

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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December 12, 2018

INDUSTRIAL PROCESS EQUIPMENT  
CONSTRUCTORS,

Contestant

v.

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

CONTEST PROCEEDING

Docket No. WEST 2018-0557-RM  
Order No. 9346744; 07/09/2019

Portland Plant and Quarry  
Mine ID 05-00037 E938

**ORDER GRANTING THE SECRETARY’S MOTION TO DISMISS  
ORDER OF DISMISSAL**

Before: Judge Manning

This case is before me upon a notice of contest filed by Industrial Process Equipment Constructors (“IPEC”) pursuant to section 107(e)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Act”). For reasons that follow, I find that I do not have jurisdiction over this case. Consequently, this case is **DISMISSED**.

On July 9, 2018, MSHA issued Imminent Danger Order No. 9346744 to IPEC for an alleged violation of section 107(a) of the Act. On September 21, 2018, IPEC filed its notice of contest. The Secretary filed a Motion to Dismiss this case arguing that IPEC failed to timely contest the 107(a) withdrawal order. IPEC filed an opposition to the motion arguing that dismissal was inappropriate due to the confusing nature of the contest procedure for 107(a) orders and its lack of counsel during the relevant contest period. I was assigned the case on October 31, 2018. Following a review of the Secretary’s motion and the Contestant’s response, I ordered the parties to brief whether I have jurisdiction over the imminent danger order. On December 6 the parties filed their respective briefs.

The Secretary argues that the court does not have jurisdiction over the imminent danger order because IPEC failed to timely contest the order. Sec. Br. 1-2. Congress granted the Commission and its judges jurisdiction to hear contests of enforcement actions brought by the Mine Safety and Health Administration (“MSHA”) only when properly presented. *Id.* 3. The clear language of the Act mandates that 107(a) orders be contested within 30 days. *Id.* 2. The Commission, relying on the language of the Act, has stated that operators who wish to contest 107(a) orders must notify the Secretary within 30 days. *Id.* 3 (citing *ACI Tygart Valley*, 38 FMSHRC 939 (May 2016)). *Id.* 3. The Secretary asserts that, because IPEC did not file its contest within 30 days, this court is without jurisdiction to consider the merits of the order. *Id.* The Secretary maintains that under IPEC’s interpretation, imminent danger orders would never become final and the 30 day contest period would be rendered irrelevant “because the order always could be challenged.” Sec’y Br. 3 n. 3.

IPEC argues that the Act grants Commission administrative law judges jurisdiction to hear contests of citations and orders brought before the Commission. IPEC Br. 2-3. Section 105(a) of the Act specifically removes jurisdiction over, and makes final, citations and orders issued pursuant to section 104 when those citations and orders are not timely contested in a civil penalty case. IPEC Br. 3. However, section 107 includes no such language. *Id.* 4. As a result, IPEC argues that because no language exists to revoke jurisdiction over orders issued pursuant to section 107, this court has authority to hear this case. *Id.*

I find that I do not have jurisdiction over this matter because the imminent danger order became a final order of the Commission before the notice of contest was filed. Section 107(e)(1) of the Act states that an operator who is notified of the issuance of a 107(a) order “may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order.” 30 U.S.C. § 817(e)(1). Section 105(d) of the Act provides that an operator may contest a citation or order issued under section 104 of the Act within 30 days of receipt thereof. Only section 105(a) provides that if an operator fails to contest a citation or a proposed penalty within 30 days, the “citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency.” 30 U.S.C. 815(a). Nevertheless, the Commission has stated that “treating all penalties and orders as ‘final’ is the better practice and is more consistent with the structure and language of the Act.” *Sims Crane, Inc.*, 39 FMSHRC 1367, 1371 n. 2 (July 2017).<sup>1</sup> In *Sims Crane*, upon motion of the operator, the Commission reopened a section 107(a) order, which it described as “final” throughout its decision, after the operator failed to contest the order within the 30 day period prescribed in section 107. Consequently, I find that upon expiration of the 30 day contest period, an imminent danger order becomes a final order of the Commission. *See also, ACI Tygart Valley*, 38 FMSHRC 939.<sup>2</sup>

