FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021
Telephone: (202) 233-3880
Fax: (202) 434-9949

July 18, 2011

ROAD FORK DEVELOPMENT COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
v.	:	Docket No. KENT 2009-1523-R Citation No. 8226728; 08/26/2009
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. KENT 2009-1524-R Citation No. 8226729; 08/26/2009
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
v.	:	Docket No. KENT 2010-69 (settled) A.C. No. 15-09830-197537
ROAD FORK DEVELOPMENT COMPANY, INC., Respondent	:	Docket No. KENT 2010-196 (settled) A.C. No. 15-19269-200650
	:	Docket No. KENT 2010-384 A.C. No. 15-19270-205018
	:	Docket No. KENT 2010-577 A.C. No. 15-19270-209618
	:	Mine: Love Branch South

ORDER DENYING SECRETARY'S MOTION FOR EXTENSION OF TIME TO FILE ASSESSMENT FOR CIVIL PENALTY PETITION FOR ALLEGED VIOLATIONS OF SECTION 110(c) RELATED TO DOCKET NO. KENT 2010-577

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION OF CONTINUANCE OF HEARING SET FOR AUGUST 2, 2011 AND CONTINUING DATES THEREAFTER

ORDER EXPRESSLY LIFTING PRIOR STAYS

The above-captioned dockets concern events that occurred back *in August 2009.* These dockets were originally set for Calendar Call on April 18, 2011.

On February 18, 2011, the parties in Docket No. KENT 2010-577 filed a joint motion requesting a 90-day stay of the proceedings in that docket based on the fact that there was a

pending 110(c) investigation related to the 104(d)(1) unwarrantable failure Order in that docket. I convened a conference call to discuss the matter and requested that the Secretary's counsel in Docket No. KENT 2010-577, Ms. Jennifer Booth, provide a status update as to the 110(c) investigation by April 18, 2011. Thereafter, by Order dated March 9, 2011, I granted a 90-day stay in Docket No. KENT 2010-577 until May 19, 2011.

On March 30, 2011, Ms. Booth wrote my clerk the following e-mail, with copy to Respondent's counsel, Ms. Sarah Korwan and Ms. Carol Marunich, and counsel for the alleged agent in the pending 110(c) investigation, Mr. David Hardy:

> "This is to confirm that Road Fork Kent 1010-577 docket will not be handled in the conference call scheduled for 4-18 at 1pm est. This docket has an 110c investigation pending. I will let you know when the 110c investigation is coming to an end and the conference call will be rescheduled."

Thereafter, my clerk informed Ms. Booth that Docket No. KENT 2010-577 would indeed be discussed in the Calendar Call conference scheduled for April 18, 2011. Thus, on April 18, 2011, the Calendar Call conference was held on the above-captioned dockets. Ms. Booth, the Secretary's counsel in Docket No. KENT 2010-577, indicated that the 110(c) investigation *had been dropped.* Ms. Motsenbocker, the Secretary's counsel in the remaining dockets, informed the Court that Docket No. KENT 2010-69 and Docket No. KENT 2010-196 were close to settling. The Court was informed that the parties were still negotiating Dockets No. KENT 2010-384 and Docket No. KENT 2010-577, which were somewhat related based on overlapping electrical issues. Depositions were scheduled for early May 2011.

On April 19, 2011, Ms. Booth confirmed in an email to the Court with copy to counsel for the Respondent and counsel for the alleged 110(c) agent that MSHA was no longer pursuing any 110(c) violations in Docket No. KENT 2010-577. On April 20, 2011, I issued a Notice of Hearing setting all of the above-captioned matters for hearing on May 24, 2011 in Pikeville, Kentucky. On April 22, 2011, another conference call was held to discuss issues involving the upcoming hearing scheduled for May 24, 2011.

On May 2, 2011, counsel for Respondent, requested a conference call and a continuance of the hearing scheduled for May 24, 2011, after being informed by the Secretary that new information had come to light and that *MSHA had now decided to reverse course and once again pursue the 110(c) investigation related to Docket No. KENT 2010-577.* Counsel for Respondent also requested that the depositions be postponed in light of this new development. I convened a conference call on May 2, 2011 and included counsel for Mr. Smith, the alleged agent in the pending 110(c) investigation.

