FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 15, 2007

SECRETARY OF LABOR,	:		
MINE SAFETY AND HEALTH	:		
ADMINISTRATION (MSHA)	:	Docket Nos.	WEVA 2006-788-R
	:		WEVA 2006-789-R
v.	:		WEVA 2006-790-R
	:		
MARFORK COAL COMPANY, INC.	:		

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DECISION

BY: Jordan and Young, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"). Administrative Law Judge Jerold Feldman dismissed notices of contest filed pursuant to section 105(d) of the Act, 30 U.S.C. § 815(d), by Marfork Coal Co. ("Marfork"). 28 FMSHRC 842 (Sept. 2006) (ALJ). For the reasons that follow, we reverse the judge's decision.

I.

Factual and Procedural Background

Marfork, a subsidiary of Massey Energy Company, operates the Slip Ridge Cedar Grove Mine, an underground coal mine located in Raleigh County, West Virginia. 28 FMSHRC at 847 n.3. On June 27, 2006, MSHA issued Citation No. 7257574 under Mine Act section 104(d)(1), alleging a significant and substantial ("S&S")[1] violation of 30 C.F.R. § 75.512 for Marfork's alleged improper maintenance of a power center. On that same day, MSHA issued Citation No. 7257568 under Mine Act section 104(a), alleging an S&S violation of 30 C.F.R. § 75.517 for

[1] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

inadequate insulation of cables. MSHA also issued Order No. 7257575 under Mine Act section 104(d)(1), charging Marfork with an S&S violation of 30 C.F.R. § 75.360(b)(9) for an inadequate preshift examination of the power center.

On July 10, 2006, Marfork filed a notice of contest for the three violations. 28 FMSHRC 745 (Aug. 2006) (ALJ). On July 27, 2006, the Secretary filed an answer and motion for continuance until a civil penalty assessment was proposed. *Id*. In her cover letter to Chief Administrative Law Judge Lesnick, the Secretary requested that "given the inordinate number of contest cases being filed by this operator," the operator, not the Secretary, file periodic reports to the judge concerning the status of the civil penalty, as is customary. Marfork did not oppose the continuance but did oppose the requirement of providing periodic status reports to the judge. On August 7, 2006, the case was assigned to Judge Feldman.

On August 11, 2006, the judge issued Marfork an order to show cause why the contest proceeding should not be dismissed because it constituted a needless and duplicative consumption of Commission resources and contravenes Commission Procedural Rule 20(e)(1)(ii), 29 C.F.R. § 2700.20(e)(1)(ii). 28 FMSHRC at 747. On September 1, 2006, Marfork filed a response to the order to show cause contending that its contest should not be dismissed. 28 FMSHRC 890 (Sept. 2006) (ALJ). The Secretary responded, submitting that although she was "unaware of any statutory provision, any procedural rule, or any case law that requires dismissal of the operator's contest," filing notices of contest without a specific or urgent need for a hearing was not an appropriate use of the litigation process. S. Letter (Sept. 11, 2006).

On September 27, 2006, the judge dismissed the contest proceeding. 28 FMSHRC at 847. He stated that the purpose of a section 105(d) contest proceeding is to adjudicate the validity of a citation without waiting for the Secretary's proposed civil penalty. *Id.* at 842. The judge reasoned that, by filing a contest "only to agree shortly thereafter to stay its contest pending the civil penalty case, Marfork apparently does not want a disposition on the merits *before* the civil penalty is proposed." *Id*. at 843 (emphasis in original). He found that Marfork's response to the show cause order did not seek an "early" adjudication on the merits, but was instead based on a desire to contest all S&S violations for the purpose of initiating discovery and informal negotiations with the Secretary. *Id.* at 844. The judge concluded that these were insufficient reasons to initiate a contest because there was no need for an immediate hearing, which the judge perceived to be a critical element. *Id.* at 844-45. He also determined that permitting discovery would be counterproductive because many of the violations would not be litigated after the Secretary proposes her penalty. *Id*. at 845. The judge added that a notice of contest effectively cuts off the opportunity for settlement through informal conferences. *Id*. He concluded that because Marfork lacked the intent to seek an "early" hearing, its contest served no purpose. *Id*. at 846. The judge believed that the "unprecedented" filing of voluminous contests results in needless expense and wasted effort and preparation for no legitimate reason. *Id.* at 845.

