

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

January 28, 2000

NOLICHUCKEY SAND COMPANY, INC.,	:	CONTEST PROCEEDINGS
	:	
Contestant	:	Docket No. SE 2000 62-RM
v.	:	Citation No. 7778464; 1/3/2000
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	:	Docket No. SE 2000 63-RM
	:	Citation No. 7778465; 1/3/2000
	:	
Respondent	:	Docket No. SE 2000 64-RM
	:	Citation No. 7778466; 1/3/2000
	:	
	:	Bird's Bridge Mine
	:	
	:	Mine ID No. 40-03145

## DECISION

Before: Judge Weisberger

### Statement of the Case

These cases are before me based upon Notices of Contest filed by Nolichuckey Sand Company, Inc. ("Nolichuckey") on January 4, 2000, challenging the issuance by the Secretary of Labor ("Secretary") of three section 104(b) withdrawal orders based on an alleged failure to abate previously issued citations alleging violations of 30 C.F.R. § 56.14109(a).<sup>1</sup> A Motion to Expedite accompanied the notices of contest.

On January 6, 2000, in a telephone conference call initiated by the undersigned with counsel for both parties, it was agreed by counsel that the parties would waive a right to an oral evidentiary hearing, and present the matter for decision based on a stipulated set of facts, and legal argument. On January 12, 2000, the parties filed points and authorities. On January 13, 2000, in a recorded telephone conference call pursuant to the parties' agreement, the parties presented oral arguments.

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<sup>1</sup>/ 30 C.F.R. § 56.14109(a) provides that "[u]nguarded conveyors next to the travelways shall be equipped with - (a) Emergency stop devices which are located so that a person falling on or against the conveyor can readily deactivate the conveyor motor; or (b) Railings which - (1) Are positioned to prevent persons from falling on or against the conveyor; . . . ."

On January 12, 2000, the parties filed the following joint stipulations regarding the relevant and materials facts in these cases as follows:

1. Nolichuckey Sand Co., Inc., (Nolichuckey) is the owner and operator of the Bird's Bridge Mine, MSHA Mine ID No 40-03145.
2. Nolichuckey and the Bird's Bridge Mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977 and this court has jurisdiction over this proceeding.
3. The Secretary agrees to admit the attached notarized Affidavit of Nolichuckey President Thomas Bewley as proffer of testimony, but does not stipulate to the truth of the matters states therein.
4. During 1999 and currently, the Bird's Bridge mine employs four miners.
5. Annual production at this mine is approximately 150,000 tons of aggregate material.
6. Employees worked approximately 8,000 hours at this mine in 1999.
7. Mr. Elton Hobbs, the inspector who issued the subject citations and orders, is a duly authorized representative of the Secretary of Labor.
8. Copies of the relevant citations and orders previously filed with the Administrative law Judge are authentic copies and were properly served.
9. On January 28, 1999, MSHA Inspector Elton Hobbs issued six non-significant-and-substantial, low negligence citations to Nolichuckey for alleged violations of 30 C.F.R. § 56.14109(a) at its Pit No. 436, because of failure to install railings or emergency stop devices on the inside of the catwalks at six conveyors.
10. Nolichuckey timely contested the January 1999 citations and they were assigned to Dockets No. SE 99-101-RM, SE 99-102-RM, SE 99-103-RM, SE 99-104-RM, SE 99-105-RM and SE 99-106-RM.
11. A trial was conducted concerning the January 1999 citations and on June 30, 1999, Administrative Law Judge Weisberger issued a decision affirming the citations.
12. Nolichuckey timely appealed this decision and the Federal Mine Safety and Health Review Commission granted the Petition for Discretionary Review on July 30, 1999. The case has been fully briefed before the Commission and a decision is now pending.
13. MSHA has agreed to extend abatement on the Pit No. 436 conveyor citations throughout the trial before ALJ Weisberger, however, it set an abatement date of September 10, 1999 (subsequently extended until October 15, 1999).
14. On September 14, 1999, MSHA Inspector Hobbs issued Citations No. 7777974, 7777976 and 7777978 to Nolichuckey for alleged violations of 30 C.F.R. § 56.14109(a) at its Bird's Bridge Mine. All three citations were categorized as non-significant and substantial (gravity of unlikely to result in lost workdays/restricted duty) and moderate negligence.
15. The above-listed citations allege a failure to provide a mandatory railing or

emergency stop device on the inside of the catwalks on three conveyors.

