

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLF AX AVENUE
DENVER, COLORADO 80204

DEC 2 1980

<hr/>)	NOTICE OF CONTEST
GEX COLORADO, INCORPORATED,)	
	Contestant,)	DOCKET NO. WEST 80-327-R
	v.)	Citation No. 0786929
)	
SECRETARY OF LABOR, MINE SAFETY AND)	Roadside Mine
HEALTH ADMINISTRATION (MSHA),)	
	Respondent.)	
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DECISION

Appearances:

Richard L. Fanyo, Esq., Welborn, Dufford, Cook & Brown
1100 United Bank Center, Denver, Colorado 80290
for Contestant,

Robert J. Lesnick, Esq., Office of Tedrick A. Housh, Jr.,
Regional Solicitor, United States Department of Labor
Room 2106, 911 Walnut Street, Kansas City, Missouri 64106
for Respondent

Ann M. Noble, Esq., Office of Henry Mahlman, Regional Solicitor,
United States Department of Labor,
1585 Federal Building, 1961 Stout Street, Denver, Colorado 80294
for Respondent

Before: Judge John J. Morris

STATEMENT OF THE CASE

Contestant, GEX Colorado, Incorporated, (GEX), seeks damages, expenses, and costs against the Secretary of Labor. It alleges that it suffered such damage as a result of the improper issuance of Citation No. 786929 by a mine safety inspector of the Federal Mine Safety and Health Administration (MSHA). The citation was originally issued under the authority of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq.

PROCEDURAL BACKGROUND

At a hearing on May 20, 1980 in Grand Junction, Colorado in a case ¹ involving the above parties, the representative of GEX presented a copy of its notice of contest of MSHA citation No. 786929.

¹/ GEX Colorado Incorporated, Contestant, vs. Secretary of Labor, Mine Safety and Health Administration (MSHA), Respondent, Docket No. WEST 80-306-R, decision issued June 9, 1980.

The parties indicated the citation had been withdrawn before the hearing. (Tr. 7-8). The Commission file was subsequently assigned to the trial judge.

In reply to a Commission order on May 29, 1980, GEX indicated its intention to seek the additional relief as prayed in its notice of contest although the citation had been vacated.

GEX's additional relief seeks: general damages according to proof; punitive and exemplary compensation; costs of maintaining the action; incidental expenses according to proof; other and further relief as the Commission deems proper.

GEX expressly states **that** any and all compensation awarded to it will be used to offset any future valid assessed penalties.

Subsequent to the events of May 20, 1980, the Commission Judge stated he would rule on the issue of whether the GEX notice of contest, in its present posture, states a claim upon which relief can be granted. If affirmative, the case would be set for an evidentiary hearing. If negative the notice of contest would be dismissed. (Order, July 11, 1980).

The parties filed briefs in **support of** their respective positions.

The Secretary contends that the Federal Mine Safety and Health Review Commission does not have jurisdiction to consider the merits of GEX's claim because the citation was withdrawn by MSHA prior to the time that GEX filed its notice of contest. Additionally, MSHA asserts that the doctrine of sovereign immunity bars recovery on GEX's claim. The Secretary also has **moved to dismiss the case on the ground that GEX has failed to state a claim upon which relief can be granted.**

ISSUE

In a notice of contest under Section 105(d) of the Federal Mine Safety and Health Act, contestant seeks damages against the Secretary of Labor. **Prior to the filing of the notice of contest the Secretary withdrew his citation against contestant. The issue is whether the Review Commission has jurisdiction to consider the contest.**

FINDINGS OF FACT

The facts as shown by the file and admissions are as follows:

- 1. A federal mine inspector issued Citation 786929 to GEX on April 29, 1980.**

2. The citation charged GEX with violating 30 CFR 75. 1704 ² by failing to provide substantial fire doors in the main intake portal. The inspector gave GEX an extension until May 19, 1980 to abate the condition.

3. On May 15, 1980, after incurring some abatement expense, GEX was advised by the inspector that MSHA had withdrawn the citation as "being written in error" (Tr. 6, notice of contest.)

4. The notice of contest was lodged with the Review Commission on May 23, 1980.

DISCUSSION

For the reasons hereafter stated the notice of contest is dismissed with prejudice.

