

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 13, 2007

UNITED MINE WORKERS OF	:	
AMERICA, on behalf of LOCAL 1248,	:	
DISTRICT 2	:	
	:	
	:	
v.	:	Docket No. PENN 2002-23-C
	:	
MAPLE CREEK MINING, INC.	:	

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY THE COMMISSION:

This compensation proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act” or “Act”). The United Mine Workers of America (“the UMWA”), pursuant to section 111 of the Act, 30 U.S.C. § 821, seeks compensation for miners of Maple Creek Mining, Inc. (“Maple Creek”) idled by a withdrawal order issued by the Secretary of Labor’s Mine Safety and Health Administration (“MSHA”). Administrative Law Judge Michael Zielinski twice denied Maple Creek’s motion for summary decision on the question of whether the miners were owed up to one week’s compensation. 28 FMSHRC 407 (May 2006) (ALJ); 28 FMSHRC 904 (Oct. 2006) (ALJ). Maple Creek requested that the judge certify for interlocutory review the issue addressed in the judge’s decisions, and he did so. 28 FMSHRC 1120 (Dec. 2006) (ALJ). The Commission thereafter granted interlocutory review. 29 FMSHRC 1 (Jan. 2007). For the reasons that follow, we vacate the judge’s decisions denying Maple Creek’s motions.

I.

Factual and Procedural Background

On the morning of July 30, 2001, while inspecting the Maple Creek Mine, an underground coal mine then operating in Washington County, Pennsylvania, an MSHA inspector

issued Citation No. 7082157 to Maple Creek, alleging an ineffective bleeder system in violation of 30 C.F.R. § 75-334(b)(1).¹ 28 FMSHRC at 408-09 & n.4; MCM Reply Mem. on Mot. for Summ. Dec., Ex. 2 (“Citation”). In addition to the citation, issued pursuant to section 104(a) of the Act, 30 U.S.C. § 814(a), the inspector issued Order No. 7082156, an “imminent danger” withdrawal order under section 107(a) of the Act, 30 U.S.C. § 817(a).² 28 FMSHRC at 408 & n.3; MCM Reply Mem., Ex. 1. Following a ventilation survey conducted by MSHA, that order was terminated by a different inspector at 1 p.m. the following day, July 31. 28 FMSHRC at 409.³

Although the “Condition or Practice” section of Citation No. 7082157 stated that because of the imminent danger order, no abatement time was set, the citation included a notation that termination was due by 11:30 p.m., July 31. *Id.*; Citation at 2. The issuing inspector returned to

¹ 30 C.F.R. § 75.334(b)(1) provides:

During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine.

² Section 107(a) provides in pertinent part:

If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist.

30 U.S.C. § 817(a).

³ Both the imminent danger withdrawal order and the citation were ultimately modified to eliminate language stating that the alleged violation was a contributing factor to the condition prompting the imminent danger order. 28 FMSHRC at 409.

the mine before then and, pursuant to section 104(b) of the Act, 30 U.S.C. § 814(b),⁴ again ordered miners withdrawn from that area of the mine, based upon his conclusion that Maple Creek had expended “little or no effort” to correct the condition he had cited the day before. 28 FMSHRC at 409; Compl.’s Opposition to Mot. for Summ. Dec., Ex. C. According to the parties, as a result of the section 104(b) order, Order No. 7060223, MSHA did not permit mining operations to resume there until August 7, 2001. 28 FMSHRC at 409; MCM Br. at 2. Maple Creek did not file notices of contest with respect to either of the withdrawal orders or with respect to the citation. 28 FMSHRC at 413.

On October 26, 2001, pursuant to section 111 of the Mine Act, the UMWA filed a Complaint for Compensation initiating this proceeding.⁵ The claim is based on the third sentence

⁴ Section 104(b) provides that:

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 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.

