

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 3, 2024

CANYON FUEL COMPANY LLC,
Contestant,

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION, MSHA,
Respondent

CONTEST PROCEEDING

Docket No. WEST 2024-0152-R
Order No. 9730947; 02/26/2024

Mine: Skyline Mine #3
Mine ID: 42-01566

**AMENDED¹ ORDER DENYING CONTESTANT’S MOTION
FOR EXPEDITED REVIEW**

Before the Court is Contestant, Canyon Fuel Company LLC’s Notice of Contest. (“Canyon Fuel” and “Contest”) and its Motion to Expedite this proceeding (“Motion”). Thereafter, Canyon filed an Amended Motion to Expedite the proceeding, “to correct two miner [sic]² errors.” Amended Motion at 1.

Canyon Fuel is contesting a section 104(d)(2) order, Order No. 9730947, issued on February 26, 2024, seeking to have it vacated and to have “all actions taken, or to be taken, with respect thereto or in consequence thereof, be declared null or void and of no effect.” Contest at 3. The acting Secretary of Labor filed an Answer, challenging the assertions made by the Contestant. For the reasons which follow, the Court **DENIES** the Motion.

The challenged section 104(d)(2) order states:

The mine operator engaged in aggravated conduct constituting more than ordinary negligence by failing to follow their approved ventilation plan dated, March 15, 2023, amended February 5, 2024, titled, “Conversion of Three Existing Ventilation Seals in Mine 4 to Hydraulic Bulkheads”, page #7, Table #1 of Summary of

¹ This Amended Order makes but one change, adding the letter R to the docket number.

² Sic is a Latin adverb referring to “intentionally so written — used after a printed word or passage to indicate that it is intended exactly as printed or to indicate that it exactly reproduces an original.” *Sic*, DICTIONARY (Apr. 2, 2024), <https://www.merriam-webster.com/dictionary/sic>.

Bulkhead Alarm Levels that when the water pressure equals or exceeds 4.4 psi at Bulkhead #10 or 2.5 psi at Bulkhead #9, the following response is required, "Level 2 alert. Immediate response required. Discharge pipes at seals notified." An MSHA inspection found seals 7 and 8 are not equipped with any discharge pipes. The mine operator misrepresented to MSHA in writing that seals 7 and 8 have discharge pipes that would be used to remove water from the sealed area as an emergency response to high water pressure behind bulkhead #9 and #10, when in fact the mine operator knew that those discharge pipes didn't exist. This order will be reviewed for special assessment. This violation is an unwarrantable failure to comply with a mandatory standard.

Contest at 4.

Section 104(d) of the Mine Act

Within the subject of Citations and Orders, Section 104(d)(1) provides:

If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(d)(1).

The challenged provision of the Mine Act, Section 104(d)(2) provides:

If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

30 U.S.C. § 814(d)(2).

Canyon Fuel's challenge to the Section 104(d)(2) Order

In its Notice of Contest, Canyon Fuel “avers that the Order is illegal and invalid and should be vacated for the following reasons:

- a) The Order is not in conformance with requirements of Section 104(d), other provisions of the Act or applicable mandatory standards and regulations.
- b) The inspector's evaluations are without foundation in fact or law.
- c) The unwarrantable failure designation is not appropriate or proper.
- d) The high negligence designation is improper and contrary to law.

Contest at 2.

Canyon Fuel's Amended Motion to Expedite Proceedings

After repeating the information in its Contest, Respondent goes on to state:

4. The seals at issue were originally built soon after April 2020 under a plan approved by MSHA on April 23, 2020, which did not require the presence of discharge pipes. MSHA was aware of this fact and inspected such seals where they had no discharge pipes.

5. To install discharge pipes after construction of the seals is neither feasible or safe.

6. When the plan of conversion of the seals to bulkheads was submitted on September 1, 2022 there was no reference to discharge pipes in bulkheads 7 and 8. There was a list of deficiencies from MSHA Tech Support on November 21, 2022 which again did not reference discharge pipes in bulkheads 7 and 8. A revised submittal on December 16, 2022 did reference them but it is unclear at this point who requested that provision. There was no attempt to misrepresent the condition of the seals; there was a mutual mistake in including those discharge pipes. MSHA personnel knew there were no discharge pipes in seals 7 and 8 and knew it was not feasible to install them. There were such pipes in seals 9, 10 and 11 and they were at lower elevations than bulkheads/seals 7 and 8.

