FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

December 19, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) v. DQ FIRE & EXPLOSION CONSULTANTS, INC.	: : : : : : : :	Docket Nos. WEVA 2011-952-R WEVA 2011-2480

BEFORE: Nakamura, Acting Chairman; Cohen and Althen, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). It involves a citation issued to DQ Fire & Explosion Consultants, Inc. for a violation of a section 103(k)[1] order issued to Performance Coal Company at its Upper Big Branch Mine – South ("UBB") after a massive explosion on April 5, 2010. The citation was issued in January 2011, alleging that DQ violated the terms of a section 103(k) order by entering a restricted area of the mine, Zone 5. The Secretary alleged that high

[1] Section 103(k) provides:

> 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).

Secretary requested that the penalty be increased to $1,000. The Judge affirmed the citation, found high negligence, and assessed a penalty of $1,000. 34 FMSHRC 2318, 2333-36, 2338-40 (Aug. 2012) (ALJ). DQ filed a petition for discretionary review challenging the Judge's decision on several grounds. The Commission granted DQ's petition only with regard to the Judge's high negligence finding.[2] For the reasons that follow, we affirm the Judge's decision.[3]

I.

Factual and Procedural Background

On April 5, 2010, an underground coal dust explosion killed 29 miners and injured two others at Performance's UBB Mine. 34 FMSHRC at 2320; Jt. Stip. 15. In January 2011, DQ was providing consulting services to Performance at the UBB Mine. 34 FMSHRC at 2319; Jt. Stip. 2.

A representative of MSHA issued a section 103(k) order to the mine following the explosion on April 5, 2010. Gov. Ex. 3. On December 23, 2010, MSHA modified the previously issued section 103(k) order controlling access to the accident scene at the UBB Mine and limiting entry into Zone 5, which included the longwall face, a portion of the headgate for the longwall, and a portion of the tailgate for the longwall. Tr. 11-12, 38-39, 66, 100; G. Ex. 5. This is the location where authorities believed the explosion originated. Tr. 8, 85. The modified section 103(k) order stated:

> 103(k) Modification allowing Performance Coal to proceed with its' [sic] investigation following the completion of investigation activities on the longwall
>
> This Order is hereby modified to allow Performance Coal to proceed with its' [sic] investigation activities with the following stipulations:

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[2] In its petition, DQ raised the following issues: (1) whether it was an independent contractor under the Mine Act; (2) whether a violation of the section 103(k) order occurred; (3) whether MSHA abused its discretion in modifying the order for January 10, 2011, but not January 11 and 12; (4) whether MSHA abused its discretion in retaining the December 23, 2010 modification of the order; (5) whether the Judge erred in finding high negligence; and (6) whether the Judge erred in increasing the penalty.

[3] DQ also filed a motion requesting oral argument. We have determined that oral argument is not necessary, and DQ's motion is denied.

> No person shall be permitted in Zone 5 to conduct any activities other than for the purpose of conducting examinations required by the regulations.
>
> . . .
>
> Performance Coal Company shall continue to follow the Performance Coal Company Investigation Plan Addendum dated December 2, 2010 . . . .
>
> Any modifications to the existing investigation plan shall be submitted to MSHA's Accident Investigation Team. These modifications will be reviewed and approved by the AI Team prior to Performance Coal proceeding with any submitted modification to the existing plan.
>
> Performance Coal shall submit daily updates concerning the progress of its' [sic] investigation to MSHA's Accident Investigation Team . . . .

34 FMSHRC at 2324; G. Ex. 3. This was the order in effect in January 2011 on the dates of the alleged violation. The Judge credited MSHA Inspector James Keith McElroy's testimony that in order for the section 103(k) order to be modified, the operator must request modification by at least the night before, and that MSHA had to perform the modification, deliver the modification to the mine, and assign an authorized representative to escort the operator for the day of the modification. 34 FMSHRC at 2335; Tr. 82-83.

The negligence determination in this case hinges on the process required for the operator to seek modifications of the section 103(k) order – and specifically whether the informal modification process the operator claims it followed sufficed.

On January 10, 2011, Dr. Christopher Schemel led DQ's investigative team. Tr. 21-23. He was accompanied by Stephen Dubina, an electrical engineer with MSHA's Pittsburgh Technical Support Center, who was assigned as an observer to the Performance Coal/DQ investigative team. While underground, Schemel asked Dubina for permission to view the longwall face, which was located in Zone 5, the area where MSHA's 103(k) order prohibited access. Tr. 21-22; 34 FMSHRC at 2322-23. Dubina granted him permission. Tr. 46-48; 34 FMSHRC at 2322-23.[4]

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[4] Dubina testified that he did not have a map with him that day, and did not know that they had entered Zone 5 until he exited the mine. Tr. 21-22, 25.

