

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 21, 2010

PERFORMANCE COAL COMPANY,	:	CONTEST PROCEEDING
Contestant,	:	
	:	Docket No. WEVA 2010-1190
v.	:	Order No. 4642503; 04/05/2010
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine: Upper Big Branch Mine-South
Respondent.	:	Mine ID: 46-08436

**ORDER DENYING RENEWED
MOTION FOR EXPEDITION OF PROCEEDINGS**

a. *Procedural Background*

On June 28, 2010, Performance Coal Company ("Performance") filed an Emergency Application to Modify, or Alternatively for Temporary Relief from MSHA's section 103(k) Order ("Motion"), which was accompanied by a Memorandum of Points and Authorities in Support of such ("Memo"). On June 30, a conference call occurred in which the Secretary of Labor ("Secretary") was granted three days to file a written response. During the conference call, Performance indicated that it did not seek to have the 103(k) order vacated but instead sought modification. Performance was given the opportunity to file supplemental information prior to a conference call scheduled for July 2, 2010.

On July 2, 2010, the Secretary filed a Motion to Dismiss for Lack of Jurisdiction, as well as an Opposition to Performance's Motion and Memo ("Opposition"). Performance subsequently filed a Supplemental Response in Support of its Motion ("Response"), after which the Secretary filed a Reply ("Reply").

As of July 2, 2010, all of the documents that had been filed addressed, primarily, the appropriateness of temporary relief in a case of this nature, as well as the authority of the ALJ to modify the 103(k) order. During the July 2, 2010 conference call I informed the parties that, while temporary relief was not appropriate in this case, other relief may be available. Since Performance had not specifically addressed the issue of other forms of relief, they were given the opportunity to file supplemental documents. However, I informed them that I would accept the filings made as of that point as a notice of contest.

On July 8, 2010, I emailed the parties a copy of the written order denying the temporary relief, and denying a modification of the 103(k) order. In addition, I asked that the parties select a mutually agreeable time for another conference call to discuss the order that was issued. On July 9, 2010, a third conference call occurred during which the parties agreed that Performance would supplement its pleadings to focus more specifically on a request to vacate the 103(k) order and request for expedited hearing. It was determined that Performance would provide the supplemental information on or before July 13, 2010 and the Secretary would respond on or before July 16, 2010.

On July 9, 2010, Performance filed a Renewed Notice of Contest to the 103(k) order and a Renewed Motion for Expedition of Proceedings. In its filings, Performance objected to being "ordered" to provide further information and reserved its right of appeal. Further, Performance argued that the initial documents were sufficient as a notice of contest and request for expedited hearing.

On July 13, 2010, Performance filed another voluminous document, i.e., 122 pages, asserting that it is entitled to temporary relief and/or a modification of the 103(k) order. Following the filing of this document, the Secretary asked for a conference call to address the issue of her response. During the subsequent conference call on July 14, 2010, I expressed my concern that Performance had overstepped its bounds by filing new information that did not address the need for an expedited hearing. Performance argued that the information in its filing went to the issue of the daily harm that it was suffering due to the errors MSHA was making in the investigation. The Secretary expressed concern about not receiving documents earlier and, in turn, not having enough time to respond to the voluminous filing. During the call, I agreed with the Secretary that Performance was given time to address the issue of the expedited hearing and that the new documents, including the declarations, were not relevant and were, at best, repetitive. The documents included declarations from a former MSHA district manager and an engineer who is involved in the inspection on behalf of Performance. I cautioned Performance regarding the language of its filings and informed both parties that my focus was on the facts and the law. In response, Performance indicated that it wanted a court reporter to be present for further calls so that there would be no misunderstanding about what it was expected to do. At the close of the July 14, 2010 call, I ordered that only the first six pages of Performance's submission be accepted into the record for purposes of determining the need for an expedited hearing as the remainder of the filing was not relevant and would only prolong the case in allowing the Secretary time to respond to the 122 pages. I directed the Secretary to focus on the law regarding the right to an expedited hearing. At the conclusion of the call, the parties agreed to another conference call on July 16, 2010, after all documents had been filed.

As an initial aside, I take issue with Performance's characterization of the events leading up to this point. As noted above, Performance was told on July 2, 2010 that its initial documents would be accepted as a notice of contest. At no point was Performance "ordered" to file additional documents; rather, they were given the "opportunity" to file more specific information. In the documents filed by Performance on July 9, 2010, the cover motions set forth the injustices it has suffered as a result of being "ordered" to file further information. The

Renewed Notice of Contest contained five pages setting forth the requirements of a notice of contest and then had as an attachment every document, including the motions, affidavits, memorandum of law and various exhibits, totaling nearly 125 pages, that had been filed previously by Performance. The Renewed Motion for Expedition of Proceedings contained nearly all of the same documents, except that the argument section on page 11 of the Memorandum of Points and Authorities discussed the legal authority for an expedited hearing. The documents filed on July 13, 2010 add little to nothing to Performance's request for an expedited hearing. Instead, the documents, yet again, addressed the issue of temporary relief and modification of the order and included declarations and opinions in opposition of MSHA's accident investigation protocols.

