FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

November 30, 1999

SECRETARY OF LABOR,	:		
MINE SAFETY AND HEALTH	:	Docket Nos.	SE 99-101-RM
ADMINISTRATION (MSHA)	:		SE 99-102-RM
	:		SE 99-103-RM
v.	:		SE 99-104-RM
	:		SE 99-105-RM
	:		SE 99-106-RM
NOLICHUCKEY SAND CO., INC.	:		

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY: Riley, Verheggen, and Beatty, Commissioners

Before us is a "Motion to Stay Abatement" filed by Nolichuckey Sand Company, Inc., ("Nolichuckey") on September 22, 1999 in the above-captioned proceedings. Mot. at 1. The motion recites that on January 28, 1999, MSHA issued Nolichuckey six citations alleging violations of 30 C.F.R. § 56.14109(a). *Id.*; *see* 21 FMSHRC 681, 682 (June 1999) (ALJ). The Department of Labor's Mine Safety and Health Administration ("MSHA") agreed to extend the time period for abatement of the citations at issue until the judge rendered his decision. Mot. at 1. Administrative Law Judge Avram Weisberger upheld the citations on June 30. *Id.* MSHA further extended until October 1 the date by which the operator was to abate the cited conditions. *Id.* at 1-2. In support of its motion, Nolichuckey states that review of the judge's determination in this matter is pending before the Commission, that briefing in this matter will not be complete by the date by which it must abate the cited conditions, that the alleged violation is non-significant and substantial, that MSHA's enforcement position prior to these citations' issuance was that the operator was in compliance with the safety standard, and that continuation of the status quo would not place miners at risk of bodily injury. Mot. at 2.

The Secretary of Labor opposes Nolichuckey's motion. The Secretary submits that section 105(b)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(b)(2) (1994) ("Mine Act" or "Act"), "prohibits the Commission from granting temporary relief . . . in the case of a citation issued under subsection (a) or (f) of Section 104 [of the Act]." S. Opp'n at 2 (citing 30 U.S.C. § 815(b)(2)). The Secretary's opposition also cites *Energy Fuels Corp.*, 1 FMSHRC 299, 306 (May 1979), which states that the Mine Act "does not permit the Commission to stay abatement requirements of a citation during litigation." *Id.*

The citations at issue in the instant matter were issued under section 104(a) of the Mine Act. *See* 21 FMSHRC at 682. In effect, Nolichuckey's motion requests temporary relief from abatement. The text of section 105(b)(2)(C) provides in part that "[n]o temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section 104." 30 U.S.C. § 815(b)(2)(C); *see also* 29 C.F.R. § 2700.46(a) (providing that the Commission may not grant temporary relief with respect to citations issued under section 104(a) of the Mine Act).

In *Pennsylvania Electric Co.*, 11 FMSHRC 793 (May 1989), the operator requested that the Commission enjoin MSHA enforcing citations pending a Commission decision. *Id.* We noted that section 105(b)(2) "specifically states that '[n]o temporary relief shall be granted in the case of a citation issued under subsection (a) . . . of section [104]' of the Act." *Id.* We denied the operator's request, and held that "the two citations in question were issued under section 104(a) of the Act. Thus, by the express terms of the Act, temporary relief may not be granted in this case." *Id.* at 793-94. Similarly, in *Utah Power & Light Co., Mining Div.*, 11 FMSHRC 953 (June 1989), we held that "the citation from which temporary relief is sought by [the operator] is a section 104(a) citation . . . and as such is not within the purview of section 105(b)(2) relief. Accordingly, [the operator's] Application for Temporary Relief is denied." *Id.* at 958; *see also Energy Fuels, Corp.*, 1 FMSHRC 299, 306 (May 1979) ("Furthermore, the Commission cannot, unless a final order favorable to Energy Fuels is issued, relieve Energy Fuels of its responsibilities to continue to maintain the cited condition in compliance. The 1977 Act does not permit the Commission to stay abatement requirements of a citation during litigation.") (citing sections 104(b) and (h), 105(b)(1)(A) and (b)(2) of the Act).

Contrary to Nolichuckey's assertion, section 105(d) does not require a different result. Section 105(d) provides that an operator may *contest* certain issues before a Commission judge, including the issuance or modification of an order issued under section 104 or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104. *See* 30 U.S.C. § 815(d). However, Nolichuckey currently requests what amounts to *temporary relief* from the abatement requirement, not a review of the reasonableness of the time set for abatement. Mot. to Stay Abatement at 1. We previously have applied section 105(b)(2) to operator requests to stay abatement requirements related to section 104(a) citations. *See Pennsylvania Electric Co.*, 11 FMSHRC at 793; *Utah Power & Light*, 11 FMSHRC at 953. Moreover, Nolichuckey failed to contest the reasonableness of abatement time, either in its contest or in its Petition for Discretionary Review.

