FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

October 24, 2006

UNITED MINE WORKERS OF AMERICA, LOCAL 1248,	:	COMPENSATION PROCEEDING
Complainant	:	Docket No. PENN 2002-23-C
v.	:	
MAPLE CREEK MINING, INC.,	:	Maple Creek Mine
Respondent	:	Mine ID 36-00970

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION

This case is before me on a complaint filed pursuant to section 111 of the Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. § 821. The United Mine Workers of America, Local 1248 ("UMWA"), seeks compensation for miners idled by an order issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") requiring the withdrawal of miners from the Maple Creek Mine. By Order dated May 4, 2006, Respondent's motion for summary decision was denied, on grounds that the section 104(b) withdrawal order upon which the compensation claim is predicated became final for purposes of section 111. Respondent has moved for reconsideration of that ruling, and the UMWA has opposed the motion. The Secretary of Labor was invited to appear as *amicus curiae*, and submitted a brief addressing three issues. As explained more fully below, Respondent's motion to reconsider is denied.

Pertinent Facts

A more detailed recital of facts is set forth in the May 6, 2006, order. On July 30, 2001, an MSHA inspector found that the bleeder system was not effectively ventilating a section of Maple Creek's mine. He issued Citation No. 7082157, alleging a violation of 30 C.F.R. § 75-334(b)(1), and directed that the violation be abated the following day. He returned to the mine on July 31, 2001, found that virtually no steps had been taken to abate the violation, and issued Order No. 7060223 pursuant to section 104(b) of the Act, which required the withdrawal of miners from the affected area. Complainant seeks compensation for miners idled by that order.

Maple Creek did not contest Order No. 7060223 pursuant to section 105(d) of the Act. On February 25, 2002, MSHA proposed civil penalty assessments for various citations and orders issued to Maple Creek, including Citation No. 7082157, for which a penalty of $9,000.00 was proposed. Maple Creek contested the proposed penalties, and the Secretary filed with the Commission a Petition for Assessment of Civil Penalties against Maple Creek, Commission

Docket No. PENN 2002-116. No civil penalty was assessed for Order No. 7060223, and it was not specifically identified in the assessment, the petition or Maple Creek's answer to the petition. The Secretary subsequently filed a Motion for Decision and Order Approving Partial Settlement, which sought Commission approval of a settlement that included a proposed reduction in the civil penalty assessed with respect to Citation No. 7082157. The motion described the citation and added the following discussion:

> A § 104(b) Order Number 7060223 was issued on July 31, 2003 [sic], for the Respondent's failure to correct the condition cited in Citation Number 7082157. A penalty of $9,000.00 was specially assessed based on the high negligence rating and the § 104(b) Order.
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> After further discussions with the operator, the Secretary recommends that the citation should remain classified as high negligence but Order Number 7060223 should be vacated. While the negligence is still high, the parties submit that it is somewhat less than initially determined. Respondent was unsuccessfully attempting to correct the condition listed in Citation No. 7082157 at the time the 104(b) Order No. 7060223 was issued. Therefore, a reduction in the assessed penalty to $2,000.00 is warranted.

On August 11, 2003, a Decision Approving Partial Settlement was entered, granting the Secretary's motion and approving the proposed reduction of the civil penalty assessed for Citation No. 7082157.

Discussion

Based upon the representations in the Secretary's motion in PENN 2002-116, and the fact that the motion was granted, Respondent argued that Order No. 7060223 was vacated, i.e., never became final, and could not form the basis for an award of up to one week's compensation under section 111. Respondent's arguments were rejected based upon findings that the 104(b) order was not at issue in the civil penalty proceeding and, since Respondent had not contested the order within 30 days of its issuance pursuant to section 105(d), it had become final for purposes of section 111. Maple Creek now seeks reconsideration of that ruling, reasserting its argument that the ALJ's "decision approving the settlement was effective in vacating [Order No. 7060223]."

