

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, DC 20001

September 19, 2008

ROCKHOUSE ENERGY MINING CO., : CONTEST PROCEEDINGS
Contestant :
: Docket No. KENT 2008-1483-R
: Citation No. 8216019; 7/23/2008
:
: Docket No. KENT 2008-1484-R
: Citation No. 8216020; 7/23/2008
:
: Docket No. KENT 2008-1485-R
: Citation No. 8216024; 7/24/2008
:
: Docket No. KENT 2008-1486-R
: Citation No. 8216025; 7/24/2008
:
v. : Docket No. KENT 2008-1487-R
: Citation No. 8216033; 7/25/2008
:
: Docket No. KENT 2008-1488-R
: Citation No. 8216034; 7/25/2008
:
: Docket No. KENT 2008-1489-R
: Citation No. 6660866; 7/31/2008
:
: Docket No. KENT 2008-1496-R
: Citation No. 6660752; 7/2/2008
:
: Docket No. KENT 2008-1497-R
: Citation No. 6660753; 7/2/2008
:
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
Respondent. :
: Docket No. KENT 2008-1498-R
: Citation No. 6657617; 7/11/2008
:
: Docket No. KENT 2008-1499-R
: Citation No. 6657618; 7/11/2008
:
: Docket No. KENT 2008-1500-R
: Citation No. 6657619; 7/11/2008

: Docket No. KENT 2008-1501-R
: Citation No. 8216001; 7/11/2008
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: Docket No. KENT 2008-1552-R
: Citation No. 8216067; 8/25/2008
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: Docket No. KENT 2008-1553-R
: Citation No. 8216068; 8/25/2008
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: Docket No. KENT 2008-1554-R
: Citation No. 8216072; 8/25/2008
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: Docket No. KENT 2008-1555-R
: Citation No. 8216073; 8/25/2008
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: Docket No. KENT 2008-1556-R
: Citation No. 8216075; 8/25/2008
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: Docket No. KENT 2008-1557-R
: Citation No. 8216082; 9/02/2008
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: Docket No. KENT 2008-1558-R
: Citation No. 8216083; 9/02/2008
:
: Docket No. KENT 2008-1559-R
: Citation No. 8216084; 9/03/2008
:
: Mine ID 15-17651

ORDER CONSOLIDATING PROCEEDINGS
ORDER GRANTING MOTION TO FILE OUT OF TIME
ORDER DENYING MOTION TO EXPEDITE
AND
NOTICE OF HEARING

In these contest proceedings filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act) (30 U.S.C. § 815(d)) Rockhouse Energy Mining Co. contests the validity of 21 citations issued pursuant to section 104(a) of the Act. 30 U.S.C. § 814(a). The citations were issued at the company's Mine No. 1, an underground bituminous coal mine, located in Pike County, Kentucky. In addition to alleging violations of the Secretary of Labor's (Secretary's) mandatory safety standards for underground coal mines, the citations allege the violations were significant and substantial contributions to a mine safety hazard (S&S).

CONSOLIDATION OF THE PROCEEDINGS

The cases initially were docketed in three groups: KENT 2008-1496-R through KENT 2008-1501-R; KENT 2008-1552-R through KENT 2008-1559-R; and KENT 2008-1483-R through KENT 2008-1489-R. The cases present similar issues. Counsels and I agree the cases should be consolidated for hearing and decision.

MOTIONS

The contests have been filed with two attendant motions: (1) a motion to file the contests of the citations in Docket Nos. KENT 2008-1496-R through KENT 2008-1501-R out of time, and; (2) a motion to expedite all of the proceedings pursuant to Commission Rule 52. 29 C.F.R. § 2700.52.¹

MOTION TO FILE OUT OF TIME

The contested citations in Docket Nos. KENT 2008-1496-R through KENT 2008-1501-R were issued on July 2, 2008 (KENT 2008-1469-R and KENT 2008-1497-R), and on July 11, 2008 (KENT 2008-1498-R through KENT 2008-1501-R). The notices of contest were received by the Commission on August 22, 2008. Under Section 105(d) of the Act, upon issuance of the citations, Rockhouse had 30 days in which to file its contests. The contests were filed untimely by 20 and 12 days respectively. Rockhouse asserts its mine is currently being evaluated by the Secretary's Mine Safety and Health Administration (MSHA) for designation as having a pattern of violations (POV) status pursuant to section 104(e) of the Act.² Rockhouse states it is subject "to initial screening pursuant to 30 C.F.R. [§] 104.2 and [§] 104.3, and MSHA will base its final determination of the POV in part on the validity of these citations, as well as the findings of . . .