Marfork filed a petition for discretionary review with the Commission, which was granted. After Marfork filed its opening brief, the Secretary moved to dismiss for mootness and

to stay briefing. On December 21, 2006, the Commission stayed the proceeding pending a response from Marfork. Marfork filed a response to the motion to dismiss for mootness and, on January 12, 2007, the Commission lifted the stay of briefing and took the motion to dismiss under advisement.

II.

Disposition

A. Mootness

Before turning to the merits of the petition, we first address whether the proceeding should be dismissed on the basis of mootness. The Secretary claims that the contest proceeding has now been mooted because the Secretary has proposed, and Marfork has contested, penalties with respect to the violations at issue.[2] S. Mot. at 4-6. She alleges that every issue raised in Marfork's appeal was predicated on the judge's dismissal of its contest proceedings pending issuance of the Secretary's penalty proposals. *Id*. The Secretary asserts that Marfork is now in the position that it would be in if it were to prevail on the merits of its appeal and Marfork now is free to engage in any discovery or settlement negotiations. *Id.* Marfork opposes the motion on the basis that this issue will likely arise again every time an operator contests a citation or order and does not seek some type of immediate review. M. Reply to Mot. at 7.

The Commission has stated that "an agency acts within its discretion in refusing to hear a case that would be considered moot if tested under the Article III 'case or controversy' requirement." *Mid-Continent Res., Inc*., 12 FMSHRC 949, 956 (May 1990) (quoting *Climax Molybdenum Co. v. Sec'y of Labor*, 703 F.2d 447, 451 (10th Cir. 1983)). Although it is true that penalty proceedings have been instituted and Marfork is free to pursue its case despite the dismissal, this case fits within an exception to the mootness doctrine entitled "capable of repetition, yet evading review." 13A Wright, Miller, & Cooper, *Federal Practice and Procedure* § 3533.8 (2d ed. 1984). The exception applies where "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Padilla v. Hanft*, 126 S. Ct. 1649, 1651 (2006) (Ginsburg, R., dissenting) (alteration in original). For example, election issues are "among those most frequently saved from mootness by this exception." *National Right to Life Political Action Comm. v. Connor*, 323 F.2d 684, 691 (8th Cir. 2003). Similarly, the Commission has stated that "when there is a substantial likelihood that an allegedly moot question will recur, the issue remains justiciable." *Mid-Continent*, 12 FMSHRC at 955.

[2] On August 2, 2006, the Secretary proposed a penalty for Citation No. 7257568. On December 7, 2006, the Secretary proposed penalties for Citation No. 7257574 and Order No. 7257575. S. Mot. at 3. Marfork has contested the associated penalties, and the proceedings have been stayed before Judge Feldman. *See* Docket Nos. WEVA 2006-934 and WEVA 2007-232.

Based on the Commission's experience of the past few months, there is a substantial likelihood that this scenario will be repeated. Judge Feldman has already dismissed another one of Marfork's contest proceedings relating to its River Fork Powellton Mine. *See* WEVA 2006-755-R (Dec. 12, 2006) (ALJ) (Dismissal Order). Likewise, other judges have dismissed contest proceedings once penalty proceedings have been initiated. *See, e.g., Mammoth Coal Co.,* WEVA 2006-759-R (Dec. 29, 2006) (ALJ) (Dismissal Order), *vacated & remanded*, 29 FMSHRC 46 (Jan. 2007); *Pinacle Mining Co.,* WEVA 2006-123-R (Dec. 21, 2006) (ALJ) (Dismissal Order). In the past year, some operators have filed numerous notices of contests and then immediately agreed to stay them rather than proceeding to a hearing before penalties were issued. *See Aracoma Coal Co.,* WEVA 2006-801-R (Nov. 16, 2006) (ALJ) (Dismissal Order); 28 FMSHRC at 844 n.1 (noting that the operator filed 375 contests).