The legal matters over which the Commission has jurisdiction are limited to those set forth in the Federal Mine Safety and Health Review Act, 30 U.S.C. 801 et seq. A mine operator is afforded an opportunity for a hearing on its contest of a citation, a withdrawal order, the length of an abatement period, or the penalty assessed by the Secretary, 30 U.S.C. 815(d). There are additional opportunities for a hearing that are not relevant here but there is no provision in the Act for a suit against the Secretary of Labor for damages sustained as a result of the improper issuance of a citation. A contest of a citation involves a dispute **as** to the validity of the citation. It cannot be construed so as to provide for a hearing on a claim for consequential damages suffered by the operator.

GEX contends that the grant of authority in 30 U.S.C. 815(d) giving the Commission the power to order "other appropriate relief", is to be interpreted to allow consideration of GEX's claims for a set off. I disagree. This provision refers to the authority of **the** Commission to provide relief to the parties who have brought before the Commission matters within its jurisdiction. Since the citation which gave rise to the claimed damages had been withdrawn prior to the time GEX filed its notice of contest there is no substantive matter in the notice that is cognizable by the Commission.

2/ § 75.1704 Escapeways. [Statutory Provisions]. Except as provided in § 75.1705 and 75.1706, at least two separate and distinct travelable passageways which are maintained to insure passage at **all** times of any person, including disabled persons, and which are to be designated as escapeways, at least one of which is ventilated with intake air, shall be provided from each working section continuous to the surface escape drift opening, or continuous to the escape shaft or slope facilities to the surface, as appropriate, and shall be maintained in safe condition and properly marked. Mine openings shall be adequately protected to prevent the entrance into the underground area of the mine of surface fires, fumes, smoke, and floodwater. Escape facilities approved by the Secretary or his authorized representative, properly maintained and frequently tested, shall be present at or in each escape shaft or slope to allow all persons, including disabled persons, to escape quickly to the surface in the event of an emergency.

GEX also cites North American Coal Corp., 3 IBMA 93 (1974) as support for its theory that it is entitled to an award of damages and to set off such claim against any future penalties. North American is distinguishable from the present case. There the Interior Board of Mine Operations Appeals ruled that the loss in production incurred as a result of a vacated withdrawal order could be considered as a mitigating factor in the assessment of the penalty for the violation which was the subject of the withdrawal order. The loss was to be considered in the same manner as the other statutory criteria required to be evaluated in the calculation of a penalty. It was within the discretion of the judge to determine how much, if any, the penalty should be reduced because of the economic loss.

The Board did not rule that damages could be assessed against the United States and set off against any future civil penalties. The reduction in the fine was allowed because the economic loss plus the reduced penalty was believed by the Board to be a sufficient deterrent against future infractions. The ruling was limited to instances where the condition which gave rise to the improper withdrawal order and subsequent loss in production is the same condition for which the civil penalty is assessed. Cf. Climax Molybdenum Company v. Secretary of Labor et al DENV 79-102-M, October 1980.

In the present case, there is no penalty assessment at issue. The ultimate remedy requested by GEX, if granted, would allow them to violate the Act with impunity until any money damages were satisfied. This would contravene the intention of *Congress* in providing for the assessment of a penalty.

The intent of Congress on this point appears in the legislative history.

To be successful in the objective of including effective and meaningful compliance, a penalty should be of an amount which is sufficient to make it more economical for an operator to comply with the Act's requirements than it is to pay the penalties assessed and continue to operate while not in compliance. Senate Report No. 95-181, 95th Cong., 1st Sess. 41 (1977).

For the reasons stated, I have determined that the Review Commission does not have jurisdiction to consider contestant's claim for damages. Accordingly, it is not necessary to consider the Secretary of Labor's arguments based on sovereign immunity.³

CONCLUSIONS OF LAW

The Commission lacks jurisdiction to consider this *case because* the citation was withdrawn before the notice of contest was filed. A procedure awarding damages in such a situation would be inconsistent with the Act. For these reasons I find that Contestant has failed to state a claim upon which relief can be granted.

^{3/} For a companion case discussing the doctrine of sovereign immunity see GEX Colorado vs. Secretary of Labor, WEST 80-328-R.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

The notice of contest is dismissed with prejudice.


John J. Morris
Administrative Law Judge

Distribution:

Robert J. Lesnick, Esq., Office of **Tedrick** A. Housh, Jr.
Regional Solicitor, United States Department of Labor
Room 2106, 911 Walnut Street, Kansas City, Missouri 64106

Ann M. Noble, Esq., Office of Henry Mahlman, Regional Solicitor
U. S. Department of Labor,
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Richard L. Fanyo, Esq., Welborn, Dufford, Cook & Brown, Attorneys at Law
1100 United Bank Center, Denver, Colorado 80290