

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>TH</sup> STREET, SUITE 443  
DENVER, CO 80202-2536  
TELEPHONE: 303-844-3577 / FAX: 303-844-5267

October 29, 2014

HECLA LIMITED,  
Contestant

v.

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Respondent

CONTEST PROCEEDINGS

Docket No. WEST 2012-353-RM  
Order No. 8605614; 11/16/2011

Docket No. WEST 2012-354-RM  
Order No. 8605622; 12/14/2011

Lucky Friday Mine

**DECISION AND ORDER**

Appearances: Laura E. Beverage, Esq., Karen L. Johnston, Esq., Jackson Kelly PLLC,  
Denver, Colorado for Contestant.

Matthew L. Vadnal, Esq., Katherine M. Kasameyer, Esq., Office of the  
Solicitor, U.S. Department of Labor, Seattle, Washington and San  
Francisco, California for Respondent.

Susan J. Eckert, Esq., Santarella & Eckert, LLC, Littleton, Colorado for  
Intervenor United Steelworks Local No. 5114.

Before: Judge Manning

This case is before me upon notices of contest by Hecla Limited of two orders of withdrawal issued under section 103(k) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 813(k). Hecla operates the Lucky Friday Mine, an underground silver, zinc, and lead mine near Mullan, Idaho. An MSHA inspector issued Order No. 8605614 following a fall of ground that occurred on November 16, 2011 and Order No. 8605622 after a fall of ground that occurred on December 14, 2011. MSHA terminated both orders on June 12, 2013. The issue in these cases is whether the Secretary abused his discretion when he maintained Order No. 8605614 after he issued Order No. 8605622 even though the second order closed the entire mine.

The United Steelworkers Local 5114, through counsel, intervened in these cases. The Steelworkers also filed a compensation case seeking compensation under the fourth sentence of section 111 of the Mine Act, Docket No. WEST 2012-466-CM. Although my resolution of the issues before me in the present contest cases will also affect the compensation case before me,<sup>1</sup>

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<sup>1</sup> Upon agreement of the parties, the record developed in these contest cases will be incorporated by reference into the record for the compensation case.

this decision does not resolve all issues in the compensation case, which is set for hearing in January 2015.<sup>2</sup>

The parties introduced testimony at a hearing held in Coeur d'Alene, Idaho. Hecla and the Steelworkers filed principal post hearing briefs. At hearing, the Secretary did not take a position concerning the termination of Order No. 8605614, but reserved the right to file a reply brief if Hecla contested the validity of either Order No. 8605614 or Order No. 8605622. Instead, the Secretary opted to file a full post hearing brief titled as a reply brief. I accepted the Secretary's submission as a late brief in chief.

For the reasons set forth below, I find that the appropriate standard of review is whether the Secretary's actions were arbitrary and capricious and I find that, under the facts presented, the Secretary did not violate that standard by maintaining Order No. 8605614 after he issued Order No. 8605622.

### I. SUMMARY OF EVIDENCE<sup>3</sup>

On November 16, 2011, a fall of ground occurred in the Lucky Friday Mine. At 2:25 a.m. that same day, Ron Jacobsen, Field Office Supervisor of the Boise, ID Field Office, verbally issued Order No. 8605614 pursuant to section 103(j) of the Mine Act. The order identified the affected area as the "54 Ramp from the 5700 intersection from the spray chamber cut out to the down ramp of the old day box cut out and the 5900 main haulage from 100 feet from the intersection of the lateral on the 5900 level to 30 feet before the chevron." Ex. G-1 at 1-2. At 1:05 p.m., Inspector Scott Amos issued modification No. 8605614-01, modifying Order No. 8605614 to a section 103(k) order that allowed miners to begin repairs of the affected area, excluding the 54 ramp area.<sup>4</sup>

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<sup>2</sup> The fourth section of section 111 states:

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.*

30 U.S.C. § 821(emphasis added). It appears that this sentence of section 111 has never been the subject of any litigation before the Commission.

<sup>3</sup> I accept, rely upon, and incorporate by reference the 65 factual stipulations agreed upon and submitted on July 29, 2014, as Proposed Factual Stipulations by the parties and the intervenor.

<sup>4</sup> On November 17, 2011, MSHA also issued modification No. 8605614-02 to allow Hecla to scale, bolt, and repair through the fall at the 5900 haulage way and the 5700 sublevel of the 54 ramp.

On November 20, 2011, Inspector Rod Gust issued modification No. 8605614-03 to permit the installation of three stress gauges in the 5900 main haulage drift. The 5900 haulage drift was the primary access to the active mining area of the mine at this time. The Lucky Friday Mine is a deep mine; the 5900 level is 5900 feet below the surface. The stress gauges were intended to monitor changes in pressure that may lead to a fall of ground. On December 2, 2011, Gust issued modification No. 8605614-04 to allow the mine to restore utilities through the 5900 drift where the fall occurred. Mine management had to monitor the three installed stress gauges on a shift to shift basis.