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<sup>1</sup> The entire footnote in *Sims Crane* states:

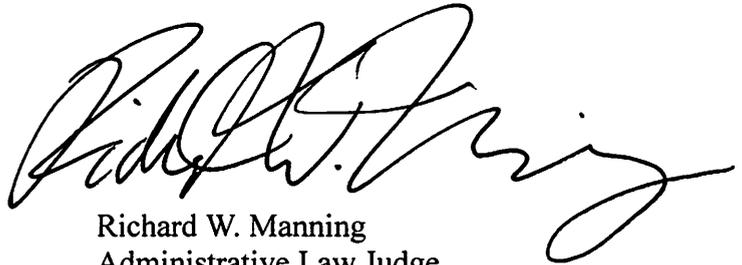
We have elected to proceed pursuant to Rule 60(b) in this case because the Commission has, in previous cases, considered imminent danger orders as though they are “final.” *See, e.g., ACI Tygart Valley*, 38 FMSHRC 939 (May 2016). However, it is not certain that the order in this case was “final” in the fatal, legal sense applied to penalties issued pursuant to section [105(a)]. Unlike that section, section 107 does not contain a clause explicitly rendering an uncontested order a “final order.” We believe that treating all penalties and orders as “final” is the better practice and is more consistent with the structure and language of the Act. But the fact that even the Secretary acted as through the imminent danger order remained a viable issue in the case, up until the latter stages of pretrial preparation, certainly renders this case “extraordinary.”

<sup>2</sup> When an operator is issued a citation or order under section 104 of the Act, it need not contest the citation or order by filing a notice of contest under section 105(d) but can wait to contest the matter when a civil penalty is proposed by the Secretary. If an operator files a notice of contest of a citation or order issued under section 104(a) out of time and the case is dismissed on that basis, it does not lose its right to contest the citation or order in the civil penalty case. Because penalties are not assessed for imminent danger orders, such orders can only be challenged by filing a notice of contest under section 107(e).

Order No. 9346744 was issued by MSHA on July 9, 2018, was not contested within 30 days and became final on or about August 8, 2018, before IPEC filed its Notice of Contest on September 21, 2018. As a consequence, I find that I do not have jurisdiction over the case because the subject imminent danger order became a final order of the Commission before the notice of contest was filed.<sup>3</sup>

It is important to emphasize that IPEC is not without a potential remedy. The Commission has held that, in appropriate circumstances, it has jurisdiction to reopen a contest of an imminent danger order that has become a final order of the Commission. *ACI Tygart Valley*, 38 FMSHRC 939. In that case, the Commission held that it will be guided by Rule 60(b) of the Federal Rules of Civil Procedure when faced with a motion to reopen the contest of an imminent danger order. A party may be entitled to relief from a final order of the Commission on the basis of mistake, inadvertence, or excusable neglect, for example.

The Secretary's Motion to Dismiss is **GRANTED** and this case is **DISMISSED**.



Richard W. Manning  
Administrative Law Judge

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<sup>3</sup> Several Commission judges have taken a different approach to late filed notices of contest by resolving the issue on the merits without considering the jurisdictional issue. For example, in *Kinder Morgan Operating L.P.*, 24 FMSHRC 1055 (Dec. 2002), a Commission judge dismissed ten contest proceedings involving citations issued under section 104 of the Act because they were filed more than 30 days after the citations were issued, citing a long line of cases holding that “the late filing of notices of contest of citations is not permissible under the Mine Act[.]” 24 FMSHRC at 1056. In another case, a Commission judge excused the late-filing of 21 notices of contest of section 104(a) citations without objection by the Secretary. *Rockhouse Energy Mining Co.*, 30 FMSHRC 988, 989-90 (Oct. 2008).