

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

May 22, 2020

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 : Docket No. WEST 2019-205-M
v. :
 :
CALPORTLAND COMPANY :

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DIRECTION FOR REVIEW AND STAY ORDER

BY: THE COMMISSION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act” or “Act”). In the underlying case, Docket No. WEST 2018-402-DM, a Commission Judge found that mine operator CalPortland Company (“CalPort”) had discriminated against miner Robert Thomas, in violation of section 105(c) of the Act, 30 U.S.C. § 815(c). 40 FMSHRC 1503 (Dec. 2018) (ALJ). Upon CalPort’s subsequent petition in that case, the Commission agreed to review the Judge’s decision.

While that review was pending, the Secretary of Labor initiated a penalty proceeding in this docket. Pursuant to Commission Procedural Rule 44(b), 29 C.F.R. § 2700.44(b), the Secretary filed a petition for assessment of penalty against CalPort for its violation of section 105(c). The case was assigned to the same Judge who had decided the discrimination case.

The Secretary and CalPort subsequently moved the Judge to approve their proposed settlement of the penalty, with CalPort agreeing to pay the penalty only in the event that its liability for discriminating against Thomas was eventually upheld by the Commission (and, potentially, in any subsequent federal court appeal by CalPort). In a decision issued March 21, 2019, the Judge approved the settlement agreement and conditionally ordered CalPort to pay \$17,500 in accordance with the agreement between the parties.

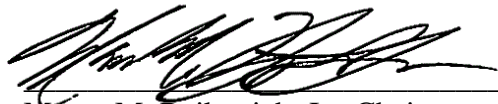
On January 29, 2020, the Commission issued a decision reversing the Judge’s discrimination decision. 42 FMSHRC 43 (Jan. 2020). Consequently, two days later the Secretary filed an unopposed motion to vacate the conditional penalty and dismiss this proceeding. When the Judge did not act on that motion, the Secretary and CalPort, on April 8, 2020, jointly moved for the requested relief. In an order dated April 17, 2020, the Judge denied

the motion, stating that her authority to take action in the case had ceased upon the issuance of her March 2019 order.

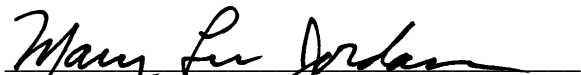
Consequently, on May 7, 2020, CalPort filed with the Commission its Motion to Reopen and Petition for Discretionary Review (hereinafter “PDR”). Therein, CalPort states that the Secretary does not oppose the Commission granting review, vacating the conditional penalty, and dismissing this proceeding. PDR at 1. According to the PDR, the parties agreed that, in the event any Commission decision vacating the Judge’s decision is itself later vacated on court review, the Secretary at that point would initiate a renewed penalty proceeding. *Id.* at 16.

Having considered the PDR, and reviewed the Judge’s decisions and orders in this proceeding, we grant review and stay further proceedings, including briefing.

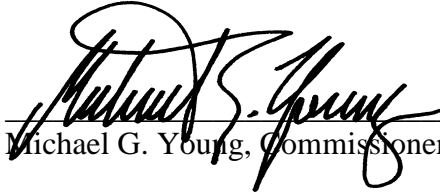
The decision of the Commission in the underlying discrimination case is presently the subject of court review. *Thomas v. CalPortland Co. and FMSHRC*, No. 20-70541 (9th Cir. docketed Feb. 26, 2020). Consequently, the parties are instructed that, if upon final resolution of court review in that case the decision of the Commission is upheld, they should jointly move the Commission to lift the stay in this proceeding, vacate the conditional penalty, and dismiss the proceeding. Conversely, should the Commission’s discrimination decision be vacated as a result of court review, upon the return of that case to the Commission, we shall, sua sponte, lift the stay here and consolidate the penalty proceeding with the discrimination case, before conducting such further proceedings that are necessitated upon remand.



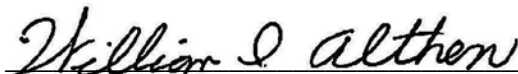
Marco M. Rajkovich, Jr., Chairman



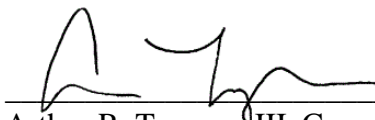
Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner



William I. Althen, Commissioner



Arthur R. Traynor, III, Commissioner

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