter, on July 23, 2010, the Secretary filed a motion for summary decision based upon the voluminous material already contained in the file, including pleadings and affidavits from each party. On August 4, 2010, Performance filed an opposition to the motion for summary decision alleging that material facts are in dispute and, even if they are not, the Secretary is not entitled to summary decision as a matter of law. The Secretary subsequently filed a reply brief. For reasons that follow, I **GRANT** the Secretary’s Motion for Summary Decision.

**I. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

*a. Statement of Undisputed Facts*

1. Between May 3 and May 20, 2010, MSHA and Performance exchanged letters discussing initial accident investigation protocol guidelines regarding destructive testing

and the subdivisions of the underground inspection team. Performance's Memorandum of Points and Authorities in Support of Emergency Application to Modify, or Alternatively for Temporary Relief from MSHA's Section 103(k) Order ("Mem. Supp. of Application"), 3-4, Ex. 4 pp. 1-4.

2. On May 28, 2010, Performance contacted MSHA by letter and highlighted its objections to MSHA's preliminary protocol guidelines, which Performance had gathered from MSHA's various letters and from verbal communications with Chief Accident Investigator Norman G. Page. *Id.* at 4, Ex. 6.
3. On June 8, 2010, MSHA responded to Performance by letter and stated that MSHA's accident investigation team wanted to work with Performance as to what should be included in the protocols. MSHA also stated that the protocols would be completed and distributed to all parties before the start of the underground inspection. *Id.* at 4-5, Ex. 7.
4. Also on June 8, 2010, Performance submitted a draft investigation protocol for MSHA's review and approval. *Id.* at 5, Ex. 8. In its letter accompanying the draft, Performance stated "[w]e request your approval of this plan and, accordingly, the modification of the 103(k) Order at the appropriate time." *Id.* at Ex. 8 p. 1. Performance would have limited the composition of each team underground to two representatives from MSHA, two from OMHST, two from Performance, and one from the miners' representative. Performance's draft stated that "[o]nly Team members may go underground," except for occasional visits by officials from MSHA, OMHST, and Performance. *Id.* at Ex. 8 ¶¶ 1, 9.
5. On June 15, 2010, MSHA rejected Performance's submitted protocol and noted its deficiencies. *Id.* at 5, Ex. 10. That same day, OMHST similarly rejected Performance's submitted protocol. *Id.* at Ex. 11.
6. On June 24, 2010, MSHA provided Performance with a copy of its and OMHST's final joint protocols. *Id.* at 5, Ex. 12 pp. 3-7. The cover letter that MSHA sent with the protocols to Performance noted that MSHA had addressed some of Performance's concerns raised at a June 23, 2010 meeting by modifying the language of the joint protocols. *Id.* at Ex. 12 pp. 1-2. The modified provisions included those relating to photography, destructive testing and dust sampling. *Id.*
7. The joint protocols include provisions covering various investigative scenarios; of these provisions, Performance has objected to particular provisions relating to photography, dust sampling, mapping, and destructive testing. *Id.* at 5-6, Ex. 13.
8. On June 25, 2010, MSHA modified the Section 103(k) order at the Upper Big Branch Mine-South to reference the joint protocols, stating that the reason for the modification was to "insure the safety of any person in the mine, including all accident investigation team members." *Id.* at Ex. 15 p. 1. The joint protocols allow Performance to request that certain photographs be taken; to view them underground and promptly receive

copies of them; to receive copies of maps; and to receive excess material from dust samples whenever it is possible. *Id.* at 6., Ex. 12 pp. 5-6, Ex. 15.