At the outset, I should note that I am troubled by the misrepresentations made by Performance in the documents submitted in this matter, and specifically with the misrepresentations made about the procedure in this case. In addition, I am troubled by the waste of time and resources on the part of Performance in filing two motions that contained virtually no supplemental information and could have been done in two or three pages. Finally, I am troubled by the overstated allegations made by Performance at every step of this process.

b. Findings of Fact and Conclusions of Law

At the heart of Performance's Motions and Responses is the argument that the mine is suffering, and continues to suffer, irreparable harm due to the MSHA protocols for its accident investigation, which Performance finds objectionable. Performance seeks to vacate the subject modification of the 103(k) order because it does not "permit Performance: (i) to conduct its investigation using its own photography; (ii) to conduct its investigation using its own electronic mapping; (iii) to conduct its own dust sampling or parallel dust sampling with MSHA; and (iv) to participate meaningfully in any destructive testing of evidence." Performance Response 2. Performance seeks immediate hearing on the issues. For the reasons that follow below, I DENY the request for an expedited hearing.

As I indicated in my earlier order, I accept that operators have the right to challenge the issuance of a 103(k) order, *see American Coal Co.*, 639 F.2d 659, 661 (10th Cir. 1981) and may do so by filing a document with the Commission similar to a Notice of Contest. Congress granted the Secretary wide discretion under section 103(k) and, while the Commission has the authority to review the Secretary's 103(k) orders, that review authority is limited to a determination of whether MSHA has acted reasonably under the circumstances. *See e.g. Buck Mountain Coal Co.*, 15 FMSHRC 539 (Mar. 1993) (ALJ); *West Ridge Resources, Inc.*, 31 FMSHRC 287, 301 (Feb. 2009) (ALJ). Here, Performance seeks not only review, but expedited review of the 103(k) order. Pursuant to Commission Procedure Rule 2700.52, a mine operator may request an expedited hearing, 30 C.F.R. § 2700.52, however, such expedited proceedings are not mandated in all circumstances and it is within the discretion of the ALJ to determine whether an expedited hearing is warranted. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1286 (Aug. 1992). While Rule 52 does not address any substantive requirements, or list of factors to consider in granting a request for expedited hearing, Commission Judges have required a mine operator to demonstrate "extraordinary or unique circumstances resulting in continuing harm or

hardship." *Southwestern Portland Cement Co.*, 16 FMSHRC 2187 (Oct. 1994) (ALJ); *Consolidation Coal Co.*, 16 FMSHRC 495 (Feb. 1994) (ALJ).

Performance asserts that, given that the accident investigation continues daily, it suffers irreparable harm if it is not granted an expedited hearing on the 103(k) order. While irreparable harm may be good cause for an expedited hearing, I find that Performance has not demonstrated such. Rather it only insists that, in its opinion, it is harmed. A 103(k) order is, as the Secretary suggests, a "control" order, and not an order that would shut down an otherwise operating mine and cause harm to the mine operator. I agree with the Secretary that the circumstances of this case, the importance of the accident investigation, and the ability of MSHA to control that investigation, present no continuing harm or hardship to the mine. Indeed, the Secretary has demonstrated that the order is in place to meet its mandate to conduct an investigation in a manner that supports its paramount concern, i.e., the safety of those entering the mine. Performance on the other hand, makes little to no mention of safety for persons conducting the investigation or the extreme care that is necessary in such circumstances.

Performance has filed a number of documents in support of its view that it suffers irreparable harm by being denied its choice of protocols for the accident investigation. However, after consideration of all documents supplied, I am not persuaded by the over-reaching and over-stated information provided by Performance, which includes the affidavits of John Head, an engineer who says Performance's suggested protocols are better than MSHA's, or Christopher Schemel, a fire and explosion analyst, who says MSHA is not using best accident investigation techniques, or David Laurisky, a former Assistant Secretary of Labor for Mine Safety and Health, who stated that in his three years with MSHA an accident investigation was not conducted in this way. Instead, I am persuaded by the affidavit of Norman Page, the MSHA district manager, who is in charge of this investigation.