¹Because Rockhouse moved to expedite all of the proceedings, the contests were not automatically stayed pending the filing of the related civil penalty proceedings. *See* Order of Assignment (September 10, 2008) (no indication of automatic stay). Therefore, I need not act on counsel for Rockhouse's Motion to Lift Stay.

²Section 104(e) states in part:

If an operator has a pattern of violations of mandatory health or safety standards in the . . . mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal . . . mine health or safety hazards, he shall be given written notice that such pattern exists.

S&S.³ Rockhouse also states the company's safety director discussed the validity of the citations and the inspector's gravity, negligence and S&S findings during a July 18 conference with MSHA. On July 21, Rockhouse was advised MSHA would not modify the citations. Because Rockhouse's representative did "not understand the POV determination would occur before penalties on these citations [were] assessed and [the] citations were set for hearing in the normal . . . litigation process," Rockhouse did not contest the citations. Timeliness Motion 2. Therefore, Rockhouse should be permitted to late file. *Id.*

Counsel for Rockhouse, counsel for the Secretary, and I discussed the motion. Counsel for the Secretary orally questioned its propriety, but chose not to formally object to it. Given the fact the contests were untimely by only a few days, given the lack of prejudice to the Secretary, and given the new and complex nature of the Secretary's POV procedures and resulting understandable lack of knowledge of them by Rockhouse's safety director, I conclude the

³The agency's procedures for determining whether an operator has established a POV are set forth at 30 C.F.R. § 104.1 *et seq.* Section 104.2 specifies the information MSHA will review in its annual initial screening process, including information regarding "The mine's history of . . . [S&S] violations." 30 C.F.R. § 104.2(1). Section 104.3 specifies the information MSHA will use to identify mines with a potential pattern of violations. It states:

(a) The criteria of this section shall be used to identify those mines with a potential pattern of violations. These criteria shall be applied only after initial screening conducted in accordance with § 104.2 . . . reveals that the operator may habitually allow the recurrence of violations of mandatory safety or health standards which . . . [are S&S]. These criteria are:

(1) A history of repeated [S&S] violations of a particular standard;

(2) A history of repeated [S&S] violations of standards related to the same hazard; or

(3) A history of repeated [S&S] violations caused by unwarrantable failure to comply.

(b) Only citations and orders issued after October 1, 1990, and that have become final shall be used to identify mines with a potential [POV].

motion to allow the untimely filing should be granted.⁴

⁴While MSHA has had the statutory authority to put mines under a POV designation since the passage of the Act, the agency only recently has begun to exercise that authority by promulgating and by starting to enforce 30 C.F.R. § 104 *et seq.* It is fair to say the policy and procedures that ultimately may lead the agency to determine a mine should be given a POV designation are little understood by many in industry and the bar, and I include myself among those who have difficulty deciphering the process.

30 C.F.R. §104 establishes a four-step procedure: (1) initial screening (section 104.2); (2) identification by MSHA of mines with a potential POV through application of the regulatory criteria (section 104.3); (3) designation of POV status and issuance of the designation to the operator (section 104.4); and (4) termination of POV status (section 104.5). For operators the critical steps in the process are 1, initial screening; 2, identification as having a potential POV; and 3, designation of POV status.