The plain language of section 105(b)(2) mandates that we deny the requested relief. However, we find several circumstances presented by this case troubling. It appears that the Secretary agreed to extend the abatement period for the citations at issue here during the pendency of this litigation. This made sense given that MSHA's position before the citations were issued was that the operator was in compliance with the relevant safety standards. 21 FMSHRC at 682 n.2. Indeed, MHSA extended the abatement period until October 1, 1999 — for a condition cited in January 1999.

MSHA has apparently declined, however, to extend the abatement period any further, notwithstanding the fact that the agency apparently decided to re-evaluate its position regarding the application of 30 C.F.R. § 56.14109(a) to the guards used by Nolichuckey. Since MSHA is advancing a new position regarding a specific condition that was previously deemed in compliance, we believe, in this case, it would be appropriate and reasonable for MSHA to opt not to press for abatement.

The Commission is bound, however, by the terms of the Mine Act, and the Act does not allow us to intervene here and order the Secretary to continue her forbearance. Instead, if Nolichuckey wants further vindication, it must risk defying MSHA's abatement period so that it might obtain a closure order and institute further proceedings before the Commission. The Secretary's insistence at this particular time to require abatement makes little sense — her brief certainly sheds no light on why abatement is suddenly needed now. Absent any explanation, we find her position unfortunate and merely a potential cause of additional litigation.[1]

In sum, and in accordance with Commission case law, we hold that the provision of temporary reinstatement procedures in section 105(b)(2) of the Mine Act does not include temporary relief from section 104(a) citations.

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[1] While our concurring colleagues characterize our concerns as "gratuitous" and "dabbl[ing] in the affairs" of MSHA (slip op. at 5), we note that this Commission has not been reluctant in the past to scrutinize the Secretary's enforcement activities. *See, e.g., Minerals Exploration Co.*, 8 FMSHRC 477, 478 (Apr. 1986) ("we express our strong disapproval of and, as appropriate, serve warning with respect to some of the activities of certain MSHA officials and the Secretary's trial counsel"). In fact, this scrutiny was recently reemphasized by the Commission in *Black Diamond Constr., Inc.*, 21 FMSHRC __, No. EAJ 98-1 (Nov. 3, 1999). In *Black Diamond*, a Commission majority expressed disapproval of the Secretary's position in an EAJA case by stating that "it is hardly reasonable for a litigant to be forced to bear the considerable cost of defending itself over many months . . . while an enforcement agency ignores essential information brought to its attention at the outset." Slip op. at 11.

In light of the Commission's previous willingness to scrutinize the Secretary's enforcement activities, it is unfair to characterize our position here as "gratuitous" and "dabbl[ing] in the affairs"of MSHA. It is important that all members of the Commission recognize that Congress established this impartial adjudicative body to, among other things, "review[] the enforcement activities of the Secretary" and "provide guidance to [her] in enforcing the [Mine Act]." Hearing on the Nomination of Members of the Federal Mine Safety and Health Review Commission before the Senate Comm. on Human Resources, 95th Cong., 1 (1978). We are not prepared to join our concurring colleagues in their willingness to turn a blind eye to this important statutory responsibility imposed by the Mine Act.

Accordingly, upon consideration of Nolichuckey's motion, and in accordance with the plain language of section 105(b)(2) of the Act and Commission Procedural Rule 46(a), we deny the operator's motion.

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Marks, concurring:

We agree with our colleagues that the plain language of the Mine Act clearly states that an operator may not be granted temporary relief in a case arising from a citation issued under section 104(a) of the Act. We are therefore in accord with the majority's denial of Nolichuckey's motion to stay abatement, as the operator is requesting a remedy explicitly precluded by the statute.

We write separately, however, because we wish to disassociate ourselves from the majority's gratuitous criticism of the Secretary's decision to require abatement as of October 1. The judge in this case found six violations of the regulation mandating stop cords or railings on conveyor belts. The Secretary, who is charged with enforcing the Mine Act, has determined that any additional delay in abating these violations is not warranted. We are most reluctant to second-guess that decision and announce that this regulation — designed to ensure the safety of miners working near the belt — should not now be enforced.

When the majority interpreted — correctly — the clear language of the Mine Act to mandate the denial of temporary relief to Nolichuckey, its task was complete. To then opine on the propriety of the Secretary's enforcement action at this stage of the proceedings appears to be little more than the attempt of an adjudicatory agency to dabble in the affairs of its prosecutorial counterpart. We do not know why the Secretary agreed to the previous extension of the abatement period, nor have we been provided with any information as to what prompted her decision to impose abatement as of October 1. On the basis of the pleadings filed in this proceeding, we are unwilling to draw conclusions about the implications for miner safety if the abatement period were extended beyond that date.[1]

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

[1] Commissioner Marks also notes:

In light of the fact that Nolichuckey is represented by competent and experienced counsel, I find that my colleagues' suggestion to Nolichuckey on how to proceed in order to obtain "further vindication" against the Secretary is not only superfluous to the holding in this case but it is inappropriate, as the Commission is not in the business of providing legal advice on how to proceed against the Secretary.

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