MSHA approved Hecla's proposal to install a steel liner through the affected area of the 5900 haulage drift. The steel liner was intended to protect miners in that area from any falls of ground. On December 14, 2011, at approximately 7:40 p.m., a rockburst occurred in the 5900 pillar, injuring seven miners who were installing the steel liner. MSHA issued Order No. 8605622, a section 103(j) order that removed all miners working in the 5900 main haulage. Order No. 8605622 encompassed all underground areas of the mine including the area affected by Order No. 8605614. On December 15, 2011, Amos issued modification No. 8605622-01, modifying Order No. 8605622 to a section 103(k) order that required the operator to obtain prior approval for all actions taken to recover and restore operations anywhere in the Mine.<sup>5</sup>

On December 21, 2011, Inspector Ronald Eastwood issued Citation No. 8565565 alleging that the mine operator worked in the face of Order No. 8605614 by failing to perform the required stress gauge reading directly before the rockburst. Hecla contested this citation, which was originally set to be adjudicated at the instant hearing, but the parties reached a settlement of Citation No. 8565565 a few days before the hearing.<sup>6</sup> The citation was not vacated and I approved the settlement.

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<sup>5</sup> On December 16, 2011, Inspector Scott Amos issued modification No. 8605622-02 to allow essential repair work in the #2 shaft and Inspector Rodric B. Breland issued modification No. 8605622-03 to allow service work on the pumps at the 2800 and 5300 level pump stations. On December 20, 2011, Inspector Ronald Eastwood issued modification No. 8605622-04, requiring the mine to write and submit an abatement plan for each violation. On February 14, 2012, Breland issued modification No. 8605622-06 to prohibit all access to the 54 ramp between levels 5500 and 5900. On February 17, 2012, Breland issued modification No. 8605622-07, which allowed Hecla to commence the Silver Shaft "Clean Down Procedure." On February 22, 2012, Breland issued modification No. 8605622-08 to allow the removal of mobile equipment out of areas that may flood. On July 30, 2012, Breland issued modification No. 8605622-09 so the operator could inspect the 54 ramp between the 5500 and 5900 levels. On August 9, 2012, Breland issued modification No. 8605622-10 to allow the operator to drive a bypass around the 5900 main haulage drift. On January 4, 2013, Inspector Keith Palmer issued modification No. 8605622-11, allowing the operator to access the 54 Ramp to perform ground support maintenance from the 5500 Sublevel to the 5900 level. On February 7, 2013, Breland issued modification No. 8605622-12 and modified the affected area for the order to the 5900 level I-drift pillar and the haul road leading North and South from the pillar to the chain link barricades.

<sup>6</sup> The Steelworkers rely upon this citation and the fact that MSHA terminated Order No. 8605614 on June 12, 2013, as the basis for its claim that miners are due compensation until that date under the fourth sentence of Section 111 of the Mine Act. The Steelworkers maintain that

On December 20, 2011, Inspector Ron Jacobsen issued Citation No. 8690610 under section 104(a), requiring that Hecla remove concrete debris from the shaft sets in the Silver Shaft. The stated termination deadline was 1:00 p.m. on December 20, 2011, but Citation No. 8690610 was later modified to extend the termination deadline to 12:00 p.m. on December 30, 2011. On January 5, 2012, Inspector Steven Kidwell issued Order No. 8599596, taking the entire Silver Shaft out of service. Active repairs of the Silver Shaft require all utilities to be shut off, leaving the entire mine with no power, no water, and no compressed air. The Silver Shaft was also the Mine's primary escapeway. As a result, no mining or repair work was possible underground until the shaft was cleaned and inspected to the 5900 level. Hecla had to install a Galloway<sup>7</sup> in the shaft to clean cementitious material from the walls of the entire shaft. MSHA did not allow the Silver Shaft to be returned to service until all work was completed. The shaft was not reactivated until MSHA issued modification No. 8599596-10 on February 26, 2013.

In addition to Citation No. 8690610, an impact inspection as well as a regular inspection resulted in MSHA issuing numerous citations and orders at the Mine. Hecla had to abate these violations before the 103(k) orders could be terminated. The lengthy abatement process required to address the numerous conditions cited by MSHA contributed to Order Nos. 8065614 and 8065622 existing for an uncommonly long period of time for section 103(k) orders.

