# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 14, 2003

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| M & H COAL COMPANY, | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| | : | Docket No. PENN 2002-176-R |
| | : | Citation No. 7004521;07/02/2002 |
| v. | : | |
| | : | Docket No. PENN 2002-177-R |
| SECRETARY OF LABOR, | : | Citation No. 7004522;07/02/2002 |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION, (MSHA), | : | Mercury Slope |
| Respondent | : | Mine ID 36-01920 |

**ORDER GRANTING SECRETARY'S MOTION FOR SUMMARY DECISION AND STAY ORDER**

These cases are before me on Notices of Contest filed by M&H Coal Company under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(d). M&H contests the issuance of a citation and an order by an MSHA inspector alleging that it was mining pillars in violation of its approved roof control plan. The Secretary has moved for summary decision, pursuant to Commission Procedural Rule 67, 29 C.F.R. § 2700.67, contending that the entire record shows that there is no genuine issue as to any material fact and that the Secretary is entitled to summary decision as a matter of law as to the validity of the alleged violations. For the reasons set forth below, the Secretary's motion is granted.

Facts

The pleadings, responses to discovery, affidavits and other portions of the record establish that, for purposes of this motion, there is no genuine issue as to the following facts. While certain of the facts might ultimately be disputed by the Secretary, for present purposes, the facts are assumed to be as alleged by M&H.

M&H operates a deep anthracite coal mine. As of May 2002, its approved roof control plan did not provide for the removal of pillars on the 3rd level west gangway of its Mercury Slope Mine. By letter dated May 18, 2002, it submitted a proposed addendum to its roof control plan to the MSHA District Director, pursuant to which it proposed to mine main haulage pillars in that area. On June 20, 2002, Kenneth Richter, a consultant to M&H, was advised by a MSHA field office supervisor that he and a MSHA roof control specialist favored approval of the addendum, but that they had been unable to convince John A. Kuzar, MSHA's District Director,

to approve it. It was suggested that M&H might be able to persuade him. In a phone conversation that morning, Richter spoke with Kuzar, who confirmed that he was going to deny the requested addendum, remarking that he had never seen anything like the proposed addendum. Neither Kuzar, nor the other MSHA staff who participated in the conversation had ever been in M&H's mine. Richter responded that M&H had removed pillars in the manner proposed for fifty years and never had any problems. Kuzar responded that M&H was now mining deeper than it ever had before, he felt that the proposed mining was too deep, and he feared they would have a collapse resulting in fatalities. Kuzar also referred to a computer analysis that indicated that the pillars could not be removed safely, and advised that his technical support group had not yet finished its analysis of the proposal. Richter countered that the computer program was designed for bituminous, not anthracite, coal. Richter answered two questions posed by other MSHA staff. Kuzar stated that he was going to deny the requested addendum and that M&H would get the written response in a few days.

On June 21, 2002, the day after the phone conversation, M&H commenced pillar recovery at the subject location, in violation of its approved roof control plan. M&H hoped to be able to demonstrate that pillar removal could be done safely. On July 1, 2002, M&H received a letter dated June 28, 2002, from Kuzar advising that the proposed addendum to the roof control plan was disapproved. The letter stated the reasons for the denial and listed five "circumstances" upon which the decision was based. M&H continued to remove the pillars at the subject location. On July 2, 2002, MSHA inspected the mine, and observed the ongoing pillar recovery operations. Citation No. 7004521, was issued, citing M&H for conducting mining operations in violation of its approved roof control plan.[1] Order No. 7004522 was also issued, directing that all pillaring operations cease. M&H then ceased pillaring operations.

M&H filed notices of contest, challenging the citation and order, alleging that MSHA's denial of the proposed addendum to its roof control plan was arbitrary and capricious, and requesting a reversal of MSHA's determination that the pillars could not be removed in accordance with its proposed plan and its customary and usual practices. By letters dated July 26, and 30, 2002, M&H requested a "conference" to discuss the reasons for the denial of the addendum, pursuant to 30 C.F.R. § 75.220(b)(2). A meeting was held on August 7, 2002, at which M&H agreed to have tests run on the compressive strength of its coal. Following those tests, on August 29, 2002, Kuzar reaffirmed the denial of the requested addendum.

The Applicable Law

The Mine Act and regulations require that operators conduct mining in conformance with a mine-specific roof control plan, approved by the Secretary. 30 U.S.C. § 862, 30 C.F.R. § 220.