⁵ Section 111 provides that:

[1] If a coal or other mine or area of such mine is closed by an order issued under section 103, section 104, or section 107, all miners working during the shift when such order was issued who are idled by such order shall be entitled, regardless of the result of any review of such order, to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than the balance of such shift. [2] If such order is not terminated prior to the next working shift, all miners on that shift who are idled by such order shall be entitled to full compensation by the operator at their regular rates of pay for the period they are idled, but for not more than four hours of such shift. [3] If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 for a failure of the operator to

of section 111, which provides that, if a mine is closed by an order issued under section 104 or section 107, all miners who are idled by the order shall receive up to one week's pay after there is an opportunity for a public hearing and "after such order is final." 30 U.S.C. § 821. Accordingly, the UMWA seeks up to a week's pay for each Maple Creek miner idled as a result of the section 104(b) withdrawal order. 28 FMSHRC at 407 & n.1, 411.

On February 25, 2002, MSHA issued proposed civil penalty assessments for a number of citations and orders that had been previously issued to Maple Creek. 28 FMSHRC at 409. Among the proposed penalties was a proposed penalty of \$9,000 for Citation Number 7082157. *Id.* It was categorized under the "Type of Action" column on the assessment form as "104A-104B." *Id.* at 413. Maple Creek contested that and some of the other proposed penalties on March 18, 2002. *Id.* at 409-10.

On May 3, 2002, the Secretary filed with the Commission a Petition for Assessment of Civil Penalties in Docket No. PENN 2002-116. *Id.* at 410. In that proceeding, the Secretary sought to assess civil penalties in the total amount of \$36,853.00 for 12 alleged violations, including the aforementioned \$9,000 penalty. *Id.* The petition was served on both Maple Creek and UMWA Local Union 1248. *Id.* By letter dated June 19, 2002, the UMWA sought party status in the case — a request that was granted by the assigned judge, Judge Bulluck. *Id.*

comply with any mandatory health or safety standards, all miners who are idled due to such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and after such order is final, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser. [4] Whenever an operator violates or fails or refuses to comply with any order issued under section 103, section 104, or section 107 of this Act, all miners employed at the affected mine who would have been withdrawn from, or prevented from entering, such mine or area thereof as a result of such order shall be entitled to full compensation by the operator at their regular rates of pay, in addition to pay received for work performed after such order was issued, for the period beginning when such order was issued and ending when such order is complied with, vacated, or terminated. The Commission shall have authority to order compensation due under this section upon the filing of a complaint by a miner or his representative and after opportunity for hearing subject to section 554 of title 5, United States Code.

30 U.S.C. § 821.

On July 29, 2003, the Secretary filed with Judge Bulluck a Motion for Decision and Order Approving Partial Settlement, by which the Secretary and Maple Creek sought approval of a settlement of all but one of the violations at issue in the civil penalty proceeding. *Id.*; MCM Mot. for Summ. Dec., Ex. 2 (“Settlement Mot.”). Among the violations included in the motion was Citation No. 7082157. 28 FMSHRC at 410; Settlement Mot. at 2-3. In addressing the citation, the Secretary “recommend[ed] that . . . Order No. 706223 be vacated” and stated that a reduction in the \$9,000 proposed penalty to \$2,000 was warranted. 28 FMSHRC at 410; Settlement Mot. at 2-3.

The UMWA was served with a copy of the settlement motion but filed no response. 28 FMSHRC at 410. On August 11, 2003, a Decision Approving Partial Settlement was entered. Judge Bulluck granted the Secretary’s motion and approved the proposed reduction of the civil penalty assessed for Citation No. 7082157. *Id.*; MCM Mot. for Summ. Dec., Ex. 3.⁶

Subsequently, in the separate compensation proceeding, Maple Creek moved for summary decision before Judge Zielinski, who by then had been assigned the proceeding. Maple Creek contended that a week’s compensation for miners is not permissible in this instance under the terms of section 111 because Order No. 706223 had been vacated as part of the approved settlement in the civil penalty proceeding. 28 FMSHRC at 408. According to Maple Creek, because the order had been properly challenged and vacated, it did not constitute a “final order” entitling the miners to up to a week’s compensation under the pertinent provisions of section 111.