During the May 2, 2001 conference call, I discussed with the parties the fact that I was inclined to issue an Order to Show Cause why the Section 110(c) proceeding should not be dismissed for failure to prosecute in a timely manner. I was eventually persuaded by counsel for the Secretary's argument that such action would be premature as no Petition for Assessment of Civil Penalty had yet issued in the 110(c) matter. I expressed my concern, however, that the events being investigated occurred in August 2009 and that MSHA has had ample time in my view to complete its investigation and issue its Petition consistent with the liberal 18-month guideline in the Program Policy Manual. I further expressed my opinion that MSHA's routine

requests for stays during dilatory investigations of 110(c) cases stymies the expeditious processing of related cases that would otherwise not become part of the Commission's backlog.

At the conclusion of the call, however, I was persuaded by the Secretary's arguments that given the current status of the case, the most prudent course of conduct would be to continue the stay until May 23, 2011, the date that the Secretary indicated would be sufficient to permit issuance of the Petition. Depositions scheduled for early May were postponed by the parties. Consistent with Commission Rule 10, the Solicitor made an oral motion to extend the stay of Docket No. KENT 2010-577 until May 23, 2011 in order to allow MSHA time to issue its 110(c) Petition. During the call, Mr. Hardy, as counsel for the 110(c) agent, indicated that he would contest any proposed penalty assessment against his client and file an appropriate pleading once the Petition in the 110(c) case issued, and he requested that the Court order MSHA to issue its Petition by May 23, 2001. The parties discussed a new hearing date for these consolidated matters and a new hearing was scheduled for August 2, 2011 and consecutive days thereafter in Pikeville, Kentucky.

On May 6, 2011, I issued an Order Granting [second] Stay and Notice of Hearing until May 23, 2011, the Secretary's self-imposed deadline for issuing the Petition. Having duly considered the arguments raised by the parties during the conference call, I determined that I was without authority to Order MSHA to issue its petition in the 110(c) matter by May 23, 2011, but indicated that I would not look kindly on any Petition filed after said date. Accordingly, I ordered that Docket No. KENT 2010-577 be stayed a second time *until May 23, 2011. My order further indicated that no further requests for stay would be granted.* Further, in accordance with Section 105(d) of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. §801, *et seq.*, I ordered that the above-captioned matters and any 110(c) Petition, if viable, would be heard on **Tuesday, August 2, 2011**, and continuing dates after until completed at 8:30 a.m. E.S.T. in Pikeville, Kentucky.

Road Fork and the Secretary filed pre-hearing statements in Docket No. KENT 2010-384 on May 10, 2011. Docket No. KENT 2010-69 and Docket No. KENT 2010-196 settled and my Decisions Approving Settlement issued on or about June 1, 2011 and have become final Orders of the Commission.

On May 23, 2011, notwithstanding my May 6, 2011 Order granting a second and final stay in Docket No. KENT 2010-577, Ms. Booth, on behalf or the Secretary, filed a Motion for Extension of Time to File Assessment for Civil Penalty Petition in the 110(c) matter related to Docket No. KENT 2010-577. The Secretary alleged that Mr. Smith, the intended recipient of the 110(c) petition, was unavailable to accept attempted service of the assessment of civil money penalty by Federal Express package on May 17 and 18, 2011; that Mr. Smith has 30 days to contest the proposed penalty assessment under Commission Rule 25; and that until Mr. Smith contests the proposed penalty assessment, a petition is untimely. The Secretary's motion acknowledged, however, that during the May 2 conference call, counsel Hardy stated that Mr. Smith would contest the proposed penalty assessment, and therefore the Secretary assumed that Mr. Smith would contest the proposed penalty assessment before the 30-day deadline provided for in the Commission's rules. Accordingly, the Secretary's motion sought some unspecified amount of "more time to file the petition" based on the argument that "Mr. Smith's case has not been prejudiced by the small time delay and there is no reason that the case could not be heard on August 2nd as per the May 6, 2011 Notice of Hearing and Order to File Pre-Hearing Report."