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[1] The citation initially charged a violation of 30 C.F.R. § 75.220(a)(1) which requires that an operator develop and follow a roof control plan approved by MSHA's District Manager. It was modified following a conference to allege a violation of subsection (c), which states that: "No proposed roof control plan or revision to a roof control plan shall be implemented before it is approved."

The regulations provide that the operator be notified in writing of the denial of a proposed revision to a plan and that "the deficiencies of the plan or revision and recommended changes will be specified and the mine operator will be afforded an opportunity to discuss the deficiencies and changes with the District Manager." 30 C.F.R. § 75.220(b). While the Secretary of Labor retains the ultimate authority and responsibility to determine the contents of the plan, her discretion is not unbounded. In discussing comparable provisions of the regulations applicable to ventilation plans, the Commission stated:

> The requirement that the Secretary approve an operator's mine ventilation plan does not mean that an operator has no option but to acquiesce to the Secretary's desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan provision, review of the dispute may be obtained by the operator's refusal to adopt the disputed provision, thus triggering litigation before the Commission. *Penn Allegh Coal Co*., 3 FMSHRC 2767, 2773 (Dec. 1981).

*Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985).

Both the Secretary and the operator are obligated to engage in good faith negotiations and an operator who fails to do so may be precluded from challenging the denial of a proposed amendment. *Id*. *and see C.W. Mining Co.*, 18 FMSHRC 1740, 1746-47 (Oct. 1996); *Peabody Coal Co.*, 15 FMSHRC 381, 387-88 (March 1993).

M&H does not dispute that, on July 2, 2002, it was removing pillars in non-conformance with its approved roof control plan, as alleged in the citation and order. Through these notices of contest, it seeks to obtain a declaration that the decision to deny the proposed addendum to its roof control plan was arbitrary and capricious, that the addendum should have been approved and it should not have been cited for the violations.[2] The dispute here is centered on whether M&H and the Secretary fulfilled their respective obligations to negotiate prior to the issuance of the citation. The Secretary contends that M&H did not fulfill its obligation to negotiate and, therefore, is precluded from challenging the correctness of the decision to deny the proposed addendum. M&H contends that the Secretary did not fulfill her obligation to negotiate and that further attempts to negotiate beyond the July 20, 2002, phone conversation would have been futile.

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[2] While M&H also challenges the gravity and negligence determinations made by the inspector and stated on the citation, the main thrust of these actions is a challenge to the alleged violations, i.e., to reverse the denial of its proposed roof control plan addendum. The Secretary's motion, and this order, are directed only to the fact of the violation itself.

Two key elements of good faith negotiation are clear notice of a party's position and adequate discussion of disputed provisions. *C.W. Mining Co., supra.* The Secretary's obligation to negotiate is reflected in 30 C.F.R. § 220(b), which requires that when denying a proposed addendum, the District Manager must do so in writing, specifying the reasons for the denial. The District Manager must then afford the operator an opportunity to discuss the reasons for the denial. The District Manager's June 28, 2002, letter appropriately stated the reasons for the denial and the considerations upon which it was based. After receiving the letter, M&H made no attempt to discuss the issues with Kuzar. It continued to mine the pillars and the citation and order were issued the following day.

The regulations and cases that discuss the duty to negotiate under the regulatory scheme for approval of roof control and similar plans make clear that the duty to negotiate begins with the District Manager's written rejection of a proposed addendum citing the reasons for the denial. None of the cases cited by either party sanction an operator's implementation of a proposed addendum in anticipation of the District Manager's formal decision. In *C.W. Mining Co.*, *supra*, the operator was found to have fulfilled its duty to negotiate in good faith where the citation in question was issued over two months after MSHA had provided a detailed written notice of deficiencies in the operator's plan, during which time the parties met and discussed all of the items cited by MSHA and the operator submitted two revised plans. In *Carbon County Coal Co.*, *supra*, negotiations over MSHA's dissatisfaction with the operator's proposed plan were conducted for several months before the subject citation was issued. In *Peabody Coal, supra*, the subject citation was issued one month after MSHA's rejection of a plan, during which time the parties met and discussed all of the issues and the operator submitted two revised plans.