Judge Zielinski denied Maple Creek’s motion for summary decision on May 4, 2006. *Id.* at 413. The judge concluded that because the section 104(b) withdrawal order did not allege a new violation and since there was no separate civil penalty assessed with respect to the order, the order was not properly part of the civil penalty proceeding. *Id.* The judge held that Maple Creek’s sole avenue for challenging a section 104(b) withdrawal order was to file a notice of contest pursuant to section 105(d), which it did not do. *Id.* at 411-13. Consequently, the judge concluded that 30 days after its issuance the section 104(b) withdrawal order had become final for purposes of section 111. *Id.* at 413.

Upon Maple Creek’s motion for reconsideration, the judge requested that the Secretary appear as *amicus curiae* in the case because he believed that her views would aid his resolution of the ultimate issue raised by Maple Creek’s renewed motion. Order (ALJ) (June 13, 2006). In her *amicus* brief to the judge, the Secretary explained that because Maple Creek had indicated it was contesting a penalty that had “104A - 104B” in the “Type of Action” column on the penalty proposal form, the Secretary had subsequently treated the civil penalty proceeding as including Maple Creek’s contest of the section 104(b) withdrawal order. 28 FMSHRC at 906.

⁶ The UMWA was not served with a copy of the decision approving settlement. Dec. Approving Settlement (Aug. 11, 2003) (ALJ).

The judge nevertheless upheld his original decision on the same grounds as before. *Id.* at 906-08. He further held that “a belated agreement by the Secretary to vacate a section 104(b) [order], which had little or no continuing legal significance and was not at issue in the contest proceeding before the Commission, would not render the order invalid for purposes of section 111.” *Id.* at 908.

II.

Disposition

Maple Creek contends that the judge erred in holding that the withdrawal order could not have been appropriately included in the civil penalty proceeding. MCM Br. at 5-6. According to Maple Creek, the order was vacated pursuant to the terms of the settlement that was approved by the judge in the proceeding. *Id.* at 6-9. Maple Creek submits that the Secretary has unreviewable discretion to vacate a withdrawal order, as she did in settling the civil penalty proceeding. *Id.* at 9-10.

The UMWA urges the Commission to affirm the judge’s decisions that Maple Creek’s failure to contest the withdrawal order pursuant to section 105(d) rendered the order final for purposes of section 111. UMWA Br. at 3-4. According to the UMWA, any language in the settlement agreement vacating the withdrawal order is irrelevant because, pursuant to the same agreement, Maple Creek agreed to pay a penalty for the underlying violation. *Id.* at 4-8.

In her *amicus* brief before this Commission, the Secretary changes the position she took before Judge Zielinski. She now agrees with the judge’s holding that in order to contest the withdrawal order, Maple Creek was required to file a section 105(d) notice of contest. S. Br. at 12-18. The Secretary now states that the language in the settlement agreement regarding the withdrawal order is ineffective because the order was not timely contested. *Id.* at 18-20.

Maple Creek moved for summary decision below, pursuant to Commission Procedural Rule 67(b),⁷ on the ground that, as a matter of law, the miners are not entitled to a week’s

⁷ Rule 67(b) provides that:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

(1) That there is no genuine issue as to any material fact;
and

compensation under section 111. The Commission's review of decisions granting or denying motions for summary decision is de novo. *See Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007).

Section 111 plainly states that up to a week's compensation is only available if and when the order withdrawing miners has become "final." Section 111 states in pertinent part that:

If a coal or other mine or area of such mine is closed by an order issued under section 104 or section 107 for a failure of the operator to comply with any mandatory health or safety standards, all miners who are idled by such order shall be fully compensated after all interested parties are given an opportunity for a public hearing, which shall be expedited in such cases, and *after such order is final*, by the operator for lost time at their regular rates of pay for such time as the miners are idled by such closing, or for one week, whichever is the lesser.

30 U.S.C. § 821 (emphasis added). Thus, up to a week's compensation will be ordered by the Commission only in those instances in which the withdrawal order was ultimately upheld and will not be ordered if the order was later vacated. *See Rushton Mining Co. v. Morton*, 520 F.2d 716, 720 (3rd Cir. 1975) (upholding interpretation by Commission's predecessor agency of a substantially similar predecessor provision to section 111, section 110(a) of the Federal Coal Mine Safety and Health Act of 1969, 30 U.S.C. § 820(a) (1970)).

