

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 28, 2009

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v.

MACH MINING, LLC

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Docket No. LAKE 2009-395-R

BEFORE: Jordan, Chairman; Duffy, Young, and Cohen, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) (“Mine Act”). On March 13, 2009, pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued a withdrawal order to Mach Mining, LLC (“Mach”), alleging a violation of 30 C.F.R. § 75.370(d), a ventilation plan regulation.¹ Mach filed a notice of contest,

¹ The cited safety standard provides:

No proposed ventilation plan shall be implemented before it is approved by the district manager. Any intentional change to the ventilation system that alters the main air current or any split of the main air current in a manner that could materially affect the safety and health of the miners, or any change to the information required in § 75.371 shall be submitted to and approved by the district manager before implementation.

30 C.F.R. § 75.370(d). The withdrawal order alleges the following violation:

A proposed ventilation plan dated February 25, 2009 was implemented before it was approved by the district manager. The mine operator has mined over 1000 feet inby the location of the

and in an order dated May 15, 2009, ruling on cross motions for summary decision filed by the Secretary of Labor and Mach, Administrative Law Judge Richard Manning held that Mach had violated section 75.370(d). 31 FMSHRC 709, 713-15 (May 2009) (ALJ).²

Mach subsequently submitted a modified ventilation plan for approval to MSHA in order to abate the violation. MSHA did not agree that the violation had been abated and refused to terminate the order of withdrawal. Mach then requested a hearing on whether the violation has been abated and the order should terminate, and the judge set the case for hearing. The Secretary filed a motion to cancel the hearing on the ground that the Commission lacks jurisdiction to determine whether abatement has occurred and order termination of the order.

On August 18, 2009, the judge denied the Secretary's request to cancel the hearing based on his conclusion that he had jurisdiction to review the order. The Secretary subsequently requested that the judge reconsider his decision or, in the alternative, certify the question of jurisdiction for interlocutory review by the Commission. Mach filed a response in opposition to both requests. On August 25, 2009, the judge denied reconsideration but granted the request for certification.

proposed set up rooms in headgate No. 3. The drawing titled "Ventilation Plan Map for future Longwall Operations" dated March 19, 2006, which is part of the currently approved ventilation plan for this mine approved on March 18, 2008, shows a six panel design with all six panels approximately 18,000 feet deep without any stair steps.

Order No. 8414238.

² The judge denied the Secretary's motion for summary decision on the issue of whether the violation was due to Mach's unwarrantable failure, and ordered the parties to confer as to that issue and the issue of negligence. 31 FMSHRC at 715, 716.

Interlocutory review is a matter of sound discretion of the Commission. 29 C.F.R. § 2700.76(a). The Commission will grant interlocutory review upon a majority vote that a judge's interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(2). Upon consideration of the judge's certification, all four Commissioners agree that the ruling involves a controlling question of law. Chairman Jordan and Commissioner Cohen further conclude that immediate review would materially advance the final disposition of the proceeding and thus would grant interlocutory review. Commissioner Duffy and Commissioner Young do not agree and would deny review. Accordingly, because there is not a majority of Commissioners who would grant interlocutory review, it is denied.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

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