9. From the time of the accident until some time in June, 2010, MSHA often detected potentially hazardous levels of carbon monoxide and other fire gases in the mine; MSHA also detected explosive levels of methane. Secretary's Memorandum of Points and Authorities and Statement of Undisputed Facts in Support of Motion for Summary Decision ("Sec'y Mem. Supp. Summ. Dec."), 4.
10. The Team Leader of MSHA's accident investigation, Norman Page, relied on his understanding that MSHA considered the existing ventilation system to be fragile due to the susceptibility of the temporary controls in place at the time. MSHA also saw issues of potential roof control hazards, poor visibility, water accumulations, and severely obstructed travelways with abundant trip-and-fall hazards. *See* Declaration of Norman G. Page, July 1, 2010 ("Page Decl."), ¶ 14.
11. Mike Lawless, the expert for Performance and a former MSHA employee, was not involved when the protocols were drafted but believes that there is a stable gas environment, with predictable straight line methane liberation, that is safe for an underground accident investigation, including use of digital photography and electronic mapping and surveying equipment. Declaration of Michael J. Lawless, P.E., C.M.S.P., July 13, 2010 ("Lawless Decl."), ¶ 24.
12. The joint protocols that are being used and were put in place through the amendment to the 103(k) order are contained in Exhibit C of the Secretary's Opposition to Emergency Application to Modify, or Alternatively for Temporary Relief from MSHA's Section 103(k) Order and Memorandum of Points and Authority in Support of Motion to Dismiss for Lack of Jurisdiction ("Sec'y Opp'n Application"). Sec'y Opp'n Application, Ex. C.
13. Since the amendment, MSHA has been operating under the auspices of the joint protocols in its underground investigation. Mem. Supp. of Application, Ex. 17 ¶ 41.
14. The Joint Protocols limit the number of individuals underground. There are to be certain types of teams (mapping, dust survey, electrical, photography, flames and forces, geologic mapping, and evidence gathering), and each team will consist of at least one MSHA representative and one OMHST representative. *Id.* at Ex. 14 ¶¶ 1, 2. One representative each from Performance, the West Virginia Governor's Independent Investigation Panel, and the miners' representative may accompany each team. *Id.*
15. MSHA Accident Investigation Leader Page determined that, in issuing the 103(k) order, limiting the number of individuals underground and the length of time individuals spend underground are safety-related concerns, as this minimizes the total number of individuals exposed to the potentially hazardous conditions. Page Decl., ¶ 4.

Performance agrees that quicker and more efficient investigation methods will improve the safety of investigators. *See* Mem. Supp. of Application, 9, Ex. 17 ¶ 12.

16. Limiting ignition sources underground in this mine is a safety-related concern that Page relied on in making his determination regarding the investigation protocols. *See* Page Decl., ¶¶ 18, 27.
17. Permissible cameras are not available. *Id.* at ¶ 27.
18. In rejecting Performance's request to take its own photographs, MSHA determined to limit the use of non-permissible cameras underground on the belief that it affects safety. *Id.* at ¶ 27.
19. If Performance had its own cameraman taking pictures underground, MSHA determined that this would increase personnel underground and the length of time of the investigation, thus raising safety concerns. *Id.* at ¶¶ 25, 30. According to the protocols, Performance may request that MSHA take a photograph where it deems appropriate.
20. The essential component of the company's transit system, needed for its laser mapping, is a non-permissible piece of equipment, which means that it is a potential ignition source. *Id.* at ¶ 18. This is a safety-related concern that MSHA raised in restricting the use of a laser transit system. *Id.* at ¶ 17.
21. MSHA restricted use of the laser transit system on safety grounds because MSHA determined that its use would increase the number of personnel underground or, if the number of personnel were not increased, would increase the length of time of the investigation for the people who were underground. *Id.* at ¶¶ 17, 19, 20. Lawless agrees that the mapping method Performance seeks to use would require additional persons underground. *See* Lawless Decl., ¶34.
22. MSHA restricted Performance from taking additional dust samples based on the belief that it affected safety, as performing a single dust sampling at each sampling point serves to reduce the amount of time spent by investigators underground. *See* Page Decl., ¶ 24.
23. The joint protocols do not prohibit Performance from being present at tests conducted on evidence. *See* Mem. Supp. of Application, Ex. 14 ¶ 39. MSHA inserted language on testing in the joint protocols after a dialogue with Performance, making clear that Performance will be notified of any tests to be conducted and given an opportunity to attend and review testing procedures (except for testing on rock dust samples). *See id.*; *see also* Page Decl., ¶ 7.<sup>1</sup>

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<sup>1</sup> As for destructive testing, Performance has not made clear what relief it seeks. It states that it wants to "participate meaningfully" in testing, but does not argue how MSHA's testing procedures fail to provide it with meaningful participation.