7. The injury or illness from the alleged violation was designated as “unlikely.” The previous order was issued December 6, 2023 and there is a question because of the lapse in time and regular and spot inspections whether a “clean” inspection had occurred.

8. Canyon Fuel has a number of steps it takes if pressures rise to certain limits at seals 9 and 10. They include:

- a. Ceasing to pump water behind the bulkheads;
- b. Pumping water from behind the bulkheads;
- c. Releasing water from bulkheads 9, 10 and 11 from the existing discharge pipes.

9. Canyon Fuel has submitted a plan to terminate the order and the approval of such plan does not include installing discharge pipes in seals 7 and 8 which is neither feasible or safe.

10. An expedited hearing is necessary to resolve the validity of the Order and to facilitate mitigation of the alleged condition.

Amended Motion at 3-4.

The Respondent, Secretary of Labor’s, Response in Opposition to Contestant’s Amended Motion to Expedite Proceedings (“Opposition”)

The Secretary’s Opposition, states:

On March 15, 2023, MSHA approved a ventilation plan for mining at the Skyline Mine #3 and approved an amended ventilation plan on February 5, 2024. On February 26, 2024, the Secretary’s authorized representative, Mine Inspector Michael C. Olsen, issued Order Number 9730947 to Contestant pursuant to Section 104(d)(2) of the Mine Act after he found Mine 4 seals 7 and 8 were not equipped with water discharge pipes as required by Contestant’s approved ventilation plan. Contestant filed its Notice of Contest of Order No. 9730947 on March 4, 2024, challenging the order and its negligence designations and arguing there are disputes regarding the facts surrounding the cited violation. Contestant filed its Amended Motion to Expedite Proceedings on March 6, 2024, arguing generally, without specific factual or legal support, that “[i]f an expedited hearing is not granted, Canyon Fuel will be irreparably harmed.”

Opposition at 2.

The Secretary contends that the:

Contestant does not identify any extraordinary or unique circumstances resulting in continuing harm or hardship that necessitate an expedited hearing. The fact of the matter is that the violation at issue does not affect work on the working sections of the mine. *Notably, many of the facts in dispute regarding Order No. 9730947 are related to issues at the mine that have been ongoing since mid-November 2023 when a seal catastrophically failed, causing an inundation at the mine when three miners narrowly escaped, and resulting in the issuance of enforcement actions that are the subject of an open 110(c) investigation. The parties have sought to stay one of them pending the outcome of the 110(c) investigation.*

At issue with this and at least two of the other orders is whether Contestant

complied with its approved ventilation plan. While there may be factual disputes regarding what Contestant represented to MSHA about discharge pipes and seals 7 and 8, and what MSHA knew about the presence of such discharge pipes, those facts go to the negligence and gravity of the violation – and do not rise to level of creating extraordinary or unique circumstances that warrant an expedited hearing.

Id. at 2-3. (emphasis added).

The Secretary sums up its position, stating it:

concur that Complainant has submitted a revised ventilation plan to MSHA which is currently under review. Importantly, this plan and process will continue in the normal course and does not support the need for an expedited hearing here. Stated differently, **approval of a revised plan that does not include installing discharge pipes in seals 7 and 8** has no bearing on the violation at issue here, i.e. whether Respondent complied with the approved ventilation plan in effect at the time of the inspection. Finally, the complexity and number of issues in this case and related cases call for a more deliberate pace. Both parties will benefit from written discovery, depositions, and expert testimony to resolve these issues and the parties will need sufficient time to complete the discovery process.

Id. at 3. (emphasis added).

Discussion

The Secretary correctly states the standard for review when a Commission judge is presented with a Motion for Expedited Review.