16. Citations No. 7777974, 7777976 and 7777978 were timely contested on September 22, 1999, by Nolichuckey and were assigned to Dockets No. SE 99-289-RM, SE 99-290-RM and SE 99-291-RM.

17. An initial abatement date of October 1, 1999, was designated for Citations No. 7777974, 7777976 and 7777978.

18. According to the Affidavit of Thomas Bewley, Nolichuckey's Bird's Bridge mine has not been in production since November 14, 1999, and it is not scheduled to resume production until on or about February 15, 1999. Further, Mr. Bewley states that the cited conveyors are permanently locked out and are not operational. See *Bewley Affidavit at paragraph 2 and 4*. Nolichuckey informed the Secretary of this fact prior to December 31, 1999.

19. On December 31, 1999, MSHA refused to grant Nolichuckey's request for further extension of abatement on both the Bird's Bridge and Pit 436 citations, pending the final decision of the Commission in Dockets No. SE 99-102-RM through SE 99-106-RM.

20. Nolichuckey subsequently abated the alleged violations at is Pit 436 and those six citations have been terminated without any further enforcement action.

21. On January 4, 2000, MSHA Inspector Hobbs issued Orders No. 7778464, 7778465, and 7778466 (dated January 3, 2000) at Nolichuckey's Bird's Bridge mine, alleging a failure to abate Citations No. 7777974, 7777976 and 7777978 under Section 104(b) of the Mine Act, 30 U.S.C. § 814(b).

22. Nolichuckey timely contested Orders No. 7778464, 7778465, and 7778466 on January 4, 2000, and requested expedited proceedings.

23. At this time, the Commission has not rendered its decision on the merits in *Nolichuckey Sand Co., Inc. v. Secretary of Labor*, SE 99-102-RM through SE 99-106-RM.

24. The actual mechanical installation of stop cords or hand railings is not at issued with respect to the time of abatement.

In addition, in a telephone conference call, on January 12, 2000, the parties agreed to the following stipulation: "Inspector Hobbs drafted the orders on January 3, 2000, and that he physically served the orders on Nolichuckey on January 4, 2000"

In contesting a section 104(b) order<sup>2</sup>, the operator may challenge the reasonableness of

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<sup>2</sup>Section 104(b) of the Federal Mine Safety and Health Act of 1977 provides as follows:

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the

(continued...)

time set for abatement, or the Secretary's failure to extend that time. (*Energy West Mining Company* 18 FMSHRC 565, 568 (1996) *affirmed*, 111 F.3rd 900 (D.C. Cir. 1997); *Clinchfield Coal Company*, 11 FMSHRC 2120, 2128 (November 1989).

In evaluating whether the Secretary's failure to extend the time set for abatement was reasonable I am guided by the following language set forth by the Commission in *Energy West, supra*: ". . . in reviewing an operator's challenge to the Secretary's failure to extend an abatement time, the Commission considers whether the inspector 'abused his discretion' issuing the order. The Commission has noted that 'abuse of discretion' has been found when 'there is no evidence to support the decision or if the decision based on an improper to understanding of the law'. *Utah Power and Light Co.*, 13 FMSHRC 1617, 1623 n.6 (October 1991), *Bothyo v. Moyer*, 772 F.2nd 353, 355 (7<sup>th</sup> Circuit 1985)." (18 FMSHRC at 569).