Hecla determined that repairing the 5900 haulage drift was not feasible and MSHA approved its plan to build a new drift in an adjacent area to bypass the old drift. Modification No. 8605622-10. On April 2, 2013, Inspector Keith Palmer issued modification No. 8605622-13 to allow the operator to construct sand walls on the North and South sides of the rockburst area in the 5900 haulage drift and subsequently backfill the area. On June 12, 2013, Stemberidge issued modification Nos. 8605614-07 and 8605622-14, terminating Order Nos. 8605614 and 8605622.

## **II. DISCUSSION WITH FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The only issue before me in this hearing is whether MSHA acted in an arbitrary or capricious manner when it maintained Order No. 8605614 upon issuing Order No. 8605622. Although Hecla advances several arguments concerning the relationship between Order No. 8605614 and Order No. 8605622, my review in this contest proceeding is limited to ascertaining if MSHA's action was arbitrary or capricious.<sup>8</sup> The matter before me is Hecla's contest of Order

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by permitting miners to work in the 5900 drift without taking a required reading of the stress gauges, Hecla violated or failed to comply with the terms of Order No. 8605614.

<sup>7</sup> A Galloway is a multidecked work platform that is suspended in a mine shaft.

<sup>8</sup> In addition to arguing that the Secretary's actions were arbitrary and capricious, Hecla also argues that withdrawal of miners from the affected area complied with section 103(k), Order No. 8605622 superseded and mooted Order No. 8605614, Order No. 8605622 terminated Order No. 8605614 as a matter of law, and that Order No. 8605622 made it impossible for Hecla to comply with Order No. 8605614. Although I considered these arguments with respect to the arbitrary or capricious standard of review, these arguments will also be addressed in the compensation case.

Nos. 8605614 and 8605622, both of which are 103(k)<sup>9</sup> orders. The Act does not specify a standard of review for such orders. Section 103(k) awards MSHA broad discretion to effectively address potentially dangerous, post-accident situations in mines. *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). The wide grant of authority under the Act and the expertise of MSHA in dealing with dangers in mines suggest that a 103(k) order merits a narrow standard of review. See *West Ridge Resources, Inc.*, 31 FMSHRC 287, 301-02 (Feb. 2009) (ALJ). The appropriate standard of review for 103(k) orders is an arbitrary and capricious standard. *Pattison Sand Co., LLC v. Federal Mine Safety and Health Review Com'n*, 688 F.3d 507, 512-513 (8<sup>th</sup> Cir. 2012); *Pinnacle Mining Co.*, 33 FMSHRC 2207, 2232 (Sept. 2011)(ALJ); *Performance Coal Co.*, 32 FMSHRC 1352, 1357 (Sept. 2010) (ALJ). Hecla, moreover, did not directly challenge either order, but rather the agency's action of maintaining Order No. 8605614 after it issued Order No. 8605622.

Based upon the evidence before me, I find that MSHA's action was not arbitrary or capricious. The Commission "is not to substitute its judgment for that of the agency" under the narrow scope of review of the arbitrary and capricious standard. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42-44 (US 1983). The Secretary "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* at 43 (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (US 1962)). The Secretary's action is arbitrary and capricious if the Secretary:

has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*Id.* A party that seeks to prove that agency action is arbitrary and capricious carries "a heavy burden indeed." *Wisconsin Valley Improvement v. FERC*, 236 F.3d 738, 745 (D.C. Cir. 2001) (citing *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 714 (D.C. Cir. 2000)). Hecla did not fulfill its burden to show that MSHA's decision to maintain Order No. 8605614 when it issued Order No. 8605622 was arbitrary or capricious.

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<sup>9</sup> Section 103(k) of the Act 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).

There was a rational connection between MSHA's decision to maintain Order No. 8605614 after issuing Order No. 8605622 and the particular facts that arose. The Secretary claims that he retained Order No. 8605614 to focus upon the affected area because it was dangerous and the cited conditions were not corrected. (Tr. 82-84). Although Breland testified that certain aspects of Order No. 8605622 superseded aspects of Order No. 8605614,<sup>10</sup> Breland, Amos, and MSHA's assistant district manager Kevin Hirsch all agree that conditions in the area affected by Order No. 8605614 were not corrected and Order No. 8605614 was therefore not terminated. (Tr. 86, 109, 170). The Secretary believes and the testimony of all three of his witnesses reflects that the area targeted by Order No. 8605614 presented a greater danger than other areas of the mine. Hirsch testified that at the time MSHA issued Order No. 8605622, it was not clear whether Order No. 8605622 would be terminated before or after Order No. 8605614. (Tr. 230). Hirsch's argument may seem academic since Order No. 8605622 encompassed the entire mine, but it reflects that MSHA believed at the time that maintaining Order No. 8605614 kept a "spotlight" on the most dangerous area of the mine, ensuring that it would not be overlooked and accessed by miners. (Tr. 83). MSHA issued each order, moreover, under separate MSHA event numbers.