If M&H was convinced that its proposed addendum would not be approved, it was obligated to await the written decision specifying the reasons for the denial, and thereafter attempt to negotiate with MSHA. If unable to achieve its goal through negotiation, it apparently would have had two options. The first would have been to seek direct court review of the denial, pursuant to 30 U.S.C. § 811(d).[3] The second would have been to notify the Secretary that it continued to dispute the denial and would commence mining the pillars at a specified time, essentially, requesting that a citation be issued so that it could challenge the citation and the denial of the proposed addendum in a proceeding before the Commission. M&H did not await the written decision and made no attempt to negotiate after receiving it. It cannot now attack the denial of the proposed addendum.

M&H maintains that it was excused from any obligation to attempt to negotiate because in the June 20, 2002, phone conversation, Kuzar "refused to further consider the addendum, to receive or consider information from M&H Coal Company about its mine, rendering any further attempts by M&H at negotiation with MSHA absolutely futile." Respondent's memorandum of

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[3] Because the provisions of such plans are enforceable as mandatory standards, it appears that an operator may obtain direct judicial review of the Secretary's denial of a proposed plan addendum pursuant to section 101(d) of the Act, 30 U.S.C. § 811(d). *See United Mine Workers of America v. Dole*, 870 F.2d 662, n. 13 at 670 (D.C. Cir. 1989).

law in opposition to the motion at p. 2. I reject its argument that the futility of negotiation, or fulfilment of its duty to negotiate, could be established based upon a phone conversation prior to the final decision.

However, assuming *arguendo*, that the "futility of negotiation" position had legal merit, M&H failed to establish the alleged futility and would not have been relieved of its obligation to negotiate in good faith. M&H initiated the June 20 phone call to Kuzar in order to try and convince him to approve the proposed addendum. Accepting M&H's description of the conversation, at no time did Kuzar state, unequivocally, that the addendum would never be approved, or that he would not consider any information that M&H might submit in support of its proposal. As noted above, Kuzar had a legal obligation to itemize all of the reasons for the denial in his written decision and to discuss the decision with M&H. There is nothing in the facts submitted by M&H to suggest that he did not intend to fulfill that obligation.

In fact, there were several facts known to M&H that should have lead it to conclude that eventual approval of the proposal was at least possible. It knew that the MSHA field office supervisor and one of the roof control specialists favored approval of the addendum. It knew that Kuzar's technical support group had not finished its investigation, and it might also be able to challenge some of the factors that Kuzar was relying on, such as his belief that the proposed pillar removal was deeper than M&H had conducted such operations in the past. The conversation apparently did not touch upon the first three factors later itemized in the written denial. In fact, after the citation and order were issued, M&H submitted additional information to Kuzar, and agreed to have coal from the mine tested for compressive strength.

The precedent that M&H seeks to establish here is somewhat alarming. Having been apprised of the likely denial of its proposed addendum, it immediately commenced mining in violation of its approved roof control plan, and continued to mine in violation of the plan after receipt of the written decision. It did not inform MSHA that it was doing so. It claims that it was attempting to prove that mining pursuant to the procedure contained in the proposed addendum could be done successfully and safely. But, it was also mining as much coal as it could before being ordered by MSHA to cease pillar removal. It deliberately chose to embark upon a mining procedure that MSHA had determined posed a serious risk to miners – not as a limited operation to prompt issuance of a citation in order to generate litigation before the Commission – but to generate as much evidence and coal as possible prior to MSHA's discovery of the operation. To permit an operator to litigate the correctness of MSHA's decision under these circumstances would encourage operators to violate § 75.220(c) and to virtually ignore adverse decisions on proposed plan addenda.

Based upon the foregoing, the Secretary's motion for summary decision is **GRANTED**, Citation No. 7004521 and Order No. 7004522 are affirmed as to the alleged violations of 30 C.F.R. § 220(c). M&H will not be permitted to challenge the denial of the proposed addendum to its roof control plan in these proceedings. The parties did not directly address the gravity and negligence determinations in the motion and opposition and those issues can be dealt with more efficiently in a challenge to the proposed civil penalties.

Accordingly, further proceedings in these cases are hereby **STAYED**, pending assessment of civil penalties.

Michael E. Zielinski
Administrative Law Judge
202-434-9981

Distribution:

Andrea J. Appel, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630 East, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106-3306

James P. Wallbillich, Esq., 450 West Market Street, Pottsville PA 17901

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