I hereby reaffirm the earlier holding that the 104(b) withdrawal order was not at issue in the civil penalty proceeding, i.e., the Administrative Law Judge did not have jurisdiction to entertain a challenge or grant relief with respect to that order. Section 104(b) orders, like the one at issue here, typically do not allege a separate violation. Consequently, no civil penalty can be assessed for the order under the mandatory language of section 110(a) of the Act. It appears that a penalty could be assessed for a section 104(b) order under section 110(b), which provides that a civil penalty of up to $5,000.00 *may* be assessed for each day that a violation continues beyond the specified abatement date. However, the Secretary has rarely sought to impose that

considerably more severe sanction.[1] Of course, a penalty must be assessed for the violation charged in the underlying citation. The assessment typically describes the "Type of Action" of the citation as "104A - 104B," as was done with respect to the citation relevant to this case.

Maple Creek argues that the description on the assessment form "must be presumed to include the 104(b) order within the civil penalty proceedings," or else it would have had no opportunity "to a civil penalty proceeding on the 104(b) order." Res. Mot. at 2. The Secretary takes the position that, since there are no specific requirements as to the form or content of a notice of contest, "as long as the operator has indicated, and MSHA understands, which citations and orders [the operator] wishes to contest . . ., the contest(s) will be accepted and forwarded to the Commission. In this case, the operator returned a proposed assessment card which contained the notation '104A – 104B' in the 'Type of Action' column. MSHA proceeded with the understanding that the operator had contested both the Order issued under section 104(b) and the underlying 104(a) citation." Sec'y. Br. at 3.

The Commission's jurisdiction to entertain a challenge to or grant relief from a section 104(b) withdrawal order must be determined by the authority bestowed upon it in the Act, not by "presumptions" or by "understandings" between mine operators and MSHA. The Act provides two potential opportunities for an operator to contest before the Commission an order issued under section 104. Section 105(d) provides an operator a right to contest an order issued under section 104 within 30 days of receipt of the order. Maple Creek did not exercise its right to contest Order No. 7060223 within the 30-day period.

Where a proposed civil penalty is assessed under section 110(a) for a cited violation, section 105(a) provides that an operator has a right to contest the alleged violation or the proposed assessment of penalty within 30 days of receipt of notice of the proposed assessment. However, no opportunity to contest the 104(b) order was provided under section 105(a) because there was no violation alleged in the 104(b) order, and there was no proposed assessment of a penalty for it.[2] Maple Creek was not entitled to have a penalty assessed for the 104(b) order, or to a second opportunity to contest it.

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[1] See *Thunder Basin Coal Co.*, 19 FMSHRC 1495 (Sept. 1997), for an example of assessment of penalties under section 110(b) of the Act.

[2] Because no penalty was assessed for the 104(b) order, the notation "104A – 104B" on the assessment form was nothing more than a shorthand reference to the operator's lack of good faith in attempting to achieve rapid compliance after notification of a violation, one of the factors that the Commission must consider in fixing the amount of a civil penalty. 30 U.S.C. § 820(i). The operator's good faith is only one of several factors that might be addressed in determining the reasonableness of an inspector's decision to issue a 104(b) order. *See Youghiogheny and Ohio Coal Co.*, 8 FMSHRC 330, 339 (Mar. 1986) (*citing Consolidation Coal Co.*, BARB 76-143 (1976)).

Similarly, the Secretary's "jurisdiction by agreement of the parties" argument must be rejected because it is inconsistent with the statute. Moreover, it appears that the Secretary has taken a contrary position in cases before the Commission.

In *Consolidation Coal Co.*, 20 FMSHRC 988 (Sept. 1998), an operator sought to challenge a section 104(b) order in a penalty proceeding on the underlying citation. The ALJ held that he lacked jurisdiction over the section 104(b) order because it was not attached to the Secretary's petition for assessment of a civil penalty. It is not clear how the jurisdictional issue was raised, or what position the Secretary took with respect to it. However, when the operator filed a notice of contest of the order, the Secretary moved to dismiss, claiming it had not been timely filed. The Judge denied the motion, and eventually vacated the order. On review, the Commission affirmed the ALJ's decision, and did not comment on the earlier jurisdictional ruling or the ALJ's decision to accept the late-filed notice of contest.