The underlying citations allege that Nolichuckey was not in compliance with 30 C.F.R. § 56.14109(a) which requires that unguarded conveyors next to travelways be equipped with either emergency stop devices or railings. Nolichuckey does not assert that by December 30, 1999, the date set for abatement in the last extension, it had provided the subject equipment with either stop devices or railings, that it was in the process of making such installations, or that it had encountered unanticipated difficulties in making such installations. It appears to be Nolichuckey's position that the equipment at issue does not come within the purview of Section 56.14109(a) and that accordingly compliance with the section is not required. Nolichuckey argues that since this issue is presently pending before the Commission in *Secretary v. Nolichuckey Sand Co. Inc.*, Docket No. SE 99-101-RM *et al*, it is unreasonable not to extend abatement until the Commission rules on this controlling issue.

In the absence of the binding authority I must conclude that there was no abuse of discretion on the Secretary's part to refuse to extend abatement pending a decision by the Commission where the operator has not taken any steps to comply with the standard that is the subject of the issued citations.

Nolichuckey argues further that the Secretary's representative abused his discretion in not extending the abatement time, since he failed to take into consideration the lack of risk for non-compliance based on the non-significant and substantial character of the citations at issue, and the fact that the Secretary in the past implicitly recognized the lack of risk by granting a number of extensions while the equipment was in operation, whereas at present the conveyors in issue

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<sup>2</sup>(...continued)

period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

have been locked and tagged and are not scheduled to be in operation until February 15, 2000.<sup>3</sup>

I find no merit to Nolichuckey's arguments since there is no evidence in the record that Nolichuckey is in compliance with Section 14109(a) *supra*, or that it has taken or intends to take any actions to comply with the cited standard, and hence to abate the violations. In the absence of any controlling authority I cannot find that failure to extend abatement when the equipment is not in operation constitutes an abuse of discretion. I note that *Secretary of Labor v. Noland Corporation* 15 FMSHRC 468, 477 (Judge Morris 1993), the only case wherein this issue was actually litigated, is contrary. However *Noland, supra* was decided by a Commission judge (since retired). Since this decision is not binding precedent, I choose not to follow it.

Lastly, *Nolichuckey* argues, in essence, that, due to the nature of its operation, were it to comply with section 14109(b) *supra*, and thus abate the violations at issue, it would be in violation of 30 C.F.R. § 56.14109(b)(3) which requires that unguarded conveyors be equipped with emergency stop devices or railings that “. . . are constructed and maintained so that they will not create a hazard”. In essence, this argument is in reality based on “diminution of safety.” It has been held by the Commission that “diminution of safety” is not available to an operator as a defense unless it had first filed a petition for modification, and the Secretary had granted the modification but nonetheless continued the enforcement proceedings. (*Sewell Coal Company*, 5 FMSHRC 2026, 2029 (December 1983). Accordingly, I find that the argument of diminution of safety is not relevant to the instant proceedings.

Therefore, for all the above reasons, I conclude that the Secretary was not unreasonable in deciding not to extend the time set for abatement beyond December 30.

### **ORDER**

It is **ORDERED** that the notices of contest filed in these proceedings shall be dismissed. It is further **ORDERED** that these cases be **DISMISSED**.

Avram Weisberger  
Administrative Law Judge

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<sup>3</sup>In this connection, Nolichuckey argues that for the Secretary to refuse abatement now is unreasonable. Nolichuckey relies on the following language from the Commission's decision in *Secretary v. Nolichuckey Sand Co., Inc.*, 21 FMSHRC 1218, 1220 (November 30, 1999): “The Secretary's insistence at this particular time to require abatement makes little sense . . . .” This statement is clearly dicta as it was not necessary to the Commission's decision that the temporary reinstatement procedures in section 105(b)(2) of the Act do not include temporary relief from section 104(a) citations. Accordingly, the relied upon language from Nolichuckey is not binding precedent, and I choose not to follow it for the reasons set forth above.

Distribution:

Adele L. Abrams, Esq., Patton Boggs, LLP, 2550 M Street, N.W., Washington, D.C. 20037  
(Certified Mail)

Thomas A. Grooms, Esq., Office of the Solicitor, U. S. Department of Labor, 2002 Richard  
Jones Road, Suite B-201, Nashville, TN 37215-2862 (Certified Mail)

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