In addition, this case fulfills the other requirement for the exception to the mootness doctrine: the time frame between the notice of contest and the penalty assessment in most cases will not be of sufficient duration to permit review of the issue. Accordingly, we conclude that the exception to mootness applies and that the question should be reviewed.

B. Whether An Operator May Maintain A Section 105(d) Contest Proceeding When It Does Not Seek An Immediate Hearing

Marfork argues that operators have an absolute right under section 105(d) of the Mine Act to contest citations and orders. M. Br. at 9. It asserts that the language of the Mine Act is plain and unambiguous in granting this right and therefore the judge erred by interpreting section 105(d) to require that the operator request an immediate hearing.[3] *Id*. at 14. Marfork also contends that the operator's procedural due process rights under section 105(d) outweigh the concern of alleged waste of Commission resources. *Id*. at 27. It also asserts that Marfork's interest is best served by filing notices of contest so that it may begin discovery before memories fade or witnesses re-locate. *Id*. at 17. Marfork submits that the judge erred in concluding that its contest served no purpose because it was actively engaged in discovery and in moving the proceedings forward and that it was the Secretary who sought a continuance. M. Reply Br. at 4.

The Secretary responds that review of the judge's management of cases lies within the discretion of the Commission. S. Br. at 2. The Secretary takes no position as to whether the judge abused his discretion in this case. *Id*. However, she states her belief that management of cases before judges should be entrusted to the discretion of judges and should be disturbed only for an abuse of that discretion. *Id*. The Secretary asserts that effective administration of justice requires that trial courts possess the capability to manage their own affairs and be able to dismiss a

[3] In this decision, we use the term "immediate hearing" to refer to a section 105(d) hearing that is intended to take place before a hearing on any subsequent contest of the proposed penalty assessment for the citation or order involved. *See Energy Fuels Corp*., 1 FMSHRC 299, 308 (May 1979). We interpret this term to mean the equivalent of the judge's reference in his decision to an "early hearing." 28 FMSHRC at 842, 844.

case "[f]or failure of the plaintiff to prosecute." *Id*. at 3-4 (citing Fed R. Civ. P. 41(b)). The Secretary maintains that "pre-penalty" notices of contest are not a reasonable use of the litigation process unless the contestant has an urgent or specific need for a hearing on the underlying violation and that they constitute a burdensome use of litigation resources. *Id*. at 5-9.

The Commission has not directly addressed the statutory interpretation question posed by this case — whether an operator's contest of a citation or order pursuant to section 105(d) may subsequently be dismissed if the operator does not seek an immediate hearing with regard to its contest. We now employ traditional principles of statutory interpretation to resolve that issue.

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).[4] If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, 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 agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *Chevron*, 467 U.S. at 843; *Joy Technologies, Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997).

Turning to the first inquiry, "in ascertaining the plain meaning of the statute, the court must look at 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).

Section 105, subsections (a) and (d), sets forth the procedures for contesting citations, orders, and penalties under the Act. The Commission has historically considered these provisions together. *Energy Fuels Corp.*, 1 FMSHRC 299, 301 (May 1979) (analyzing section 105(a) and 105(d) together rather than in isolated fashion); *Quinland Coals*, *Inc.*, 9 FMSHRC 1614, 1620 (Sept. 1987) (stating that "the contest provisions of section 105 are an interrelated whole").

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[4] The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp*., 16 FMSHRC 6, 13 (January 1994).

Subsection (a) lays out the framework for contesting violations after the penalty has been proposed. It provides in relevant part:

> 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 operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency.