24. The joint protocols allow photographs to be taken only by MSHA and OMHST. The same is true of mapping. The other three entities involved in the investigation are restricted from doing either. Only MSHA will take dust samples. Sec'y Opp'n Application, Ex. C.
25. Performance, the miners' representative, and the West Virginia Governors' Independent Investigation Panel may ask MSHA to take certain photographs, observe all mapping and receive the results of each at the end of each shift. *Id.*

*b. Conclusions of Law*

The issues before me on the Secretary's motion for summary decision are both constrained and simple: Are there genuine issues as to any material fact regarding whether the Secretary abused her discretion in issuing the subject modification of the 103(k) order; and, if not, did the Secretary abuse her discretion? For reasons that follow, I find that there are no material facts in dispute, that the Secretary did not abuse her discretion, and, therefore, that the Secretary is entitled to summary decision as a matter of law.

Pursuant to Rule 67 of the Procedural Rules of the Federal Mine Safety and Health Review Commission ("Commission"), a motion for summary decision shall be granted if the entire record shows: "(1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see also Meek v. Essroc Corp.*, 15 FMSHRC 606, 615 (Apr. 1993); *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981). Summary judgment should not be granted unless it is clearly shown that a trial is unnecessary. *See Wimsatt v. Green Coal Co., Inc.*, 16 FMSRHC 487 (Feb. 1994) (ALJ). If a material fact is in dispute, then the ALJ must conduct an appropriate hearing. *Energy West Mining, Co.*, 16 FMSHRC 1414. (July 1994).

In order to determine what facts may be material, it is necessary to understand how section 103(k) orders, and their respective modifications, operate. Section 103(k) of the Act states:

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). I agree with Commission Judge Hodgdon that "section 103(k) provides that it is MSHA, not the operator, who is in charge of the investigation." *Rockhouse Energy Mining Co.*, 26 FMSHRC 599, 602 (July 2004) (ALJ). The Act gives MSHA plenary power to make

post-accident orders for the purpose of protection and safety of all persons. *Miller Mining Company, Inc. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983). MSHA has broad authority to issue 103(k) orders to effectuate this purpose. *Buck Mountain Coal Co.*, 15 FMSHRC 539 (Mar. 1993) (ALJ); *West Ridge Resources, Inc.*, 31 FMSHRC 287 (Feb. 2009) (ALJ). This broad grant of authority is recognized in the legislative history, which states that:

[t]he unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise *broad discretion* in order to protect the life or to insure the safety of any person. The grant of authority under section [103(k)] to take appropriate actions and . . . to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders.

S. Rep. No. 95-181, at 29 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978) (emphasis added).

Given the broad discretion afforded the Secretary, her issuance of a 103(k) order, or subsequent modification, is reviewable for an abuse of discretion. The case law addressing this standard, while generally applied in the context of roof and ventilation plan contests, is equally applicable here. Pursuant to such, and according to the abuse of discretion standard, the Secretary must show that Norman Page, the MSHA investigation team leader, did not act in an arbitrary and capricious manner in deciding to issue the 103(k) order and subject modification. *See Peabody Coal Co.*, 18 FMSHRC 686, 690 (May 1996), *aff'd* 111 F.3d 963 (D.C. Cir. 1997). The Commission in *Twentymile Coal* applied the following guidance in determining if the actions of a district manager were arbitrary and capricious:

The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” In reviewing the explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

30 FMSHRC 736, 754-755, quoting *Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The material facts in this matter are those that “materially” address whether the Secretary examined the relevant data and articulated a rational connection between the facts and the issuance and modification of the 103(k) to “insure the safety of any person in the . . . mine.” I find that the undisputed facts, as outlined above and discussed below, sufficiently address all pertinent matters in this case such that there are no genuine issues as to any material fact.

Performance seeks to have Modification 66 to Order No. 4642503 immediately modified to permit Performance:

- (i) to conduct its investigation using its own photography;
- (ii) to conduct its investigation using its own electronic mine mapping;
- (iii) to conduct its own dust sampling or parallel dust sampling with MSHA; and
- (iv) to participate meaningfully in any destructive testing of evidence.

Performance’s Supplemental Response in Supp. of Application, 2. However, the issue is whether the Secretary abused her discretion, and is not whether Performance’s suggested protocols are better, or whether Performance would conduct the investigation differently. Performance does not dispute that it spent a great deal of time supplying information and input into the protocols prior to the issuance of the modification of the (k) order by MSHA.

