FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

June 1, 2005

NATIONAL CEMENT COMPANY OF CALIFORNIA, INC., Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEST 2004-182-RM
	:	Citation No. 6361036; 02/09/2004
TEJON RANCH CORP., Intervenor	:	
v.	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Lebec Cement Plant
	:	Mine ID: 04-00213

ORDER GRANTING CONTESTANT'S MOTION FOR SUMMARY DECISION AND STAY ORDER

The underlying issue in this matter is whether a private paved 4.3 mile long two-lane access road to the National Cement Company of California, Inc., ("National") Lebec Plant is a "mine" within the definition of section 3(h)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 802(h)(1). The subject road is on land owned by Tejon Ranchcorp ("Tejon"). The jurisdictional issue arose after Citation No. 6361036 was issued on February 9, 2004, citing an alleged violation of the Secretary of Labor's ("the Secretary's") mandatory safety standard in 30 C.F.R. § 56.9300(a) that requires the construction of berms or guardrails on the banks of roadways where significant drop-offs exist.

On January 12, 2005, I granted the Secretary's Motion for Summary Decision concluding that the subject roadway is included within the section 3(h)(1) definition of "a mine" that includes "private ways and roads appurtenant" to a mine site. 27 FMSHRC 84. On February 2, 2005, National and Tejon, as an Intervenor, by motion, pursuant to Rule 76(a), 29 C.F.R. § 2700.76(a), sought my certification to the Commission for an interlocutory ruling on the jurisdictional question of law. 29 C.F.R. § 2700.76(a). The motion for certification for interlocutory review was granted on February 7, 2005. 27 FMSHRC 157. The Commission granted interlocutory review of the jurisdictional question. *Unpublished Order*, March 1, 2005. The Commission established March 30, 2005, as the filing date for opening briefs in the interlocutory appeal. *Unpublished Order*, March 16, 2005. The parties' briefs on appeal have

been filed timely with the Commission. Despite ongoing Commission review, on April 19, 2005, MSHA modified Citation No. 6361036 by requiring National to award a contract for and begin construction of guardrails on the subject roadway by May 27, 2005.[1]

Presently before me is National's request for an expedited hearing concerning whether the Mine Safety and Health Administration's (MSHA's) refusal to extend the abatement period during the pendency of the Commission's interlocutory review constitutes an abuse of discretion. During the course of a May 9, 2005, telephone conference with the parties, I advised that I construed National's request for expedited hearing as a motion for summary decision on the reasonableness of MSHA's action. I set May 16, 2005, as the filing date for the National's brief in support of summary decision and the Secretary's opposition. The parties' briefs were timely filed and have been considered.

For the reasons discussed below, I conclude that MSHA has abused its discretion. Accordingly, the April 19, 2005, modification of Citation No. 6361036 shall be vacated. In addition, further modification of Citation No. 6361036 shall be stayed pending the Commission's decision on interlocutory review. As detailed below, the authority for this action is contained in section 105(d) of the Mine Act that empowers the Commission to rule on the reasonableness of abatement periods fixed in a citation or modification, and to direct all other appropriate relief. 30 U.S.C. § 815(d).

Statutory Authority

National contends it has received bids for the guardrail project ranging from $566,007 to $1,136,699. The Secretary notes that she is "not unsympathetic" to National's plight that it may have considerable unnecessary expenditures if the Commission determines there is a lack of jurisdiction. *Sec'y opp*. p.8. Nevertheless, the Secretary's relies on *Energy Fuels Corp.*, 1 FMSHRC 299, 306 (May 1979), for the proposition that "[t]he 1977 [Mine] Act does not permit the Commission to stay the abatement requirements of a citation during litigation." *Sec'y opp*. p.8. The Secretary's reliance on *Energy Fuels* is misplaced.

Of course litigation concerning the validity of a citation, alone, does not stay the requirements that the alleged violative condition must be abated. However, the mine operator retains the statutory right to contest the validity of a modification, or the reasonableness of the period for abatement. In this regard, section 104(h) of the Mine Act provides:

> Any citation or order issued under this section *shall remain in effect until* modified, terminated or vacated by the Secretary . . . or *modified, terminated or vacated by the Commission or the courts* pursuant to section 105 or 106.

30 U.S.C. § 814(h). (Emphasis added).

---

[1] Citation No. 6361036 was further modified on May 12, 2005, to extend the abatement date until June 27, 2005.

