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EASTERN ASS. COAL V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

EASTERN ASSOCIATED COAL CORP., APPLICANT	Notice of Contest
	Docket No. WEVA 80-120-R
v.	
	Citation No. 0628565
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	October 29, 1979
	Federal No. 2 Mine

DECISION AND ORDER GRANTING MOTION AND DISMISSING PROCEEDING

Appearances: Robert C. Brady, Legal Assistant, Eastern Associated Coal Corporation, Pittsburgh, Pennsylvania, for Applicant Barbara F. Kaufmann, Esq., Office of the Solicitor, Department of Labor, Philadelphia, Pennsylvania, for Respondent

On October 29, 1979, the Applicant, hereinafter, Eastern, received a section 104(a) Citation. The Citation was terminated some 9 hours after its issuance, presumably after the violative conditions were abated. Eastern's notice of contest which was filed on November 26, 1979, challenged:

1. The existence of the violative conditions described in the citation.

2. The occurrence of a violation of 30 C.F.R. 75.1403 as cited in the citation, and

3. The special findings contained in the citation, i.e., that the alleged violation was "of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard."

MSHA's answer was filed on December 7, 1979, requesting, inter alia, that the review (contest) proceeding be continued and consolidated with a penalty case (presumably to be filed by MSHA in the future), in accord with advisory language contained in the FMSHRC decision in Energy Fuels Corporation, DENV-78-410, decided May 1, 1979, to wit:

> If the citation lack(s) a need for an immediate hearing, we would expect (the mine operator) to postpone his contest

> of the entire citation until a penalty is proposed. Even if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and up for hearing. The two contests could then easily be consolidated for hearing * * *.

On February 28, 1980, Eastern responded to MSHA's motion to continue and consolidate, quoting other portions of the Commission's Energy Fuels decision and citing subsequent Commission decisions to the general effect that an operator under the 1977 Act may obtain review of abated citations and also to the effect that an operator has an interest in obtaining immediate review of such citations in order to avoid followup withdrawal orders, particularly where the citations contain "special findings" which subject the operator to such orders.

On February 29, 1980, the Office of Assessments, proceeding under the 30 C.F.R., Part 100 administrative settlement procedures, proposed an initial penalty of $150. An informal conference was held on March 28, 1980, after which the Office of Assessments lowered the proposed penalty to $106. Eastern paid this penalty on April 8, 1980, which apparently by coincidence was the same date I heard argument from counsel at a prehearing conference on MSHA's motion for continuance and consolidation.

The initial question in this proceeding was whether Eastern was entitled to immediate review. An affirmative answer would have required my denying MSHA's request for continuance and consolidation. However, by paying the proposed penalty when it did Eastern changed the complexion of this proceeding as well as the issue. The issue now to be decided is: Does a mine operator who has filed a prior notice of contest have the right to proceed with review of the citation after paying the proposed penalty therefor? Some of the issues at stake in the resolution of this question are the effectiveness of the Office of Assessments, (FOOTNOTE 1) and the encouragement of automatic filings of notices of contests.

Having duly considered the contentions of both parties, I note at the outset that an operator's payment of the initial proposed penalty in the past has resulted in the citation's becoming a part of the operator's history of previous violations. The Valley Camp Coal Co., 1 IBMA 196, 204 (1972). From this, I conclude that by paying at the administrative level a penalty, whether the full amount of the proposed assessment or a compromised amount, an operator necessarily concedes the existence of the conditions alleged

to be a violation and that such conditions as a matter of law constitute a violation of the safety or health standards.(FOOTNOTE 2)

Focusing specifically on the "special findings" question, i.e.: Where an operator has filed a notice of contest specifically challenging specific findings, such as "unwarrantable failure" or "significant and substantial" is such issue set to rest by the operator's payment of a penalty during the administrative settlement stage pursuant to 30 C.F.R. 100.5 and 100.6, I conclude that it should be.

It must first be recognized that the operator, of course, is under no compulsion, at this stage, to pay the proposed assessment issued by MSHA's Assessment Office. Special findings, such as "unwarrantable failure", and "significant and substantial", although different from, are analogous to the statutory assessment factors of negligence and seriousness, respectively, and as such will have been considered generically by MSHA in its determination of a proper penalty and by both parties in reaching any penalty settlement at the administrative level prior to a petition for penalty assessment being filed with the Commission. If the mine operator wishes to challenge these findings, it can and should abstain from paying a penalty at the administrative level, not only to preserve its objection to such findings but also to mitigate the amount of penalty to be assessed should prevail when the matter is subsequently heard.

It is therefore held that a mine operator's payment of a proposed penalty at the adminstrative level constitutes acceptance of the validity of the citation (or order) involved in all its aspects and that such payment moots the issues raised in its notice of contest proceeding previously instituted.(FOOTNOTE 3)

ORDER

MSHA's motion to dismiss, having been found meritorious, is GRANTED. This proceeding is DISMISSED.

Michael A. Lasher, Jr.
Judge

~FOOTNOTE 1

"Half-settling" a case could ultimately dilute the authority and effectiveness not only of the Assessment Office, but also of the Commission (and its judges) when the time came for it to operate on its half of the matter.

~FOOTNOTE 2

Otherwise, the situation might arise where after an administrative settlement is reached a penalty is paid by the operator and thereafter, in a subsequent review (notice of contest) proceeding, the citation (or order) is found to be improperly issued and vacated.

It should also be noted that 30 C.F.R. 100.6(c) provides that the failure of a mine operator to contest the proposed penalty within 30 days of receipt of notice thereof shall result in the proposed penalty being deemed a "final order of the Commission" and not subject to review by any court or agency. This seems to be a recognition of the necessity of merging the contest and penalty proceedings at the earliest possible juncture. To permit both types of proceedings to run separate courses to the end of the line (final adjudication) will result in an absurdity. A precise cut-off point must be established to avoid needless duplicative litigation, confusion, and "jockeying for position" by the parties. The better approach would seem to be that when a penalty is imposed at the administrative level whether by operation of the mine operator's default or by agreement of the parties, all issues, whether the occurrence of the violation, the validity of "special findings", or the amount of the penalty, are resolved thereby. The purpose of the Office of Assessments and the Part 100 procedures is to settle a case with resultant convenience, economy and expedition. These purposes are not served by dividing a case up, dragging it out, and giving the parties two bites at the apple. From the mine operator's point of view, the solution is clear: If you wish to proceed with review, do not pay the penalty prematurely.

~FOOTNOTE 3

Nothing in this holding infringes on the "immediate review" rights granted operators by Energy Fuels. Should MSHA drag its heels in issuing notifications of its proposed

assessments, the operator's remedy may well lie in a motion to dismiss for the Secretary's failure to issue same "within a reasonable time" as required by section 105(a) of the Act.