30 U.S.C. § 815(a).

Subsection (d) provides for contesting orders and citations prior to the proposed penalty assessment. It provides in relevant 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, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, or any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification, or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation or modification thereof issued under section 104, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. . . . The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104.

30 U.S.C. § 815(d).

Based on our analysis of the statutory language and legislative history, we agree with the judge's conclusion that Congress did not directly speak to the precise issue involved here. 28 FMSHRC at 846. Nowhere in section 105(d) did Congress include language that, on the one hand, requires that an operator seek an immediate hearing or, on the other hand, states that a contest may be filed and maintained regardless of whether an immediate hearing is sought. While, as the Commission concluded in *Energy Fuels*, 1 FMSHRC 299, Congress gave operators the right to file a contest of any citation or order within 30 days, it was silent on whether the operator must subsequently seek an immediate hearing or at least oppose any effort by the Secretary to delay the hearing.[5] Likewise, the legislative history of the Mine Act is not clear as to whether a section 105(d) proceeding is exclusively an immediate remedy for operators who wish to go forward before the penalty is proposed. S. Rep. No. 95-181, at 69 (1977); S. Conf. Rep. No. 95-461, at 15, 18 (1977), *both reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 657; 1293, 1296 (1978).

Where Congress has not spoken on an issue, the reviewing body is to determine whether the interpretation of the agency charged with administering the statute is a reasonable one. *Chevron*, 467 U.S. at 843-44. The Commission is clearly charged with administering the provisions of section 105(a) and 105(d), which set forth the procedures for contesting, before the Commission, the enforcement actions of the Secretary and the manner in which hearings shall be conducted before the Commission. Commission administrative law judges are responsible for presiding over proceedings initiated under section 105(a) or section 105(d) and making procedural or substantive rulings which resolve those proceedings. 30 U.S.C.§ 823(d)(1). Moreover, the Commission itself is authorized to review the judges' final decisions to determine, inter alia, whether the decisions are "contrary to law or to the duly promulgated rules or decisions of the Commission." 30 U.S.C. § 823(d)(2)(A)(ii). Similarly, the Supreme Court, in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214 (1994), stated that the Commission "was established as an independent review body to develop 'a uniform and comprehensive interpretation of the Mine Act'" (quoting Hearing on the Nomination of Members of the Federal Mine Safety and Health

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[5] Although the last sentence of section 105(d) mentions expedited proceedings being carried out in some situations, it does not directly address the question posed here. That sentence states: "The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104." 30 U.S.C. § 815(d). In other words, while the Commission is to take "whatever action is necessary" to expedite proceedings involving section 104 orders, the language does not state that all such proceedings must necessarily be expedited or that a particular proceeding must be expedited even though an operator may not desire such expedition. In addition, it is significant that the language in question applies only to "orders issued under section 104." Even if the language could be read to require that all section 105(d) contests of section 104 orders must be expedited, the language is silent as to contests of section 104 *citations*. Thus, the last sentence cannot be read to state directly that expedited proceedings must be held for all section 105(d) contests.

Review Comm'n before the Senate Comm. on Human Res., 95th Cong., 1 (1978)). Certainly, the Commission is fully empowered to interpret the Mine Act with regard to the management of its own cases and the procedures to be followed by litigants before it.

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 policy question. *Chevron*, 467 U.S. at 845, 865-66 (reasoning that deference is owed to the reasonable policy choices committed to an agency's care by statute). The Commission is uniquely qualified to establish that policy, and its policy choices are to receive deference. Congress recognized this policy-making role in section 113(d)(2)(B) of the Act, which provides, among other things, that the Commission may sua sponte grant review of cases where "the decision may be contrary to law or Commission policy or . . . a novel question of policy has been presented."[6] 30 U.S.C. § 823(d)(2)(B).