On January 11, 2011, Dr. Pedro Reszka Cabello ("Reszka") led the DQ team from Zone 3 down Entry No. 2 to crosscut 24, which is in Zone 5. While in crosscut 24, Reszka's team examined a supply car and a monorail, took several measurements, and then proceeded to Entry No. 1. The team took nine photographs of equipment within Zone 5. While underground, Dubina had suspected that the DQ team had entered Zone 5, but did not have a map to verify that and did not say anything to Reszka. 34 FMSHRC at 2323; Tr. 30-31. Reszka testified that prior to entering the mine on January 11, he informed Chris Prater of Performance of DQ's plan to enter Headgate 21, which is partly in Zone 5, during their investigation on January 11, and he believed that Prater had notified MSHA by phone on the night of January 10. 34 FMSHRC at 2326; Tr. 99.

On the night of January 11, Prater sent MSHA an email explaining the investigative teams' plans for January 12, which included two teams on "HG 21/22 crossover" and one team "working in the glory hole panel." 34 FMSHRC at 2535; DQ Ex. D.

On January 12, Reszka's DQ team traveled through the North Glory Mains at Entry No. 2 into the Headgate area, and then into Zone 5 through Crosscut 24. 34 FMSHRC at 2335; Tr. 33, 35, 105. They traveled through Crosscuts 25 and 26, went to the longwall at Crosscut 26, and under Shield number 1 to check on some measurements on covers that possibly were blown off some of the equipment. Then, the team went up to Tailgate 22, to its face area, and then back to Entry No. 3. While in these areas, the team conducted measurements, examined roof bolts, timbers, and stoppings, and took 26 photographs in Zone 5. Dubina testified that he had alerted Reszka that the team had entered Zone 5, but that Reszka did not respond. 34 FMSHRC at 2323; Tr. 37. Reszka denied that Dubina made any such statement to him. 34 FMSHRC at 2327; Tr. 103. Reszka and Danny Lee Laverty, a representative of Performance whose role was to accompany DQ during its investigation, both testified that Laverty had asked Dubina's permission to enter Tailgate 22 in Zone 5 on Janunary 12, and that Dubina said "I don't see a problem with that." 34 FMSHRC at 2327-28; Tr. 111, 128-31. Dubina testified that he did not recall this conversation. 34 FMSHRC at 2334; Tr. 135-36.

Initially following the UBB mine explosion, Dubina was part of MSHA's investigation team in the electrical group tasked to identify electrical problems. Dubina was not an authorized representative of MSHA and had no authority to enforce the Mine Act on the Secretary's behalf. 34 FMSHRC at 2322; Tr. 20. Dubina admitted that he never explained to Schemel or any representative of DQ that he was not an authorized representative of MSHA. 34 FMSHRC at 2324; Tr. 48, 50, 51.

During his role as observer, Dubina maintained daily logs corroborating DQ's activities on the dates in question and reported to MSHA's Accident Investigation ("AI") Team any apparent violation he observed. 34 FMSHRC at 2323-24; Tr. 32-33, 38-39, 56; G. Ex. 6; R. Ex. E. Following the events of January 10 through 12, Dubina reported DQ's activities in Zone 5 to Inspector McElroy, an authorized representative of MSHA's AI Team, who prepared the citation at issue in this case. 34 FMSHRC at 2323, 2325.

MSHA issued a section 104(a) citation to DQ for a violation of section 103(k) of the Mine Act. 34 FMSHRC at 2321; Jt. Stip. 16. Citation No. 8249977 states:

> Evidence indicates the operator worked in violation of the 103(k) order #4642503-BB. This modification specifies "No person shall be permitted in Zone 5 to conduct any activities other than for the purpose of conducting examinations required by the regulations." The operator failed to comply with this stipulation on 01-11-2011 and 01-12-2011. Investigative activities were conducted in Zone 5 without modification of the k order. This condition has not be [sic] designated as "significant and substantial" because the conduct violated a prevision [sic] of the mine act rather than a mandatory safety or health standard.

Ex. G-1; Jt. Stip. 17. The negligence was designated as high and the Secretary initially proposed a penalty of $112. However, in his post-hearing brief, the Secretary requested that the penalty be increased to $1,000 "in order to have a deterrent effect so that future MSHA accident investigations of major mine disasters are not compromised by operators disregarding the important restrictions in place under a 103(k) order." S. Post-Hearing Br. at 20-21; 34 FMSHRC at 2329.