In this instance, the Secretary's settlement motion in the civil penalty proceeding addressed the withdrawal order and recommended that it be vacated. Judge Bulluck granted the Secretary's unopposed motion, and therefore the order was vacated. *See Johnson v. Lamar Mining Co.*, 10 FMSHRC 506, 509 (Apr. 1988) ("The judge's order approving the settlement and dismissing the proceeding obviously and inherently directs compliance with the settlement agreement."). The relevant language of section 111 requires a final order before compensation may be awarded. 30 U.S.C. § 821. Because a vacated order cannot serve as the "final order" required by the statute, compensation must be denied in this case.

However, the UMWA and, on interlocutory review at least, the Secretary contend that the withdrawal order was never properly a part of the civil penalty proceeding and thus could not have been lawfully vacated by the judge's decision approving settlement in that proceeding. According to the UMWA and the Secretary, Maple Creek's sole opportunity to contest the withdrawal order was to file a notice of contest pursuant to section 105(d) of the Act within 30

(2) That the moving party is entitled to summary decision
as a matter of law.

29 U.S.C. § 2700.67(b).

days of the order's issuance.⁸ Because Maple Creek did not do so, the UMWA argues that the order became a final order at the end of the 30 days. UMWA Reply Br. at 1-2.

The issue of whether a section 104(b) withdrawal order can only be contested pursuant to section 105(d), and not later in a section 105(a) civil penalty proceeding, has not been directly decided by the Commission.⁹ Although the parties do not refer to the terms of the Mine Act to support their competing positions, we must start there to determine whether Congress spoke directly to the question presented.

The first inquiry in statutory construction is “whether Congress has directly spoken to the precise question at issue.” *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Local Union No. 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Moreover, “in ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.” *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a statute’s text and legislative history, may be employed to determine whether “Congress had an intention on the precise question at issue,” which must be given effect. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (citations omitted).

⁸ Section 105(d) states in pertinent part:

If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing

30 U.S.C. § 815(d).

⁹ The issue was specifically noted but not decided by the Commission some time ago in *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 508 n.5 (Apr. 1989). The issue has since been addressed by Commission judges in the context of civil penalty proceedings, but they have reached different conclusions. *Compare Webster County Coal, LLC*, 29 FMSHRC 90, 91 (Jan. 2007) (ALJ) (Commission does not have jurisdiction under section 105(a) to entertain a challenge to a section 104(b) withdrawal order), *with Nelson Bros. Quarries*, 24 FMSHRC 980, 982-84 (Nov. 2002) (ALJ) (section 104(b) orders can be contested pursuant to the section 105(a) civil penalty proceeding provisions).

If, however, the statute is ambiguous or silent on a point in question, a second inquiry is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing *Chevron*, 467 U.S. at 844).

The Commission is clearly charged with administering the provisions of sections 105(a) and 105(d) of the Mine Act, which address the challenge of enforcement actions of the Secretary, the initiation of cases before the Commission, and the Commission's administration of hearings concerning the validity of those enforcement actions. *See Emerald Mines Co. v. FMSHRC*, 863 F.2d 51, 53, 56-59 (D.C. Cir. 1988) (where language of Mine Act was indecisive, court deferred to Commission's interpretation of section 104(d) regarding the issuance of withdrawal orders). As the Supreme Court stated in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994), the Commission was established as an independent review body to "develop a uniform and comprehensive interpretation" of the Mine Act (citing Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Comm'n before the Senate Comm. on Human Res., 95th Cong. 1 (1978)). Moreover, the question of how the procedures set forth in sections 105(a) and 105(d) are to mesh and how the Commission will conduct hearings involves a major policy component, which the Commission is uniquely qualified to establish. Section 111 is also one of the provisions of the Mine Act the Commission is "charged with administering." 30 U.S.C. § 821 ("The Commission shall have the authority to order compensation due under this section"); *Clinchfield Coal Co. v. FMSHRC*, 895 F.2d 773, 775-80 (D.C. Cir. 1990). Consequently, we need not defer to another agency's interpretation of the statutory language at issue here.¹⁰

Based on our analysis of the statutory language and relevant legislative history, we conclude that a section 104(b) withdrawal order may be contested under section 105(a) in a civil penalty proceeding regardless of whether it was separately contested under section 105(d). As discussed below, such an interpretation is compatible with the Mine Act as a whole. Moreover, this interpretation is also consistent with the Commission's Procedural Rules and with the policies established by prior Commission decisions addressing contest rights.

