

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW, SUITE 9500
WASHINGTON, DC 20001

September 9, 2011

MAMMOTH COAL CO.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2009-888-R
	:	Citation No. 8076518; 02/25/2009
v.	:	
	:	Docket No. WEVA 2009-889-R
	:	Order No. 8076519; 02/25/2009
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2009-894-R
ADMINISTRATION (MSHA),	:	Order No. 8076638; 03/02/2009
Respondent	:	
	:	Mine: Mammoth No. 2 Gas
	:	Mine ID 46-09108
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-1295
Petitioner	:	A.C. No. 46-09108-179898-01
	:	
v.	:	
	:	
MAMMOTH COAL CO.,	:	Mine: Mammoth No. 2 Gas
Respondent	:	

ORDER DENYING RESPONDENT’S MOTION
FOR INTERLOCUTORY REVIEW CERTIFICATION
AND
FOR STAY

These matters are scheduled for hearing on September 13, 2011, in Charleston, West Virginia. At issue are 104(d)(1) Citation No. 8076518 and 104(d)(1) Order No. 8076519 issued to Mammoth Coal Company (“Mammoth”). The citation and order concern the fundamental requirement in section 75.380(d)(1) that requires escapeways to be “[m]aintained in a safe condition to always assure passage of anyone, including disabled persons.” The Secretary initially filed a Petition for Assessment of Civil Penalty proposing a total civil penalty of \$133,000.00 for the subject citation and order.

I. Procedural History

Based on information obtained during discovery, the Secretary filed a motion to amend her assessment petition by increasing the total proposed penalty from \$133,000.00 to \$335,200.00. The proposed amendment was based on the allegation that the subject two violations were “flagrant” as contemplated by Section 110(b)(2) of the Mine Act as amended by the Mine Improvement and New Emergency Response Act of 2006 (“the Act”), 30 U.S.C. § 820(b)(2).¹ The Secretary’s motion to amend her petition was granted by Order on June 3, 2011. The Order noted there was no showing of prejudice as the underlying facts and the violations alleged remained unchanged. *Wyoming Fuel*, 14 FMSHRC 1282, 1289-90 (Aug. 1992), citing *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990) (pleadings may be liberally modified under Federal Rule of Civil Procedure 15(a) absent a showing of legal prejudice to the party opposing the modification).

Subsequent to the June 3, 2011, Order Modifying the Secretary’s Petition, Mammoth unsuccessfully attempted to withdraw its contests by paying the \$133,000.00 initially proposed by the Secretary. The Commission has determined that a mine operator may not unilaterally withdraw its contest in a civil penalty proceeding by offering to pay the original assessment proposed by the Secretary. *Consolidation Coal Company*, 2 FMSHRC 3 (Jan. 1980). Rather, the Commission has concluded that the Secretary’s request for a higher penalty than that initially proposed is a triable issue to be resolved by the statutory penalty criteria. *Id.* at 5.

II. Mammoth’s Request for Interlocutory Review

On September 8, 2011, Mammoth filed, pursuant to Commission procedural Rule 76, a Motion to Stay Proceedings and for Certification for Interlocutory Review of the June 3, 2011, Order granting the Secretary’s motion to amend her petition. 29 C.F.R. § 2700.76. Mammoth’s request for interlocutory review is based on its assertion that the grant of the Secretary’s amended petition constitutes a modification “of the original civil penalty assessment prior to the required *de novo* review of the relevant evidence to be applied to the statutory criteria in 30 U.S.C. § 820(i) (Mine Act § 110(i)) (“§820(i)” or “§110(i)”)." *Mammoth Mot.* at 1.

¹ Section 110(b)(2) of the Act provides that a mine operator who commits a violation deemed to be “flagrant” may be assessed a civil penalty of not more than \$220,000. Section 110(b)(2) defines “flagrant” as “a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.”

The Secretary opposed Mammoth's motion on September 9, 2011. The Secretary's opposition is based on her assertion that Mammoth "has not properly phrased the legal issue for which it seeks review." *Sec'y Opp.* at 2. The Secretary notes that the grant of her motion to amend her petition was not a modification of "the original civil penalty assessment" as contended by Mammoth. *Id.* at 3. In this regard, the Secretary summarized the relevant procedural history: "the Administrative Law Judge did not elevate the penalties. He merely permitted the Secretary to amend her Petition to seek higher *proposed* penalties." *Id.* at 4, fn.4 (emphasis in original).

Under Rule 76, interlocutory review is appropriate when the review sought involves a controlling question of law, and immediate review will materially advance the final disposition of the proceeding. Sections 105(a) and 110(a) of the Act empower the Secretary *to propose* civil penalties. 30 U.S.C. §§ 815(a) and 820(a). Section 110(i) of the Act delegates the *de novo* authority of the Commission *to assess* civil penalties. 30 U.S.C. § 820(i); *See also Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000). The authorities delegated by the Act to the Secretary and the Commission with respect to the imposition of civil penalties are separate and distinct. The Commission's statutory *de novo* authority to assess civil penalties in contested cases does not preclude, or otherwise restrict, the exercise of the Secretary's statutory authority to amend the penalties she seeks to impose.

ORDER

Thus, given the unambiguous statutory provisions and case law noted above, the issues raised by Mammoth present neither a novel nor controlling question of law. The Secretary may modify her initial civil penalty proposal at any time prior or subsequent to a Commission hearing on the merits. *Consolidation Coal*, 2 FMSHRC at 5; *See also Spartan Mining Co., Inc.*, 29 FMSHRC 465, 467 (June 2007) (ALJ) (Sec'y proposing to increase the civil penalty in her post-hearing brief). Consequently Mammoth has not presented any controlling question of law for which immediate review is required or otherwise appropriate. As such, **IT IS ORDERED** that Mammoth's Motion for Certification for Interlocutory Review **IS DENIED**.

Accordingly, **IT IS FURTHER ORDERED** that Mammoth's Motion to Stay the hearing in these matters **IS ALSO DENIED**. Absent any contrary direction by the Commission in the event Mammoth seeks its review, the trial proceedings will commence **at 9:00 a.m. on Tuesday, September 13, 2011**, at the U.S. Federal Courthouse, Room B 6200, 300 Virginia Street, Charleston, West Virginia.

Jerold Feldman
Administrative Law Judge

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