With regard to S&S violations, in steps 1 and 2, MSHA's Office of Assessments reviews the 24-month violation history of a mine to determine if it exhibits a potential POV. Among the criteria are all alleged S&S violations cited at the mine in the previous 24 months. According to section 104.3(b) "[On]ly citations and orders . . . **that have become final** shall be used to identify mines with a potential pattern of violations." Thus, an operator may be notified its mine exhibits a potential POV only on the basis of final S&S allegations. If an operator is issued a notification its mine exhibits a potential POV, the operator has not more than 20 days within which to do the following: (1) Review all documents on which it has been evaluated for the designation and provide additional information to MSHA; (2) Submit a written request for a conference with the MSHA District Manager; and/or (3) Provide a written corrective action plan to institute a program to avoid repeated S&S violations. *See* Pattern of Violations Procedures Summary, www.MSHA.gov/POV/POVprocedures. If an operator chooses not to submit an improvement plan to MSHA, within 60 days of the operator's receipt of notification of a potential POV designation MSHA will conduct a complete inspection of the mine and the District Manager will analyze the results of the inspection to determine whether the operator has reduced the frequency rate of S&S violations by 30% or has achieved a frequency rate for S&S violations that is at or below the industry average. (If the operator chooses to submit an improvement plan, MSHA will conduct the complete inspection no later than 90 days from the date the operator submitted the plan, and the District Manager will analyze the results of the inspection to determine whether the operator has reduced the frequency rate of S&S violations by 30% or has achieved a frequency rate for S&S violations that is at or below the industry average.) The frequency rates for S&S violations will be based on the S&S designation in all citations and orders issued since the receipt of notification or since the receipt of the improvement plan. **The citations and orders need not be final orders of the Commission.** *Id.* Based on a report he or she receives from the District Manager concerning the results of the complete inspection, MSHA's Administrator will decide whether to issue a Notice of Pattern of Violations to the operator. *Id.*

MOTION TO EXPEDITE PROCEEDINGS ⁵

The motion to expedite is based on the fact that Rockhouse “is currently being evaluated for a . . . POV pursuant to Section 104(e) of the . . . Act” and that “MSHA will base its final determination of the POV in part on the validity of [the contested] citations as well as the findings of . . . S&S . . .” Rockhouse contends MSHA will “make its POV determination before a hearing on the merits of the citations can be held in the normal course.” Notice and Motion at 13.

Counsel for the Secretary responds an expedited hearing requires an operator to show “extraordinary or unique circumstances resulting in continuing harm or hardship.” Sec.’s Response 3, *citing Consolidation Coal Co.*, 16 FMSHRC 495 (February 1994) (ALJ Feldman) (the contestant bears the burden of “showing extraordinary or unique circumstances resulting in continuing harm or hardship.” 16 FMSHRC at 496.) Counsel maintains Rockhouse has not given any reason why being evaluated by MSHA for a “POV” designation constitutes extraordinary harm or hardship. Sec.’s Resp. 4. According to counsel, if the mine is given a POV designation, it can result in Rockhouse being required to immediately abate any subsequent S&S violations issue at the mine.⁶ However, like the possibility an operator may be

⁵The written motion was submitted as part of Rockhouse’s notices of contest. The motion did not state the view of the Secretary’s counsel. As properly noted by counsel, the motion, therefore, is procedurally flawed. Commission Rule 52 states a motion to expedite must be made in writing pursuant to Commission Rule 10 (30 C.F.R. § 2700.10), and Commission Rule 10(b) states a written motion “shall be set forth in a document separate from other pleadings.” In addition, Commission Rule 10(c) states a motion other than a dispositive motion “shall state . . . whether any other party opposes or does not oppose the motion.” However, the motion’s defects do not warrant its defeat. Counsel for Rockhouse’s failure to observe the letter of the rules has not prejudiced the Secretary. Therefore, the motion is accepted as filed, but Counsel is reminded to fully observe the requirements of Rule 10 in future filings before the Commission.

⁶In explaining the consequences of a Notice of POV, MSHA’s Procedures Summary states:

Following notification to the operator of the issuance of a Notice of [POV], the District shall initiate appropriate inspection activities to ensure that the operation is inspected in it’s entirety during the following 90-day period and each succeeding inspection cycle until the [POV] order is terminated.

If an . . . [inspector] finds any [S&S] violation

subject to an order issued pursuant to section 104(d) of the Act, 30 U.S.C. § 814(d), the possibility an operator may be subject to a POV notice does not warrant an expedited proceeding.