Although the Commission has not addressed the precise issue of whether an operator may utilize section 105(d) when it is not seeking an immediate hearing on the merits, in *Energy Fuels*, 1 FMSHRC 299, the Commission addressed whether an operator could immediately contest a citation under section 105(d) of the Mine Act. Answering that question in the affirmative, the Commission in dicta stated that if an operator "lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed." *Id*. at 308. The Commission further stated that "[e]ven 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." *Id.* Furthermore, in *Quinland Coals,* 9 FMSHRC at 1621, the Commission determined that failure to seek an immediate contest of an order containing an unwarrantable failure finding did not preclude an operator from challenging the special finding in a subsequent penalty proceeding. There, the Commission stated that the statutory scheme set forth in section 105 for review of citations, orders and proposed assessment of civil penalties "[g]enerally . . . affords the operator two avenues of review." *Id*. at 1620.

Consistent with the Commission's historical construction of section 105 to encourage substantive review rather than to foreclose it (*Quinland Coals*, 9 FMSHRC at 1620), we interpret section 105 to permit two avenues of review. This interpretation allows operators to file contests of citations and orders before related penalties are proposed even if there is no need for immediate review of the citations and orders. This interpretation also fully accords with the Commission's reasoning in *Energy Fuels* that even if an operator "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

[6] We note that the Secretary has not argued in this case that her interpretation of sections 105(a) and 105(d) would be entitled to special deference. Additionally, she has not argued that she is to play a policy-making role under those provisions. In fact, the Secretary has acknowledged the Commission's role in this area by stating that "review of judges' case management decisions is committed to the discretion of the Commission." S. Br. at 2.

continued until the penalty is proposed." 1 FMSHRC at 308. It is also consistent with the text of section 105(d) in that there is no language in that subsection requiring that an operator seek an immediate hearing on a citation or order in order to maintain a contest proceeding.

C. Whether The Judge Abused His Discretion By Dismissing The Notices Of Contest

Although the Mine Act does provide for two avenues of review under sections 105(a) and 105(d), we recognize that a judge possesses the power to manage and control matters pending before him, which includes the authority to dismiss a case under appropriate circumstances. *See* 29 C.F.R. § 2700.55 (Powers of Judges). It is a bedrock principle that effective administration of justice requires that judges possess the capability to manage their own affairs and that the authority to order dismissal is a necessary component of that capability. *Link v. Wabash R.R. Co*, 370 U.S. 626, 630-31 (1962); *Chambers v. NASCO, Inc*., 501 U.S. 32, 43 (1991). Similarly, Rule 41(b) of the Federal Rules of Civil Procedure authorizes a trial court to dismiss an action "[f]or failure of the plaintiff to prosecute . . . ."[7] Although an operator has a presumptive right to bring and maintain a contest proceeding under section 105(d) of the Mine Act, a judge retains the authority to manage and control that contest proceeding consistent with the statutory scheme and the requirements of due process. Thus, there may be extreme circumstances where an action or inaction on the part of an operator will warrant a judge's dismissal of a section 105(d) contest proceeding on non-substantive grounds.

The Commission has set forth its standard of review of pre-trial rulings, including the dismissal of cases, as follows:

> [T]he Commission cannot merely substitute its judgment for that of the administrative law judge . . . . The Commission is required, however, to determine whether the judge correctly interpreted the law or abused his discretion and whether substantial evidence supports his factual findings.

Black Butte Coal Co., 25 FMSHRC 457, 459-60 (Aug. 2003); *Asarco, Inc*., 12 FMSHRC 2548, 2555 (Dec. 1990). Applying an abuse of discretion standard is consistent with the discretion accorded judges in matters related to the conduct of a trial. *Medusa Cement Co.*, 20 FMSHRC

[7] Commission Procedural Rule 1(b), 29 C.F.R. § 2700.1(b), provides:

> On any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act . . ., the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure.