On July 11, 2011, the Secretary finally filed its 110(c) petition, nearly two years after the events in August 2009.

A conference call was held with all parties on July 14, 2011. During the conference call, the Court denied the Secretary's Motion for Extension of Time to File Assessment for Civil Penalty Petition in the 110(c) matter, and accordingly deemed the 110(c) petition to be untimely. The Secretary indicated that she intended to appeal such Order to the Commission and the Court indicated that its written order would follow. In addition, counsel for Respondent Road Fork made an oral motion for a continuance of the August 2 hearing claiming that it had insufficient time to develop its case for hearing since the prior stay. The Court denied Road Fork's motion for continuance of the hearing and indicated that the hearing would take place as originally scheduled on August 2, 2011.

On July 14, 2011, Road Fork filed separate Pre-hearing Statements, with attached exhibits, for Docket No. KENT 2010-384 and Docket No. KENT 2010-577.

On July 15, 2011, counsel for Road Fork filed a Motion for Reconsideration of Continuance of Hearing. In its motion for reconsideration, counsel argues that because the Secretary failed to timely file its Petition, counsel was under the opinion that this case was still under the prior stay. Counsel further argues that the "operator is without fault on any delay in the filing of the special investigation and in fact, was duped by the Secretary when she indicated in April that she was not going to pursue the special investigation and surprised by the Secretary's decision in May that they were going to pursue the special investigation." Counsel requests "reconsideration of this Court's denial of a continuance of the hearing inasmuch as its client, Road Fork, will be materially prejudiced since it has not had sufficient time to develop its case pending the prior stay of the case, as the parties had been waiting for MSHA to proceed on its 110(c) petition, actions all outside the control of the operator but which now materially prejudices the presentation of the company case." In addition, counsel asserts that Road Fork is unable to fully prepare its case in this matter without the testimony of Mr. Smith, the subject of the 110(c) Petition, and requests that this Court postpone the hearing until the time has run on the Secretary's appeal of the decision to dismiss the 110(c) case decided on July 14, 2011. Counsel for Road Fork further asserts that "[i]f the Secretary fails to appeal or if the Commission denies any such appeal, then Mr. Smith can testify for the company and that prejudice is gone." Additionally, Road Fork requested a written Order from the Court so it can fully exercise its option of filing an interlocutory appeal of this matter.

On July 18, 2011, Road Fork filed a new Pre-Hearing Statement for Docket Nos. KENT 2010-384 and KENT 2010-577. Although the Secretary has already filed a Pre-Hearing Statement in Docket No. KENT 2010-384, the Secretary apparently has not yet filed a Pre-Hearing Statement in Docket No. KENT 2010-577 and should do so forthwith.

Having duly considered the positions of the parties, this Court reaffirms its July 14, 2011 oral Order during conference call denying the Secretary's Motion for Extension of Time to File Assessment for Civil Penalty Petition in the 110(c) matter related to Docket No. KENT 2010-577. The Secretary, in her Motion, does not adequately explain why Mr. Smith, the intended recipient of the 110(c) petition, was unavailable to accept attempted service of the assessment of civil money penalty and why he purportedly had made himself unavailable for service of the proposed penalty assessment back in May. More importantly, the Secretary was fully aware that Mr. Hardy, counsel for Mr. Smith, with whom the Secretary had been dealing, had entered an