MSHA Investigation Leader Page explained that, while MSHA was conducting the investigation jointly with OMHST, the agencies did consider suggestions from other parties, including Performance. However, Page explained, MSHA’s primary concern is safety, and too many persons underground increases the risk of exposure to potentially hazardous conditions, further delays the investigation, and increases the amount of time it takes for those persons underground to exit the mine in the event of an emergency. MSHA considered input from Performance and modified its protocols to accommodate a number of Performance’s requests. As Page explained, MSHA “must maintain the highest level of safety possible during the underground inspection so that no inspection team member is placed in unnecessary danger.” Page Decl., ¶ 15. He goes on to state that, while MSHA has determined that the underground investigation may proceed in a safe manner, “the mine still presents a potentially hazardous environment in which no individual should stay unnecessarily.” *Id.* Page explained that, in determining that a limited number of cameras should be underground, he took into consideration the fact that cameras are not permissible, that gas checks must be made before they are used and that the inspection will proceed more quickly with only one photographer. In addressing the issue of mapping, again he considered the issue of permissibility and the number of persons underground for purposes of safety. The same is true of the dust sampling. Page considered input from all entities who have an interest in the investigation and made adjustments to the protocols where appropriate. The joint protocols were agreed to by four of the five entities

represented underground, and were only disputed by Performance.

It is the Secretary's duty to systematically evaluate the conditions and practices at the mine and keep the section 103(k) order in effect until it can be determined that the hazards that caused the explosion have been corrected and will not recur. In doing so, the Secretary must conduct a thorough investigation into the cause of the accident. In light of the conditions at the Upper Big Branch Mine as described in the declaration of Norman Page, I conclude that the Secretary may insist on protocols that she believes are necessary to insure the safety of the investigation. While those protocols may not be what Performance wants or expects, they are nonetheless reasonable and intended to insure the safety of all persons in the mine.

The mine asserts that the protocols, specifically limiting the use of cameras, mapping and dust samples, are not related to safety. Performance further alleges that the refusal to allow it to take its own photographs, conduct its own mapping and dust sampling, deprives the mine of its congressional mandate to conduct its own investigation into the cause of the accident. First, as noted above, I find that the protocols are related to safety and are reasonable given the information before Page. Lawless, who was not involved in the creation of the protocols, has a differing view of what should be included. However, a differing view does not take away from the reasonableness of the decision made by Page. Second, Performance is not deprived of the opportunity to fulfill its duty to investigate the cause of the explosion at its mine, as the mine argues. Not only can the mine gather information while accompanying the MSHA investigation team, it can conduct an independent investigation when MSHA has completed its investigation and released the (k) order on the mine. It appears that no discussion of this right took place with Page, but even so, it does not diminish the reasonableness of his decision in putting the protocols in place.

Finally, Performance questions Page's credibility by submitting the affidavit of Andrew J. Neuhalfen. Neuhalfen Decl. Neuhalfen's declaration addresses an incident that occurred during a mantrip inspection. Page was present for a short time during the inspection and observed problems with photographers from various parties all attempting to take photographs at the same time. Neuhalfen, who was one of the individuals taking photographs, disputes that there was any problem and seeks to blame Page for any disruption that may have occurred. While the facts surrounding the event described by Neuhalfen may be in dispute, they are not material to the matter at hand, and the statement of Neuhalfen is not enough to put Page's credibility at issue.

Addressing every argument raised and each document submitted by Performance is not necessary in this case. The largest portion of the information submitted by Performance is irrelevant to the heart of this matter, i.e. whether Page abused his discretion in issuing the modification of the (k) order to include the investigation protocols. For example, the opinion of Lawless that this investigation is being conducted differently than other MSHA accident investigations is meaningless, as each accident investigation has its own special circumstances that must be addressed when determining how to best proceed. In addition, the many affidavits identifying impermissible equipment used by MSHA in the investigation have no bearing on the decision regarding Page's discretion, as he described a "limit" on impermissible equipment as opposed to a "ban" on such. Further, the opinions of Performance's experts who take issue with



the way the investigation is being conducted do not show that Page was any less reasonable in making his decisions. I find that Page considered the relevant evidence, offered a logical explanation for his decisions, and did not abuse his discretion with regard to the 103(k) order.

### **ORDER**

I conclude that the Secretary has met her burden of proving that Page did not abuse his discretion and that the joint protocols are rationally connected to safely conducting the accident investigation. Accordingly, the notice of contest filed by Performance is **DISMISSED** and the Secretary's motion for summary decision is **GRANTED**.

Margaret A. Miller  
Administrative Law Judge

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