

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

May 11, 2010

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	Docket No. PENN 2010-339-E
v.	:	Docket No. PENN 2010-340-E
	:	Docket No. PENN 2010-342-E
ORCHARD COAL COMPANY,	:	Docket No. PENN 2010-343-E
S & M COAL COMPANY,	:	
ALFRED BROWN COAL COMPANY,	:	
and B & B COAL COMPANY	:	

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

ORDER DENYING PETITION FOR DISCRETIONARY REVIEW

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”). The petition for discretionary review filed in this matter by Orchard Coal Company, S&M Coal Company, Alfred Brown Coal Company, and B&B Coal Company (hereinafter “Anthracite Operators”),¹ states that the Mine Safety and Health Administration is enforcing Mine Act requirements in a way that has denied the Anthracite Operators the opportunity to seek modification of the requirements under section 101(c) of the Act, 30 U.S.C. § 811(c). The Anthracite Operators thus include within their petition for review a petition for relief under section 101(c).

¹ The petition also was filed on behalf of RS&W Coal Company, Inc., and purports to seek review in Docket No. PENN 2010-103-E of *RS&W Coal Co.*, 31 FMSHRC 1440 (Dec. 2009) (ALJ). Under section 113(d)(2) of the Mine Act, review of that decision could only be ordered by the Commission, pursuant to petition by RS&W or sua sponte, within 30 days of the decision’s issuance. See 30 U.S.C. § 823(d)(2). Because RS&W did not seek review, and the Commission did not order review sua sponte, the decision became a final decision of the Commission 40 days later. See 30 U.S.C. § 823(d)(1). Accordingly, this order only addresses the timely petition for review filed by the Anthracite Operators in the remaining cases.

The Commission is without jurisdiction to entertain a petition for relief under section 101(c). The statute clearly states that such petitions are to be directed to the Secretary of Labor, and the modification process is the sole province of the Secretary or her designee.² Consequently, the relief the Anthracite Operators seek under section 101(c) can only be granted by the Secretary.

² Section 101(c) provides:

Upon petition by the operator or the representative of miners, the Secretary may modify the application of any mandatory safety standard to a coal or other mine if the Secretary determines that an alternative method of achieving the result of such standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard, or that the application of such standard to such mine will result in a diminution of safety to the miners in such mine. Upon receipt of such petition the Secretary shall publish notice thereof and give notice to the operator or the representative of miners in the affected mine, as appropriate, and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of such operator or representative or other interested party, to enable the operator or the representative of miners in such mine, or other interested party to present information relating to the modification of such standard. Before granting any exception to a mandatory safety standard, the findings of the Secretary or his authorized representative shall be made public and shall be available to the representative of the miners at the affected mine. The Secretary shall issue a decision incorporating his findings of fact therein, and send a copy thereof to the operator or the representative of the miners, as appropriate. Any such hearing shall be of record and shall be subject to section 554 of title 5 of the United States Code.

No two Commissioners having voted to grant the petition for review on the issues over which the Commission does have jurisdiction, it is denied.

Mary Lu Jordan, Chairman

Michael F. Duffy, Commissioner

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Distribution

Bradley S. Tupi, Esq.
Kenneth G. Scholtz, Esq.
Tucker Arensburg, PC
1500 One PPG Place
Pittsburgh, PA 15222

Stephen D. Turow, Esq.
Lynny Bowman Dunbar, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22209-2296

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Administrative Law Judge Alan Paez
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021

Administrative Law Judge Michael Zielinski
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021