The Judge addressed the issues of whether DQ was an independent contractor under the Mine Act, the validity of the citation, the degree of negligence and the appropriate penalty. 34 FMSHRC at 2321. After finding that DQ was an independent contractor under the Mine Act, the Judge subsequently affirmed the citation and found that MSHA did not abuse its discretion in modifying the section 103(k) order solely for January 10. 34 FMSHRC at 2333-38.

The Judge found high negligence and assessed a penalty of $1,000. *Id.* at 2338-39. In considering DQ's level of negligence, the Judge considered DQ's argument that it had followed the informal procedure to seek approval for travel to Zone 5, which was explicitly prohibited by the section 103(k) order. *Id.* at 2338. Finding that there was no contention that DQ personnel were not aware they were traveling to Zone 5, the Judge rejected DQ's argument, specifically because the section 103(k) order, which set out the prohibitions and process for investigative actions by Performance and its agents, was clear on its face and because DQ "offered no evidence of why the belief in the informal modification procedures was reasonable." *Id.* DQ appealed the Judge's decision, and the Commission granted DQ's petition with regard to whether the Judge erred in finding high negligence.

II.

Disposition

Negligence is one of six criteria a Commission Judge must consider in assessing a penalty for a violation under the section 110(i) of the Mine Act. 30 U.S.C. § 820(i). The Commission

has stated that a finding of high negligence "'suggests an aggravated lack of care that is more than ordinary negligence.'" *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (citations omitted). The Commission noted that, in particular, "an operator's intentional violation constitutes high negligence for penalty purposes." *Id.* (citations omitted).

The Commission has recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a finding of negligence if a violation of the standard occurs." *Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975 (Aug. 2014) ("*JWR*") (quoting *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983)). In determining whether an operator has met its duty of care, the Commission considers what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).[5]

The Commission reviews a Judge's finding of negligence on substantial evidence grounds. *See, e.g.*, *JWR*, 36 FMSHRC at 1976; *Mach Mining, LLC*, 36 FMSHRC 1525, 1526-27 (June 2014); *Topper Coal*, 20 FMSHRC at 350. Therefore, the issue before the Commission is whether substantial evidence supports the Judge's finding of high negligence.

In support of its argument that the Judge erred in finding high negligence, DQ contends that the Judge did not consider mitigating circumstances related to an informal process for seeking modification of the section 103(k) order. However, the Judge did explicitly address the evidence upon which DQ relies and rejected DQ's arguments. In his decision, the Judge stated:

> There is no contention that DQ personnel did not know they were traveling to Zone 5. Rather, Respondent argues that it complied with the 103(k) order by informing MSHA by email or telephone that it planned to enter Zone 5, or seeking approval from Dubina to enter Zone 5. For the reasons above, I do not find DQ's belief in this informal procedure to be a mitigating circumstance. The prohibitions and stipulations of the 103(k) order were clear on its face, and Respondent offered no evidence of why the belief in the informal modification procedures was reasonable. Accordingly,

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[5] While the parties cite the Secretary's Part 100 regulations, they apparently do so for the limited purpose of providing the Commission guidance in considering the issue on appeal. The Commission recently rejected the Secretary's argument that the Commission must apply the standard of care set forth in 30 C.F.R. § 100.3(d) in considering an operator's negligence. *JWR*, 36 FMSHRC at 1975 n. 4 ("The Secretary's Part 100 regulations apply only to the Secretary's penalty proposals, while the Commission exercises independent authority to assess penalties pursuant to section 110(i) of the Mine Act.") (citations omitted).

> I find that DQ acted with high negligence when it violated the 103(k) order.

34 FMSHRC at 2338. Earlier in his opinion under the violation section, the Judge addressed in great detail the evidence pertaining to DQ's argument regarding an informal modification procedure and determined that DQ's argument lacked merit. *Id.* at 2334-36.

DQ continues to argue that it believed that it complied with the section 103(k) order by following informal procedures to obtain MSHA's approval to enter Zone 5. The Secretary contends that DQ had knowledge of the clear language of the order, which contained no such procedure. It is undisputed that DQ's investigative team entered Zone 5 on January 11 and 12. Although Reszka testified that he did not know that Dubina was not an authorized representative of MSHA who could provide DQ authorization on the spot, the Judge rejected the assertion that such a belief was reasonable because (1) DQ knew the terms of the section 103(k) order, which, as Inspector McElroy testified, required that a request for a modification be made no later than the night before, approval by MSHA, and that an authorized representative of MSHA accompany the operator on the day of the modification, 34 FMSHRC at 2335; Tr. 82-83, and (2) DQ provided no evidence of approval of an informal procedure. 34 FMSHRC at 2334.