appearance representing Mr. Smith during the May 2, 2011 conference call and the Secretary could have and should have, if it did not, timely serve Mr. Hardy as representative of Mr. Smith, with the proposed penalty assessment under Commission Rule 7(d) providing for service upon representative. Moreover, the Secretary did not file her Motion for Extension of Time to File Assessment for Civil Penalty Petition until May 23, 2011, the date of the Secretary's self-imposed deadline for filing the actual Petition and the date for lifting of the final stay in this matter. Nor have any exigent circumstances been alleged that would permit the motion for extension. Cf. Commission Rule 9, dealing with motions for extensions of time. In addition, the Secretary's Motion sought some unspecified amount of additional time to file the petition based on the speculative argument that "Mr. Smith's case has not been prejudiced by the small time delay and there is no reason that the case could not be heard on August 2, 2011, as set forth in the Court's May 6, 2011 Notice of Hearing and Order to File Pre-Hearing Report." That is not the case, however, as the Secretary did not file her 110(c) Petition until July 11, 2011, depriving Mr. Smith of his 30 days to answer the Petition under Commission Rule 29, and again permitting the Secretary to attempt to postpone the August 2 hearing, which was originally set for May.

Suffice it to say that in management of its docket of nearly 500 cases, the Court will not countenance the Secretary's "on-again, off- again" litigation strategy and extensive delay in investigating and filing its110(c) case based on facts nearly two years old. The Secretary's Motion for Extension of Time to File Assessment for Civil Penalty Petition in the 110(c) matter related to Docket No. KENT 2010-577 is **DENIED**, **ALL PRIOR STAYS ARE HEREBY EXPRESSLY LIFTED**, and Dockets No. KENT 2010-384 and Docket No. KENT 2010-577 will be heard on August 2, 2011. If the Secretary prevails before the Commission in any appeal of the dismissal of the 110(c) matter for failure to timely prosecute, that matter can be heard at a later date.

Road Fork's Motion for Reconsideration of Continuance of Hearing is also **DENIED**. The terms of my May 6, 2011 Order Granting Stay and Notice of Hearing until May 23, 2011 clearly stated that *no further requests for stay would be granted.* Further, in accordance with Section 105(d) of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. §801, *et seq.*, I ordered that the above-captioned matters and any 110(c) Petition, if viable, would be heard on **Tuesday, August 2, 2011**, and continuing dates after until completed at 8:30 a.m. E.S.T. in Pikeville, Kentucky. Therefore, there is no basis for Road Fork's failure to prepare its case in Docket No. KENT 2010-577, now nearly two years old, and no basis for counsel to be laboring under the opinion that this case was still under the prior stay. Road Fork's extensive pre-hearing statements have already been filed in Docket Nos. KENT 2010-384 and KENT 2010-577. Road Fork indicates in its July 18, 2011 Pre-Hearing Statement that the parties have entered into formal stipulations, which will be submitted on the first day of trial, and Road Fork has added several witnesses to its earlier Pre-hearing Statements, which include a Mr. Smith, line crew foreman.[1] Furthermore, there is no basis presented why Mr. Smith cannot be present to testify about the unwarrantable failure issue in Docket No. KENT 2010-577 and therefore no basis for the material prejudice issue raised by Road Fork, as Mr. Smith is its agent. Furthermore, the issue of whether Mr. Smith knowingly authorized, ordered, or carried out the alleged violations in Docket No. KENT 2010-577 may be relevant to the issue of Respondent's knowledge of an

---

[1]The Court has confirmed this date by e-mail from the Secretary, with copy to the parties, that line foreman Melvin Keith Smith is the 110(c) agent.

obvious and grave danger as a factor in the unwarrantable failure analysis and Respondent has known or should have known that Mr. Smith would or might be a material witness in that matter. Finally, trial of Docket No. KENT 2010-577 may prompt settlement of the 110(c) matter should I be reversed on any appeal. Accordingly, Road Fork's Motion for Reconsideration of Continuance of Hearing is **DENIED**.

Thomas P. McCarthy
Administrative Law Judge

Distribution:

Robert E. Motsenbocker, Esq., Office of the Solicitor, U.S. Department of Labor, 211 7th Avenue North, Suite 420, Nashville, TN 37219

Jennifer D. Booth, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2456

Carol Ann Marunich, Esq. and Sarah G. Korwan, Esq., Dinsmore & Shohl, LLP, 215 Don Knotts Blvd., Suite 310, Morgantown, WV 22209-2247

David J. Hardy, Esq., Allen Guthrie & Thomas, PLLC, 500 Lee St., Suite 800, Charleston, WV 25301

/ld