Section 105(a) states in pertinent part that:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the

¹⁰ In any event, the Secretary has not requested that we accord deference to her interpretation in this case.

operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.

30 U.S.C. § 815(a) (emphases added). Consequently, under the plain terms of section 105(a), penalty assessments are authorized not only for violations alleged in citations, but also for violations alleged in orders issued pursuant to section 104. Moreover, penalties are routinely assessed by the Secretary for orders issued under section 104, and those orders are challenged in civil penalty proceedings. *See, e.g., Mettiki Coal Corp.*, 13 FMSHRC 3 (Jan. 1991) (civil penalty proceeding involving challenge of orders issued pursuant to section 104(d)(2)).

In addition, the Commission's procedural rules governing civil penalty proceedings, which are consistent with the language of section 105(a), do not distinguish between review of citations and review of orders in such proceedings. The Commission procedural rule which was in effect when the withdrawal order was issued stated that:

An operator's failure to file a notice of contest of a citation *or order* issued under section 104 of the Act, 30 U.S.C. 814, shall not preclude the operator from challenging, in a penalty proceeding, the fact of violation or any special findings contained in a citation *or order* including the assertion in the citation *or order* that the violation was of a significant and substantial nature or was caused by the operator's unwarrantable failure to comply with the standard.

29 C.F.R. § 2700.21 (2001) (emphases added).¹¹ We read our regulation to plainly permit a challenge to a section 104(b) withdrawal order in the civil penalty proceeding that includes the citation underlying the withdrawal order.

Despite the reference to section 104 "orders" in both section 105(a) and the Commission's applicable procedural rule, the Secretary and the UMWA would have the Commission interpret "order" in section 105 to exclude an order issued pursuant to section 104(b). In their view, section 104(b) orders are not contestable pursuant to section 105(a) because such orders do not allege a second, separate violation of the Mine Act, but rather a continuation of the original violation for which the operator was cited. UMWA Br. at 4; S. Br. at 14-16. Consequently, according to the Secretary, under section 105(a), she does not assess a second, separate penalty for the order, but rather only assesses a penalty for the original violation. S. Br. at 16. We are not persuaded by these arguments.

First of all, section 105(a), by its terms, does not distinguish between the different types of orders that can be issued under section 104. Absent any language in the statute suggesting that

¹¹ Language identical to that of former Commission Procedural Rule 21 now appears in Commission Procedural Rule 21(b). *See* Fed. Reg. 44,190, 44,196, 44,207 (Aug. 4, 2006).

the Secretary cannot propose a penalty in connection with a section 104(b) order, we will not interpret the phrase “order under section 104” in section 105(a) to exclude section 104(b) orders.

Secondly, contrary to her claim, the Secretary may indeed assess a separate penalty for the failure to abate a violation. Section 105(b)(1)(A) of the Mine Act provides in pertinent part:

If the Secretary has reason to believe that an operator has failed to correct a violation for which a citation has been issued within the period permitted for its correction, the Secretary shall notify the operator by certified mail of such failure and of the penalty proposed to be assessed under section 110(b) by reason of such failure and that the operator has 30 days within which to notify the Secretary that he wishes to contest the Secretary’s notification of the proposed assessment of penalty. . . .

30 U.S.C. § 815(b)(1)(A). Consequently, section 110(b) of the Act and MSHA’s regulations authorize the Secretary to assess steep daily penalties. *See* 30 U.S.C. § 820(b); 30 C.F.R. § 100.5(c) (“Any operator who fails to correct a violation for which a citation has been issued under section 104(a) of the Mine Act within the period permitted for its correction may be assessed a civil penalty of not more than \$6,500 for each day during which such failure or violation continues.”).