Performance's exhibits demonstrate a continued insistence that things be done its way. It continues to refer to the "debilitating restrictions" and the integrity of the accident scene. On the other hand, MSHA focuses on the safety issues it faces in conducting the investigation. Page explained that, while MSHA was conducting the investigation jointly with OMHST, it considered suggestions from other parties. However, Page explained, MSHA's primary concern is safety. Too many persons underground increases the risk of exposure to potentially hazardous conditions, further delays the investigation, and, presumably, increases the amount of time it takes for those persons underground to exit the mine in the event of an emergency. MSHA considered input from Performance and modified its protocols to accommodate a number of its requests. As Page explained, MSHA "must maintain the highest level of safety possible during the underground inspection so that no inspection team member is placed in unnecessary danger." *Sec'y Opposition Ex. A*, p. 7. He goes on to state that, while MSHA has determined that the underground investigation may proceed in a safe manner, "the mine still presents a potentially hazardous environment in which no individual should stay unnecessarily." *Id.* In comparing the affidavits submitted by the parties, I find Page's to be the most knowledgeable, most reasoned, and most focused on safety. Based upon the record, I conclude that there are no extraordinary or unique circumstances in this case that result in continuing harm or hardship to Performance.

I am concerned about the motives of Performance in this case. Instead of focusing on the issue at hand and submitting legal authorities that entitle it to an expedited hearing, it uses this venue to attack the investigation techniques of MSHA which are not really at issue here. Performance's documents exaggerate and misrepresent the facts, and make little attempt to address the legal issues that are being raised. Instead, Performance treats this Court as a forum for grandstanding and, in so doing, attempts to interfere with an ongoing investigation. I agree with Commission Judge Hodgdon that "section 103(k) provides that it is MSHA, not the operator, who is in charge of the investigation." *Rockhouse Energy Mining Co.*, 26 FMSHRC 599, 602 (July 2004) (ALJ). Performance attempts to direct the MSHA investigation but, this is MSHA's investigation and Performance has very limited rights to affect such.

The issue before me is simple. Performance alleges it is entitled to an expedited hearing because it is being harmed by being required to abide by the 103(k) order which, in its view, is unreasonable, i.e., not related to safety concerns. The specific harm alleged is that Performance is not able to adequately conduct its own investigation by taking measurements, photographs and dust samples.

MSHA has a broad authority to issue a 103(k) order. *Buck Mountain Coal Co.*, 15 FMSHRC 539 (Mar. 1993) (ALJ); *West Ridge Resources, Inc.*, 31 FMSHRC 287 (Feb. 2009) (ALJ). Section 103(k) of the Act, the section under which the contested order was issued, states:

In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k). The Act gives MSHA plenary power to make post-accident orders for the protection and safety of all persons. *Miller Mining Company, Inc. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983). Further, the legislative history states that:

[t]he unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person. The grant of authority under section [103(k)] to take appropriate actions and . . . to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders.

S. Rep. No. 95-181, at 29 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978).

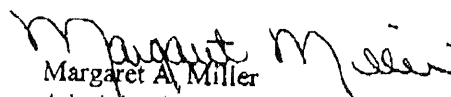
It is the Secretary's duty to systematically evaluate the conditions and practices at the mine and keep the section 103(k) order in effect until it can be determined that the hazards that caused the explosion have been corrected and will not recur. In doing so, the Secretary must conduct a thorough investigation into the cause of the accident. In light of the current conditions at the Upper Big Branch Mine as described in the declaration of Norman Page, I conclude that the Secretary may insist on protocols that she believes are necessary in the investigation. While those protocols may not be what Performance wants or expects, they are nonetheless reasonable and intended to assure the safety of all persons in the mine. The only harm suffered by Performance is its inability to use the protocols it wishes to use during the investigation. This is not the kind of harm that warrants an expedited hearing.

Any hearing in this matter will address only whether the 103(k) order should be vacated based upon its reasonableness. The order is not subject to modification as Performance asserts. In *West Ridge, supra*, the ALJ determined that his only authority was to vacate the modification of the 103(k) order and that if he chose to do so, the underlying order would remain in effect. The ALJ determined that he could review the 103(k) order for its reasonableness but had no authority to modify the order. The reasoning of the ALJ in *West Ridge* is sound, as an ALJ is not in a position to substitute his or her own judgement regarding the course of an accident investigation for that of MSHA's. As I said in an earlier order, I decline to dictate the terms of the order to the Secretary and therefore will only determine whether the current modification should remain or be vacated.

Finally, I note that while Performance made a request for temporary relief and then a request for an expedited hearing, the attempts in achieving such have been lukewarm on their part. They continue to file volumes of documents that require a great deal of time to read and to respond to, while at the same time they continue to avoid addressing the real issues as directed by the Court. They are responsible, for the most part, for any delay in having the issue resolved.

ORDER

I have reviewed all documents submitted by the parties. In making my decision I considered those documents, as well as the oral arguments made by the parties during the numerous conference calls that were held. Based on my above findings, and upon consideration of all materials, Performance's motion for expedition of proceedings is **DENIED**.


Margaret A. Miller
Administrative Law Judge