Practically, MSHA could have modified Order No. 8605622 to highlight the 5900 area; maintaining Order No. 8605614 was not the only way to address the cited area. After MSHA issued Order No. 8605622, the only modifications it issued to Order No. 8605614 simply corrected a numbering error in the modification chain and terminated the order. Every modification that concerned efforts within the mine was made to Order No. 8605622, including modification 8605622-13, which exclusively addressed the area controlled by Order No. 8605614. Although these actions are inconsistent with the Secretary's position that Order No. 8605614 needed to be maintained to control the area in and around the 5900 haulage drift, they do not render MSHA's decision to maintain that order arbitrary or capricious. Reviewing courts should "not substitute our own judgment for that of the agency[.]" *Wisconsin Valley Improvement*, 236 F.3d at 745. Numerous inspectors from different field offices inspected the Lucky Friday Mine after the rockburst of December 14, 2011 and six different inspectors issued modifications to Order Nos. 8605614 and 8605622. There was miscommunication between Hecla and MSHA about how the orders affected each other as both Superintendent Doug Bayer and Vice President of technical services John Jordan believed that Order No. 8605614 was moot and terminated. (Tr. 300, 370). In this confusing situation, it was rational for MSHA to maintain Order No. 8605614 to show both MSHA and Hecla employees that the area addressed by Order No. 8605614 was especially dangerous. Miners were less likely to enter the area and inspectors were less likely to mistakenly modify a 103(k) order without considering the conditions addressed by Order No. 8605614. The Secretary did not offer an explanation that runs counter to

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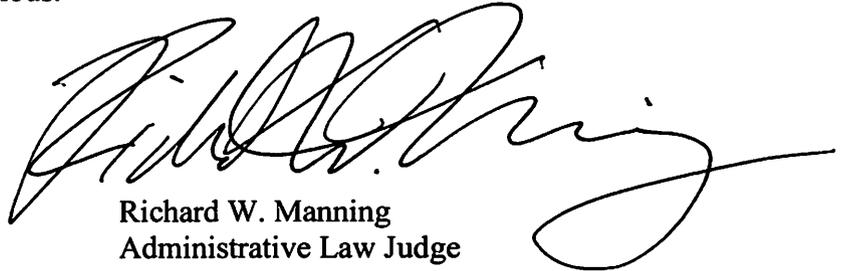
<sup>10</sup> MSHA acknowledged that the issuance of Order No. 8605622 made it impossible for Hecla to comply with many of the requirements set out in Order No. 8605614, as modified. Hecla could no longer monitor the stress gauges in the 5900 drift or enter that drift for any purpose. As detailed in footnote eight, Hecla relies on this fact in making many of its arguments. I find that these arguments are not determinative in these contest cases but will be relevant when considering the application of fourth sentence of section 111 in the compensation case.

the evidence before it; MSHA sought to protect miners by highlighting a dangerous area, which maintaining Order No. 8605614 accomplished.<sup>11</sup>

My decision today is confined to the facts and issues before me. It does not address many of the issues required to resolve the compensation case before me.

### III. ORDER

For the reasons set forth above, I **AFFIRM** Order Nos. 8605614 and 8605622.<sup>12</sup> I hold that the Secretary's decision to maintain Order No. 8605614 after the issuance of Order No. 8605622 was not arbitrary or capricious.



Richard W. Manning  
Administrative Law Judge

#### Distribution:

Laura E. Beverage, Esq., Jackson Kelly PLLC, 1099 18<sup>th</sup> St., Suite 2150, Denver, CO 80202  
(Certified Mail)

Matthew L. Vadnal, Esq., and Patricia Drummond, Esq., Office of the Solicitor, U.S.  
Department of Labor, 300 Fifth Avenue, Suite 1120, Seattle, WA 98104-2397 (Certified Mail)

Susan J. Eckert, Esq., Santarella & Eckert, LLC, 7050 Puma Trail, Littleton, CO 80125  
(Certified Mail)

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<sup>11</sup> My holding in this case is based my consideration of the two section 103(k) orders of withdrawal. The issuance of Citation No. 8565565 alleging that Hecla worked in the face of the first section 103(f) order does not alter my holding that the Secretary's actions were not arbitrary or capricious.

<sup>12</sup> The parties do not dispute that the Commission has jurisdiction to review 103(k) orders and has the authority to either affirm or vacate 103(k) orders. The Secretary and the Steelworkers, however, argue that the Commission lacks the authority to modify 103(k) orders. It is unnecessary to reach this issue because I affirmed the 103(k) orders at issue here.