144, 147 (Feb. 1998). Additionally, any factual determinations made in arriving at the judge's conclusion are subject to substantial evidence review. *Black Butte*, 25 FMSHRC at 460.[8]

Applying this standard of review, we conclude that the judge abused his discretion in dismissing Marfork's contest proceeding. The judge's decision contains a number of statements that are not supported by the record. The judge termed the operator's filing of notices of contest as a "folly" and as "serv[ing] no purpose." 28 FMSHRC at 845. However, the record reveals that Marfork was moving forward in the case before the judge dismissed its notices of contest. M. Reply Br. Exs. A & B. By that time, Marfork had timely responded to the Secretary's discovery request and had submitted its own. It is also highly significant that the Secretary, not Marfork, sought the continuance. Dismissing an operator's case because the operator agreed to a continuance sought by the Secretary strikes us as unreasonable.

In addition, Marfork provided two reasons for going forward with the contest: initiating discovery and informal negotiations with the Secretary. 28 FMSHRC at 844. We conclude that initiating discovery and settlement negotiations are valid reasons to bring and maintain a section 105(d) contest proceeding. The judge's rationale for discounting Marfork's need for discovery before a penalty proceeding is circular and defective. The judge stated that he would prohibit discovery in the contest and then concluded, as a result, that Marfork's discovery and contest would serve no purpose. *Id*. at 845. With respect to settlement negotiations, he determined that contests hinder settlement opportunities based on his belief that the contest precludes the availability of informal MSHA safety settlement conferences. *Id*. While this may be true as to one settlement avenue, it does not mean that all settlement discussions will be prevented because of a contest filing. We can foresee that a contest proceeding and its consequent ongoing discovery could actually encourage more rapid settlements as additional facts become known in a case. In sum, we determine that the judge abused his discretion in dismissing the contest proceedings and, therefore, we reverse his decision.[9]

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[8] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[9] The judge separately relied on Commission Procedural Rule 20(e), 29 C.F.R. § 2700.20(e), to support his position that Marfork's contests must be dismissed because it did not seek immediate relief. 28 FMSHRC at 845. Rule 20(e) sets forth the requirements for notices of contest and requires a "short and plain statement" of the party's position with respect to each pertinent issue of law and fact and the relief requested by the party. Although Marfork did not show a need for an immediate hearing, a need for an immediate hearing is not a specific requirement under Rule 20(e). Thus, we hold that Rule 20(e) does not provide an independent basis for dismissing the contests.

Nevertheless, we are cognizant of the concerns about administrative burdens that are raised by the judge in this case. The Commission must accommodate the operator's presumptive right to contest citations and orders under section 105(d) while not burdening the administrative hearing process with multiple cases that may never go to hearing once civil penalties are proposed. The Commission bears the sole responsibility for managing its caseload, 30 U.S.C. § 823(d)(2), and establishing internal procedures to ensure that cases are handled efficiently. Accordingly, the Commission takes the opportunity provided in this case to set forth a uniform policy for the handling of section 105(d) contests, which should alleviate most, if not all, of the concerns raised by this case.

The Chief Administrative Law Judge will automatically stay all section 105(d) contests until their accompanying civil penalties are proposed by the Secretary. At that point, the initial contest and civil penalty proceedings will be consolidated and then assigned to a judge for appropriate disposition. This procedure is in line with the commonsense approach set forth in *Energy Fuels*, 1 FMSHRC at 308. If an operator desires an immediate hearing prior to a proposed assessment of penalty or believes other specific actions should be taken in the contest proceeding, the operator is free to move the Chief Administrative Law Judge to lift the automatic stay. If the operator provides a sufficient reason for lifting the stay, the case will be assigned to a judge and proceed to hearing.

III.

Conclusion

For the foregoing reasons, we deny the Secretary's motion to dismiss on mootness grounds. In addition, we reverse the judge's dismissal of the contest proceedings and reinstate the notices of contest. The contest proceedings will be consolidated with the associated proposed penalty proceedings and proceed pursuant to the Commission's Procedural Rules.