Moreover, the fact that a withdrawal order has been issued increases the likelihood that such a penalty will be assessed. The legislative history of the Mine Act states that under section 105(b)(1)(A), like under section 105(a):

[T]he Secretary is to similarly notify operators and miners’ representatives when he believes that an operator has failed to abate a violation within the specified abatement period. *In most cases, a failure to abate closure order will have been issued pursuant to Section [104(b)].* The notice of proposed penalty to operators in such cases shall state that a [104(b)] order has been issued and the penalty provided by Section [110(b)] of the Act shall also be proposed. *This penalty shall be proposed in addition to the penalty for the underlying violation required by Section [110(a)] of the Act.*

S. Rep. No. 95-181, at 34-35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622-23 (1978) (emphases added).

In addition, even if no separate penalty for failure to abate a violation is assessed, the failure to abate allegation upon which a section 104(b) withdrawal order rests, if established, increases the amount of the penalty that is ultimately assessed for the underlying violation. As

Judge Zielinski recognized in his first decision, “the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation is one of the factors that the Commission must consider in fixing the amount of a civil penalty.” 28 FMSHRC at 413 (quoting section 110(i) of the Mine Act, 30 U.S.C. § 820(i)). Thus, the sanction for a failure to abate is not only a withdrawal order, but, likely, a higher penalty when the Secretary eventually assesses a penalty for the original violative condition that allegedly was not abated in a timely fashion. *See NAACO Mining Co.*, 9 FMSHRC 1541, 1545 (Sept. 1987) (“Under sections 104(b) and 110(b), if the operator does not correct the violation within the prescribed period, the more severe sanction of a withdrawal order is required, and a greater civil penalty is assessed.”).

While operators have the right under section 105(d) to contest citations and orders earlier instead of waiting for a penalty assessment, that right does not diminish their options under section 105(a). Recognizing the interrelationship between the violation alleged in a citation or order and the penalty ultimately proposed for the violation, the Commission has attempted to harmonize the various contest provisions of section 105 in interpreting that provision, stating that:

The contest provisions of section 105 are an interrelated whole. We have consistently construed section 105 to encourage substantive review rather than to foreclose it. *See, e.g., Energy Fuels Corp.*, 1 FMSHRC 299, 309 (May 1979). The statutory scheme for review set forth in section 105 provides for an operator’s contest of citations, orders, and proposed assessment of civil penalties. Generally, it affords the operator two avenues of review. Not only may the operator *immediately* contest a citation or order within 30 days of receipt thereof, 30 U.S.C. § 815(d), but he also may initiate a contest following the Secretary’s subsequent proposed assessment of a civil penalty within 30 days of the Secretary’s notification of the penalty proposal. 30 U.S.C. § 815(a).⁹

⁹ The procedures followed by the Secretary in proposing penalties for violations usually result in an operator’s receipt of the Secretary’s notice of proposed penalty at a time substantially after the expiration of the 30-day period within which the operator may contest a citation or order.

Quinland Coals, Inc., 9 FMSHRC 1614, 1620-21 & n.9 (Sept. 1987).

In *Energy Fuels Corp.*, 1 FMSHRC 299 (May 1979), which was cited in *Quinland Coals*, the Secretary argued against interpreting section 105(d) to permit operators to immediately contest citations, on the ground that such an interpretation would encourage piecemeal litigation.

1 FMSHRC at 300, 306-07. The Commission rejected the Secretary's position, but indicated its preference for resolution of all issues in the later civil penalty proceeding:

If the citation lacked special findings, and the operator otherwise lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed. Even if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing. The two contests could then be easily consolidated for hearing upon motion of a party or the Commission's or the administrative law judge's own motion.

Id. at 308-09 (footnote omitted).

Adhering to *Quinland Coals* so as to permit an operator to contest a withdrawal order as part of the civil penalty proceeding is particularly appropriate in cases such as this one. The penalty proposed by the Secretary and contested by Maple Creek was for the "104A-104B" action reflected not only by Citation No. 7082157, which was listed on the proposed assessment (the "104A" component), but also by Order No. 706223 (the "104B" component). Furthermore, the settlement motion in the resulting civil penalty proceeding stated that:

[The section] 104(b) Order Number 7060223 was issued . . . for the Respondent's failure to correct the condition cited in Citation Number 7082157. A penalty of \$9,[000]^[12] was specially assessed based on the high negligence rating and the § 104(b) Order.