The Commission has held that actual knowledge of the violation and failure to act in compliance constitutes high negligence. *Deshetty, employed by Island Creek Coal Co.*, 16 FMSHRC 1046, 1053 (May 1994) (concluding that actual knowledge of violative conditions and failure to act constituted high negligence).

Here, DQ knew of the restrictions on travel to Zone 5 and knowingly violated the terms of the section 103(k) order. Despite allegations of a good faith belief that it obtained authorization to enter the restricted area, the Judge concluded such belief was unreasonable. *See Consolidation Coal Co.*, 14 FMSHRC 956, 969-70 (June 1992) (holding that intentional misconduct supports a high negligence finding). We agree.

Even were we to accept the operator's argument that informal modification procedures sufficed, the record shows that such procedures were not followed for the January 11 or 12 investigations. As a threshold matter, the Judge properly concluded that DQ "conflate[d] the procedures for complying with the December 23 order by informing MSHA of its plans for the following day with procedures for modifying the 103(k) order in order to be permitted to travel to Zone 5." 34 FMSHRC at 2334 n.5. In any event, the evidence did not reflect that DQ or Performance alerted MSHA that the investigative team intended to enter Zone 5 on January 11 and 12. The Judge did not find merit in Reszka's testimony that Prater notified MSHA via phone on January 10 of DQ's intention to enter Zone 5 on January 11 because Reszka was neither on the call nor in the room when the alleged call was made. 34 FMSHRC at 2334; Tr. 123. In addition, the Judge found that DQ failed to comply with the alleged "informal procedures" because the email sent by Chris Prater of Performance on January 11 concerning where the teams were to travel on January 12 omitted reference to Tailgate 22 in Zone 5, where the DQ team traveled on January 12. 34 FMSHRC at 2334; DQ Ex. D.

Also, the Judge appeared to credit Dubina's testimony that he did not recall that either Reszka or Laverty sought his permission to enter Zone 5 on January 12. 34 FMSHRC at 2334; Tr. 134-36. The Judge declined to credit testimony from DQ's witnesses that the company attempted to use "informal procedures" to modify the section 103(k) order. 34 FMSHRC 2334. Thus, even if Dubina had the authority to permit investigators to enter Zone 5 – which he did not – there is no finding that he authorized DQ to enter the restricted area on January 11 and 12. We conclude that substantial evidence supports the Judge's finding that both on January 11 and 12, DQ did not follow the alleged "informal procedures" by using prior email or phone contacts, or by seeking approval from Dubina, MSHA's observer. 34 FMSHRC at 2334.

Therefore, substantial evidence supports the Judge's findings that the alleged informal procedure did not suffice to modify the section 103(k) order and, in any event, DQ did not comply with any "informal procedure" for modification of the order to permit entry into Zone 5.

Finally, DQ argues that MSHA's action in retroactively amending the section 103(k) order on January 17 to allow Performance Coal to enter Zone 5 on January 10, but not January 11 and 12, was arbitrary and that this inconsistency reduces its level of negligence. It states that the modification of the order for January 10 demonstrates that Dubina had apparent authority to permit entry into Zone 5. This argument fails on several fronts.

First, MSHA's after-the-fact decision to modify the section 103(k) order cannot be used to show anything about the reasonableness of an asserted belief regarding Dubina's authority on the preceding days when DQ entered Zone 5 without following the required procedures. Thus, it is not relevant to the issue of the level of DQ's negligence.

Second, the decision by MSHA not to cite DQ for its actions on January 10 does not constitute a concession that Dubina had the authority to modify the 103(k) order. MSHA's witnesses testified that the decision to modify the order for January 10 was made "to cut [DQ] a break." Tr. 83-84, 90-91. Dubina had erred by allowing DQ to enter Zone 5 on January 10. MSHA's willingness to forego prosecution under circumstances in which an MSHA employee made a mistake does not amount to a concession that Dubina had the authority to permit DQ to enter Zone 5.

Accordingly, we conclude that substantial evidence supports the Judge's finding of high negligence.

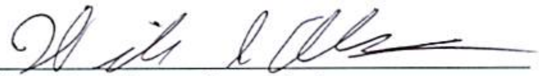
III.

Conclusion

For the foregoing reasons, we affirm the Judge's decision.

Patrick K. Nakamura, Acting Chairman

Robert F. Cohen, Jr., Commissioner



William I. Althen, Commissioner

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