

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

August 31, 2023

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2023-0141
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	
	:	
CONSOL MINING COMPANY LLC	:	

BEFORE: Jordan, Chair; Althen, Rajkovich, and Baker, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) (“Mine Act”). On July 27, 2023, the Commission granted interlocutory review pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76, to consider *inter alia* whether the Judge assigned to this matter abused his discretion when he struck an argument and related caselaw citations from the Secretary’s motion to approve settlement.

For the reasons which follow, we conclude that the Judge acted upon an improper understanding of his authority under the Mine Act and the Commission’s Procedural Rules and, therefore, abused his discretion.

I. Factual and Procedural Background

This case concerns citations issued by an inspector from the Department of Labor’s Mine Safety and Health Administration (“MSHA”) to Consol Mining Company pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a). The citations allege violations of mandatory safety standards. The settlement motion reflects Consol’s agreement to pay civil penalties in exchange for the Secretary of Labor’s agreement to modify several citations, including the removal of a significant and substantial (“S&S”) designation in one citation. The “significant and substantial” terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguished as more serious in nature any violation that “could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard.”

In the subject motion to approve settlement, the Secretary claimed that she has the unilateral authority to modify citations contested before the Commission, citing *American*

Aggregates of Michigan, Inc., 42 FMSHRC 570 (Aug. 2020) and *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877 (June 1996). The Judge believed that the Secretary’s legal argument directly conflicts with the language of section 110(k) of the Mine Act, 30 U.S.C. § 820(k), which allocates authority to the Commission to review proposed penalty settlements between the Secretary and mine operators.¹ The Judge found that the Commission decisions cited by the Secretary in support of her alleged authority “cannot support the premise for which they have been cited.” Order at 1 (May 11, 2023) (citations omitted). Accordingly, the Judge denied the motion without reviewing the settlement agreement and, as a sanction, ordered that the offending argument and citations be struck from the Secretary’s motion. *Id.* at 2 n.2. Specifically, the Judge struck the following passage from the Secretary’s motion:

Taking into account the uncertainty of the outcome of these issues at trial, the Secretary has decided to exercise her discretion to modify the gravity to unlikely and not S&S as recognized in *Am. Aggregates of Michigan, Inc.*, 42 FMSHRC 570, 576-79 (Aug. 2020) (citing *Mechanicsville Concrete, Inc.*, 18 FMSHRC 877, 879-80 (June 1996)).

*Id.*²

On July 7, 2023, the Judge certified to the Commission for interlocutory review the question of his authority to strike material from the record, stating that the “question [is] impeding consideration of the motion to approve settlement.” Order at 1 (July 7, 2023).

II. Disposition

We conclude that the Judge abused his discretion when he struck the Secretary’s argument and citations to *American Aggregates* and *Mechanicsville Concrete* from the record. The Judge lacks authority to impose such sanctions.

In making an argument and filing a motion, a representative of the Secretary must certify pursuant to Commission Procedural Rule 6(b)(2), that it “is warranted by existing law or a good faith argument for extension, modification, or reversal of existing law.” 29 C.F.R. § 2700.6(b)(2). We find that neither the presentation of the argument nor the Secretary’s citation to Commission caselaw violates the requirements of Procedural Rule 6.³

¹ In pertinent part, 30 U.S.C. § 820(k) provides, “[n]o proposed penalty which has been contested before the Commission under section 815(a) of this title shall be compromised, mitigated, or settled except with the approval of the Commission.”

² The Judge had previously ordered the Secretary to cease citing the aforementioned cases as authority to remove a S&S designation. Order at 1 (May 11, 2023) (“a conference and litigation representative who submitted a motion with such citations would be barred from practice before me.”) (citation omitted).

³ In coming to this conclusion, we rely on the Commission’s prior grant of interlocutory review of the *identical issue* in multiple separate proceedings, which are currently pending on the

Further, by disallowing the Secretary from presenting certain arguments or citing particular cases, the Judge's order improperly prevented the Secretary from preserving issues on appeal. The Mine Act generally limits the Commission's jurisdiction to questions that were first reviewed by the Judge. *See* 30 U.S.C. § 823(d)(2). The Secretary must cite to cases and make arguments that she believes are meritorious, even if the Judge does not agree, if she desires to preserve them for consideration before the Commission or federal courts. *See Midwest Minerals, Inc.*, 12 FMSHRC 1375, 1378 (July 1990) (stating that matters not raised before the Judge and instead set forth for the first time on review "cannot be considered by the Commission.") (citations omitted). In short, if a Judge "strikes" an argument (and the cases that argument relies upon), the Secretary may find it impossible to receive review regarding that argument later.

We understand a Judge may become frustrated with the repetitive recitation of arguments and citations the Judge does not find relevant. Pending resolution of the underlying issue, however, the Secretary does not act in bad faith in continuing to present the argument or in citing Commission cases in an attempt to support her argument.

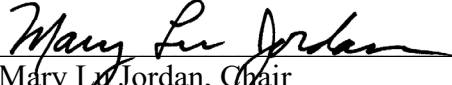
Even if a Judge believes that a party representative has failed to "conform to the standards of ethical conduct required of practitioners in the courts of the United States," the proper course of action is not to strike arguments or case citations but instead to refer the practitioner to the Commission in writing. 29 C.F.R. § 2700.80. Here, the Judge did not submit a written referral to the Commission and, accordingly, we find it unnecessary to consider any disciplinary proceedings against the Secretary's representative in this instance.

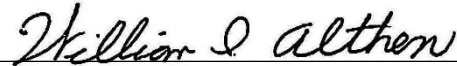
We conclude that the Judge relied upon an improper understanding of his authority under the Mine Act and the Commission's Procedural Rules and abused his discretion. *See Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC 1097, 1101 (May 2014) (stating that a Judge abuses his discretion when he issues a decision based upon an improper understanding of the law).

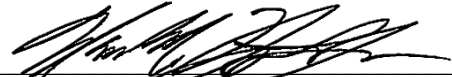
In so finding, we *do not* address the merits of the Secretary's own claim of authority. The Commission will address whether the Secretary has unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval in one of the aforementioned pending cases in which the issue arises.

Commission's docket. *See e.g., Knight Hawk Coal, LLC*, LAKE 2021-0160 (Apr. 2022); *Greenbrier Minerals, LLC*, 44 FMSHRC 706 (Dec. 2022) ("whether the Secretary has unreviewable discretion to remove an S&S designation from a contested citation without the Commission's approval under section 110(k) of the Mine Act, 30 U.S.C. § 820(k).") (footnote omitted); *Bluestone Oil Corp.*, 44 FMSHRC 709 (Dec. 2022); *Rulon Harper Constr., Inc.*, 44 FMSHRC 717 & n.1 (Dec. 2022).

In the interim, the Judge retains jurisdiction over this captioned proceeding. He should now consider whether the proposed settlement in the motion to approve settlement “is fair, reasonable, appropriate under the facts, and protects the public interest” as required by the Commission in *American Coal Co.*, 38 FMSHRC 1972, 1976 (Aug. 2016).


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Marcó M. Rajkovich, Jr., Commissioner


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