More recently, the Secretary argued that section 104(b) orders that are not immediately contested pursuant to section 105(d) are not subject to challenge in a civil penalty proceeding under section 105(a) for the underlying citation because they do not contain special findings. *Nelson Brothers Quarries*, 24 FMSHRC 980, 982 (Nov. 2002) (ALJ).[3] Maple Creek has cited several ALJ decisions approving settlements of civil penalty actions, in which related section 104(b) orders were also addressed. However, it is unclear whether the subject orders had been properly contested in those cases. In any event, the jurisdictional issue was not raised or discussed, and ALJ decisions are not binding.

As noted above, Commission ALJ's have reached different conclusions on the issue of whether a 104(b) order can be challenged in a civil penalty proceeding on the underlying citation. In *Mid-Continent Resources, Inc.*, 11 FMSHRC 505 (April 1989), the operator had also challenged a 104(b) order in a penalty proceeding on the underlying citation. In affirming the ALJ's decision vacating the order, the Commission identified the jurisdictional issue presented by the operator's failure to contest the order pursuant to section 105(d), but declined to address the issue because it was not argued to the judge or raised on review. *Id.* n. 5 at 508.

Because the 104(b) order was not contested pursuant to section 105(d) and could not be contested pursuant to section 105(a) because there was no civil penalty assessed, the order was not at issue in the civil penalty proceeding and the ALJ in that case did not have jurisdiction to entertain a challenge to it or grant relief from it.

As the Secretary points out in her submission, she has the sole discretion to decide whether to prosecute or vacate a citation or order, at least one that has not become a final order of the Commission, and that discretion is unreviewable by either the Commission or its ALJs.

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[3] The Judge in that case held that the section 104(b) orders could be challenged in the civil penalty proceeding involving the underlying citations, finding that they were related and that neither the Act nor the Commission's Procedural Rules precluded the challenge.

RBK Construction, Inc., 15 FMSHRC 2099 (Oct. [check] 1993); *Eastern Associated Coal Corp.*, 19 FMSHRC 659, 669 (1997). However, aside from the fact that there is no evidence in the record establishing that the Secretary took steps to vacate the order, e.g., by issuing a continuation sheet stating that the order was vacated, it is not clear that the Secretary would have had the authority to vacate the uncontested order.[4]

In any event, a belated agreement by the Secretary to vacate a 104(b), which had little or no continuing legal significance and was not at issue in a contest proceeding before the Commission, would not render the order invalid for purposes of section 111. Section 111 is remedial in nature and was not intended by Congress to be interpreted and applied narrowly. *Local Union 1889, District 17 UMWA v. Westmoreland Coal Co.*, 8 FMSHRC 1317, 1323 (Sept. 1986). The compensation claimed here is available only "after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after [the subject] order is final." 30 U.S.C. § 821. For a 104(b) withdrawal order for which no civil penalty was assessed, the proceeding in which the opportunity for a public hearing would be presented would be a section 105(d) contest proceeding. There was no such proceeding for Order No. 7060223, because it was not contested within 30 days of its receipt. The onus of that failure must fall on Maple Creek, the only party that had an interest in challenging the order.[5]

I find that resolution of the limited issue presented by Maple Creek's renewed motion is governed by *Local Union 2333, District 29, UMWA v. Ranger Fuel Corp.*, 12 FMSHRC 363, 370-71 (March 1990) and *Local Union 1810, District 6, UMWA v. Nacco Mining Co.*, 11 FMSHRC 1231, 1239 (July 1989). Because Maple Creek did not contest the issuance of Order No. 7060223 within 30 days of receipt, it became final for purposes of section 111. The validity of the order was not at issue in PENN 2002-116, and it was not affected by the settlement of the related citation.

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[4] The question of the Secretary's authority was suggested as an issue upon which the Secretary might wish to comment in the June 13, 2006, Invitation to the Secretary of Labor to Appear as Amicus Curiae. The Secretary's brief did not specifically address that issue.

[5] While miners or their representatives may also contest the issuance of a 104(b) order under section 105(d), it would be an unreasonable interpretation of the Act's compensation provisions to require them to challenge the very order they rely upon for their claim.

ORDER

Upon consideration of the above, Respondent's Motion for Reconsideration of the Denial of its Motion for Summary Decision is hereby **DENIED**.

Michael E. Zielinski
Administrative Law Judge

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