After further discussions with the operator, the Secretary recommends that the citation should remain classified as high negligence but Order Number 706223 should be vacated. While the negligence is still high, the parties submit that it is somewhat less than initially determined. Respondent was unsuccessfully attempting to correct the condition listed in Citation No. 7082157 at the time the 104(b) Order No. 7060223 was issued. Therefore, a reduction in the assessed penalty to \$2,000 is warranted.

Settlement Mot. at 2-3. In short, the removal of the failure to abate allegation that prompted the withdrawal order decreased the penalty by \$7,000. Stated differently, it appears that the failure to

¹² The motion mistakenly stated that the original penalty assessment was for \$9,500, not \$9,000. Settlement Mot. at 2.

abate allegation that led to the issuance of the withdrawal order increased the penalty proposed by 350 percent as compared to the amount the Secretary presumably would have proposed for the citation alone. Given the significance of the failure to abate allegation in the context of the civil penalty proceeding, we remain convinced that permitting operators to challenge section 104(b) withdrawal orders in such proceedings is consistent with the terms of the Mine Act.

The alternate approach, suggested by the Secretary and the UMWA, *i.e.*, requiring an operator to file a notice of contest under section 105(d) within 30 days of the issuance of the section 104(b) order or lose the right to contest it, is unreasonable. Such an order would become final if not contested within 30 days, even though the underlying citation giving rise to the order could still be challenged later in the civil penalty proceeding. If the underlying citation were subsequently vacated in connection with the civil penalty proceeding for any number of reasons, including the Secretary's failure to establish the violation, the UMWA and the Secretary would have the operator nevertheless obligated to compensate the miners idled due to the section 104(b) order for up to a week's compensation. The Commission, as the agency charged with administering section 111, cannot agree with interpreting the "final order" language of section 111 and the language of section 105(d) in a way that such an absurd result could occur. *See Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) (citing *In re Trans Alaska Pipeline Rate Case*, 436 U.S. 631, 643 (1978)).¹³

We are aware that vacating the judge's denial of the operator's motion for summary decision may have an adverse impact upon miners who might otherwise have been eligible for up to a week's compensation for the time they were not permitted to work due to the withdrawal order. We are sympathetic to their position. However, the Secretary has broad authority to

¹³ While Chairman Duffy and Commissioner Young believe that the plain meaning of section 105 and other provisions of the Mine Act resolves the question presented by this case, if they were to instead find the Mine Act ambiguous on the issue, they would still interpret section 105(a) to permit operators to wait and challenge withdrawal orders during the civil penalty proceeding involving the citation underlying the order. As discussed, such an interpretation is more compatible with the Mine Act as a whole, especially in comparison with the approach of the UMWA and the Secretary, who would have the Commission adopt an unreasonable and Byzantine procedure in cases in which a section 104(b) withdrawal order has been issued.

Commissioner Jordan disagrees that the plain meaning of section 105 and other sections of the Act clearly resolves the question presented in this case. In *Energy Fuels* the Commission decided a related issue under section 105(d), and stated: "[w]e find the section ambiguous." *Energy Fuels*, 1 FMSHRC at 300. She finds that assessment appropriate in resolving the matter at hand. Nonetheless, although she disagrees with her colleagues on this point, she is in accord with their conclusion that permitting operators to challenge withdrawal orders during the civil penalty proceeding is a reasonable interpretation that is harmonious with the Mine Act as a whole. She also agrees with their assertion that the approach asserted by the UMWA and the Secretary is unreasonable and needlessly complicated.

vacate orders she has issued. *See RBK Constr., Inc.*, 15 FMSHRC 2099, 2100-01 (Oct. 1993) (relying on *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3 (1985), in holding that the Secretary had the authority to vacate the citation at issue).

Consequently, for the foregoing reasons, we vacate the judge's decisions denying Maple Creek's motions for summary decision. Because it is unclear from the record whether there is any other valid claim for compensation under the other provisions of section 111, we remand the case to the judge for further proceedings consistent with this decision.

III.

Conclusion

For the foregoing reasons, we vacate the judge's decisions denying Maple Creek's motion for summary decision and remand the case to him for further proceedings consistent with this decision.

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

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