The vehicle that gives rise to the Commission's authority in this matter is National's May 4, 2005, Motion for Expedited Hearing of MSHA's April 12, 2005, modification that was filed pursuant to section 105(d) of the Mine Act. Section 105(d) provides, in pertinent part:

> If, within 30 days of receipt thereof, an operator . . . notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, . . . or the *reasonableness of the length of abatement time fixed in a citation or modification* thereof issued under section 104, . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based on findings of fact, affirming, modifying, or *vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief*. . . .

30 U.S.C. § 815(d). (Emphasis added). Clearly, a mine operator does have recourse if the length of the abatement time specified in a citation or modification is unreasonable.

The Reasonableness of the Abatement Period

The Secretary's April 19, 2005, modification raises two issues. The first issue is the general propriety of the modification. The second issue is the reasonableness of the abatement period set forth in the modification.

Although there is no provision in the Commission's Rules for amending citations, as a general proposition, the Commission has noted that modifications to citations should be liberally granted unless there is a "legally recognizable prejudice to the operator [that] would bar [an] otherwise permissible modification." *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990). In this case, the Commission has acknowledged legitimate questions of law by virtue of its acceptance of interlocutory review. As conceded by the Secretary, construction of guardrails and berms *before* the Commission rules on jurisdiction effectively eviscerates National's right of appeal. Thus, National clearly is prejudiced by MSHA's modification.

However, mine operators invariably are prejudiced by termination dates that expire before contested citations are litigated. Thus, prejudice alone, does not provide a basis for vacating the April 19, 2005, modification. Rather, the focus shifts to whether MSHA's refusal to extend the abatement date during the pendency of the Commission's review is reasonable. Resolution of this issue requires an analysis of the degree of danger posed by a further delay in construction of guardrails and berms. *Clinchfield Coal Co.*, 11 FMSHRC 2120, 2128 (November 1989).

The initial termination date in Citation No. 6361036 for abatement of the cited condition was March 20, 2004. MSHA subsequently extended the abatement date on many occasions. Specifically, the citation was modified: on March 20, 2004, to extend the termination date until June 20, 2004; on June 21, 2004, to extend the termination date until December 31, 2004; and on February 1, 2005, to extend the termination date until February 28, 2005. On each occasion the

termination date was modified to provide National with additional time to obtain bids for the installation of guardrails and berms.

In addressing the reasonableness issue in cases such as this where MSHA has liberally extended the abatement date in the past, we must consider whether MSHA's refusal to grant further extensions is due to a recalcitrant mine operator, or, an abuse of MSHA's discretion. Here the Secretary does not allege that National has acted in bad faith.

Without providing details, the Secretary relies on "[a]n undetermined number of accidents [ocurring on the road] , including the rollover of one heavy truck and the partial rollover of another. . . " to justify its action. *Sec'y opp*. p.3,fn.1. However, MSHA's claimed exigency for abatement is belied by its numerous extensions. Moreover, since 1966, when the subject road was paved and when the cement plant was constructed and became operational, until February 9, 2004, when the subject citation requiring guardrail construction was issued, MSHA declined to assert jurisdiction in recognition of any serious hazard. 27 FMSHRC at 87, 101. In fact, MSHA withdrew a similar citation issued in March 1992 that cited a lack of berms or guardrails. The fact that MSHA did not revisit the issue for more than ten years is further evidence that the degree of danger is insufficient to warrant MSHA's sudden overriding insistence that construction commence immediately despite interlocutory review.

Finally, while the degree of hazard posed by an absence of guardrails and berms should not be trivialized, it must be kept in perspective. The hazard is related to a loss of control by the truck operator. While such occurrences can occur at any time, they are rare. By way of illustration, a loss of control on this two lane road can result in a head-on collision. Yet, MSHA has not proposed guardrails separating oncoming traffic. In other words, although there are a multitude of potential hazards, not all hazards pose a degree of danger sufficient to interfere with due process. Certainly the degree of hazard relied upon by the Secretary in this matter does not. If, MSHA and its predecessor did not require the installation of guardrails and berms for almost 30 years, surely it can restrain itself for several months until the Commission has rendered its interlocutory decision.

According, **IT IS ORDERED** that the April 19, 2005, modification of Citation No. 6361036 and any subsequent modifications thereto **ARE VACATED**. **IT IS FURTHER ORDERED** further modification of Citation No. 6361036 **IS STAYED** pending the Commission's decision on interlocutory review.

Jerold Feldman
Administrative Law Judge

Distribution: (Certified Mail)

Michael T. Heenan, Esq., Margaret S. Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart, P.C., 2400 N Street, N.W., 5th Floor, Washington, DC 20037

Thomas C. Means, Esq., Crowell & Moring LLP, 1001 Pennsylvania Avenue, N.W., Washington, D.C. 20004-2595

Timothy S. Williams, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor, Arlington, VA 22203

/hs