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Mary Lu Jordan, Commissioner

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Michael G. Young, Commissioner

Chairman Duffy, concurring,

I agree with my colleagues that this proceeding should not be dismissed for mootness and that the question presented should be addressed, notwithstanding the fact that the Secretary had filed a petition for civil penalties subsequent to Marfork's filing of its petition for review of the judge's dismissal. This case presents issues fundamental to the Commission's administration of contest proceedings under section 105 of the Mine Act, issues that have arisen in other cases and that will undoubtedly continue to arise until the Commission decisively addresses them.

I further agree with my colleagues that the judge erred in dismissing Marfork's contests of the citations issued to the operator on June 27, 2006, and I, too, would reinstate them and consolidate them with the proposed civil penalty proceedings. I do so, however, on less qualified grounds: my reading of section 105 of the Mine Act leads me to conclude that mine operators have an unalloyed right to contest citations and orders issued under section 104 of the Mine Act without having to wait for the Secretary's proposed penalty, and that right cannot be subsequently infringed by the desire of the Commission or its judges to manage the Commission's docket.

Section 105 of the Mine Act is somewhat unwieldy inasmuch as it provides separately for the contesting of citations, orders, and proposed assessments of civil penalties under subsection (d), and the contesting of civil penalties assessed for citations and orders under subsection (a). In light of this seeming bifurcation and duplication of contest rights, the Commission has held that section 105 must be considered as "an interrelated whole." *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1620 (Sept. 1987). What is more, the Commission has gone on to conclude, correctly in my view, that the design of section 105 is such that operators are provided "two avenues of review." *Id*. An operator can immediately contest the Secretary's enforcement action by filing a notice of contest of the citation or order, or the operator can await the Secretary's proposed penalty and contest the penalty and the underlying enforcement action upon which it is based. *See UMWA v. Maple Creek Mining, Inc.*, 29 FMSHRC ___, slip op. at 9, No. PENN 2002-23-C (July 13, 2007) ("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).").

Where I depart from my colleagues is that I find that the Act provides an operator the right to file contests under both subsections (a) and (d) without qualification and that the Commission and its judges may not abridge that right.

In addition to those circumstances set forth by my colleagues as justifying the filing of pre-penalty contests, *i.e.*, initiating discovery or fostering settlement negotiations, there are other circumstances where such contests may be appropriate. The operator may believe that doing so may speed the assessment process so that the matter can be resolved more promptly.[1] Likewise,

[1] Section 105(a) directs the Secretary to issue a proposed penalty "within a reasonable time" after a citation or order is issued. According to the D.C. Circuit Court of Appeals, it is essentially the Secretary, not the Commission, and certainly not the operator who determines

there may be a fundamental difference of opinion between the operator and the issuing inspector as to the interpretation or application of the mandatory standard giving rise to the citation or order at issue, and the operator may wish to resolve the dispute before the standard is cited again and potentially costly and unnecessary abatement is ordered. In any event, the operator's motivation is irrelevant since my reading of section 105 clearly grants the operator the right to contest a citation or order immediately, at the time the penalty is proposed, or at both times. While the filing of an initial contest prior to the proposed penalty may not always be necessary or even advisable, it is, by the unequivocal terms of the Mine Act, an operator's fully authorized right to do so. Accordingly, I would be most hesitant to suggest that the right can be abridged for any reason, let alone the one proffered below.

I agree with my colleagues that the Commission by its own internal mechanisms can address those concerns regarding case management raised by the judge in support of his order of dismissal, and I fully endorse the procedures set forth at page 11 of their opinion. Indeed, those very procedures preclude any need to leave open the possibility for dismissal of operator contests for other speculative, "non-substantive grounds" in the future.

In sum, the right of operators to bring contests of citations and orders prior to the Secretary's institution of civil penalty proceedings is absolute and cannot bend to the administrative prerogatives of the Commission and its judges.

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Michael F. Duffy, Chairman

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what time is "reasonable" for purposes of section 105(a). *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261-62 (D.C. Cir. 2005). Therefore, a contest of a citation may spur the proposal of a penalty if delays in the assessment process are anticipated.

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