As I understand Rockhouse's situation, Mine No. 1 has been identified by MSHA as having a potential POV, and the company has been given written notification to this effect. In response, Rockhouse has submitted a corrective action plan to avoid repeated S&S violations. MSHA has conducted a complete inspection of the mine to determine whether or not pursuant to its plan Rockhouse has achieved a 30% reduction in its S&S rate or whether its S&S rate is at or below the industry average. The 21 contested citations are all of the S&S citations issued by MSHA during the complete inspection. The company has not achieved a 30 % reduction, and its average rate of S&S violations is above the industry's rate. However, if three of the 21 S&S allegations are found to be invalid, the mine will meet the 30% reduction goal.

According to MSHA's procedures summary, once the inspection has been completed and the calculation is made, the District Manager will report to the Administrator, and the calculation will be one of the bases upon which the Administrator will decide whether to issue a Notice of POV to Rockhouse. According to counsel for the Secretary, in this instance, the District Manager's report must be sent to the Administrator by September 25, 2008. The Administrator must decide whether or not to issue a Notice of POV within 30 days of his receipt of the Report. Pattern of Violations Procedures Summary3-4; www.MSHA.gov/POV/POV_procedures. It seems reasonable to expect the decision to be made on or shortly after October 27, 2008 (October 26 is a Saturday).

I agree with Rockhouse that it is entitled to a speedy review of the validity of the citations and the S&S findings therein. As the Commission noted in *Energy Fuels Corp.*, 1 FMSHRC 299, 307 (May 1979), an operator may have legitimate interests in seeking a determination of the validity of a citation and its findings prior to a penalty being proposed. Abatement may be expensive. More than that, "The citation may . . . contain special findings . . . that may start a series of events culminating in an order that miners be withdrawn from some areas of the mine." *Energy Fuels* at 307. (The Commission was referring to section 104(d) of the Act, but it just as easily could have been referring to section 104(e)).

. . . during the inspection conducted while an operator is subject to a Notice of [POV], the inspector shall issue an **order** requiring the operator to withdraw all persons in the area affected by the violation except those listed in [section] 104(c) of the . . . Act. All persons except as listed in [section] 104(c) . . . shall also be prohibited from entering that area until the inspector determines . . . such violation has been abated.

In addition, I agree with the Secretary that an expedited hearing is not required. Because the District Manager has not yet sent his report to the Administrator, a decision as to whether to issue a Notice of POV is not imminent. There is no need to convene a hearing within the next five days or even within the next two weeks. Nonetheless, Commission Administrative Law Judge Jerold Feldman once noted that some cases that might not require an expedited hearing still should be heard on an expeditious basis. *Consolidation Coal Co.*, 16 FMSHRC 495, 496. In my opinion, Rockhouse's interest in avoiding the effects of a Notice of POV and the likelihood of a POV decision on or shortly after October 27 warrant accelerating the trial schedule so the cases can be heard and decided before the time within which the Administrator must act on the District Manager's POV recommendation expires.

ORDER AND NOTICE OF HEARING

For the foregoing reasons, the captioned cases **ARE CONSOLIDATED** for hearing and decision. Rockhouse's motion to file its contests out of time **IS GRANTED**. Its motion for an expedited hearing **IS DENIED**. The parties are advised these contest proceedings will be called for hearing on **October 7, 2008, in Pikeville, Kentucky at 8:30 a.m.** (A specific hearing site will be designated later.) At issue will be whether the violations alleged in the citations occurred and, if so, the validity of the inspector's allegations regarding gravity, negligence and S&S. In preparing for the hearing, counsels are directed to confer regarding limiting discovery. It appears depositions are unnecessary. If the Secretary provides Rockhouse with all relevant inspectors' notes and photographs (assuming such exist) and Rockhouse provides the Secretary with all relevant pre- and on-shift inspection reports and photographs (assuming such exist), no further discovery will be required. Counsels are also directed to provide by facsimile and first class mail copies of intended exhibits and a witness list to one another and to me one week prior to the hearing.

David F. Barbour
Administrative Law Judge

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