As articulated by former Chief Administrative Law Judge Paul Merlin in *Southwestern Portland Cement*, 16 FMSHRC 2187 (Oct. 1994) (CALJ).

Section 2700.52(a), *supra*, does not specify the basis upon which an expedited hearing may be sought and granted. The Commission has held that consideration of an expedited hearing request remains within the discretion of the judge. *Wyoming Fuel*, 14 FMSHRC 1282 (August 1992). Commission Judges have held that in order to be entitled to such consideration, an operator must show extraordinary or unique circumstances resulting in continuing harm or hardship. *Consolidation Coal Company*, 16 FMSHRC 495 (February 1994); *Energy West Mining Company*, 15 FMSHRC 2223 (October 1993); *Pittsburgh and Midway*, 14 FMSHRC 2136 (December 1992); *Medicine Bow Coal Company*, 12 FMSHRC 904 (April 1990). In the foregoing cases, it was held that the possibility operators could be subject to withdrawal orders under section 104(d) of the Act, 30 U.S.C. § 815(d), did not justify expedited hearings.

Id.

Subsequent case law has adhered to these principles. *See, for e.g., IMI Aggregates*, 45 FMSHRC 789, (Aug. 2023) (ALJ).

In the Court's estimation, the Contestant presents, at times conflicting, arguments, which collectively fail to demonstrate any extraordinary or unique circumstances resulting in continuing harm or hardship. The arguments begin with what the Court considers to be, at least for the purposes of this motion, an irrelevant reference to an April 2020 ventilation plan. Amended Motion at 2-3. It then moves to more than two years later when a new plan was submitted. *Id.*

The new plan apparently involved conversion of seals to bulkheads. Though admitting that MSHA's Tech Support listed deficiencies with the plan, the Contestant twice asserts that there was no reference to discharge pipes in bulkheads 7 and 8. *Id.* at 3. It then immediately admits that a revised submittal [from Contestant] on December 16, 2022 *did* reference them, while changing the subject to assert that it "is unclear at this point who requested that provision." *Id.* From there, Contestant then asserts "[t]here was no attempt to misrepresent the condition of the seals" and that all of this came about as "a mutual mistake in including those discharge pipes." *Id.*

Contestant continues its argument asserting that "MSHA personnel knew there were no discharge pipes in seals 7 and 8 and knew it was not feasible to install them," but then admits that "[t]here were such pipes in seals 9, 10 and 11 [but that] they were at lower elevations than bulkheads/seals 7 and 8." *Id.*

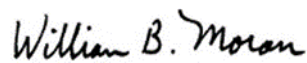
Canyon Fuel then fans out its argument mentioning that the "alleged violation was designated as 'unlikely' and that there is an issue whether a clean inspection had occurred. *Id.* Contestant's sprawling arguments then move to the steps it has taken to address "if pressures rise to certain limits at seals 9 and 10." *Id.* These remarks can fairly be construed as tacit admission that the hazards from November 2023, when a seal catastrophically failed, causing an inundation at the mine when three miners narrowly escaped, are not figments.

The Contestant then notes that it has submitted a plan to terminate the order, adding that its plan does not involve installing discharge pipes in seals 7 and 8. *Id.* at 4. The *irreparable harm* it asserts is "to resolve the validity of the Order and to facilitate mitigation of the alleged condition." *Id.* The former is a garden variety issue in 104(d)(2) orders and the *facilitation of mitigation* does not appear to be a subject warranting expedited review.

In sum, the Court agrees that the violation at issue here is “whether the Respondent complied with the approved ventilation plan in effect at the time of the inspection.” Opposition at 3. The Court has determined that no extraordinary or unique circumstances resulting in continuing harm or hardship has been presented. *Canyon Fuel does not contend that the violation at issue affects work on the working sections of the mine.* In addition, the Court agrees with the Secretary that “the complexity and number of issues in this case and related cases call for a more deliberate pace. Both parties will benefit from written discovery, depositions, and expert testimony to resolve these issues and the parties will need sufficient time to complete the discovery process.” *Id.*

Accordingly, Contestant’s Motion is **DENIED**.

SO ORDERED.



William B. Moran
Administrative Law Judge

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