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Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

GEX COLORADO, INCORPORATED,  
CONTESTANT

HEALTH ADMINISTRATION (MSHA),  
RESPONDENT

v.

NOTICE OF CONTEST

SECRETARY OF LABOR, MINE SAFETY AND

DOCKET NO. WEST 80-328-R  
Citation No. 0786890

Roadside Mine

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. 786890 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 (FOOTNOTE 1) involving the above parties, the representative of GEX presented a copy of its notice of contest of MSHA citation No. 786890.

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Counsel for the Secretary of Labor moved to withdraw the citation, (Tr. 7). The trial judge indicated he did not have the Commission file but he would grant the motion to vacate (Tr. 10). The 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 doctrine of sovereign immunity bars recovery on GEX's claim. He also has moved for the dismissal of the case on the ground that GEX has failed to state a claim upon which relief can be granted.

#### ISSUE

The issue raised is whether contestant, GEX, can seek damages against the Secretary of Labor for an allegedly improper issuance of a citation.

#### FINDINGS OF FACT

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

1. A federal mine inspector issued Citation 786890 to GEX on May 15, 1980.

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2. The citation charged GEX with violating 30 CFR 75.503 (FOOTNOTE 2) by failing to properly maintain its roof bolting machine. Specifically, flat washers were used between the face of the lock washers and the cover lid bolts on the main controller compartment. (Citation, Notice of Contest, 4).

3. The GEX notice of contest was presented (FOOTNOTE 3) to the Review Commission Judge during a hearing on an unrelated case involving the same parties.

4. At the above hearing the Secretary moved to vacate Citation 786890. The motion to vacate was granted (Tr. 7, 10).

#### DISCUSSION

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

The Secretary is correct in his view that the doctrine of sovereign immunity bars GEX's claim. There are a myriad of cases holding that the United States "is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define the court's jurisdiction to entertain the suit." United States v. Testan 424 U.S. 392 (1976). Contestant is not entitled to money damages without a waiver of sovereign immunity, and the Federal Mine Safety and Health Act of 1977 contains no such waiver.

A mine operator is provided relief from improper actions of the Secretary through the vacation or modification of a citation, penalty, order of withdrawal, or abatement period. Administrative and judicial review of any action of the Secretary is allowed but the remedies available do not include monetary or exemplary damages.

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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 broadly interpreted to allow consideration of GEX's claims for a set off. I disagree. The consent to be sued must be "unequivocally" expressed in the statute. Testan, supra.

"Other appropriate relief" cannot be interpreted as an express waiver of sovereign immunity.

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 which would be set off 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 set off 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).

#### CONCLUSIONS OF LAW

The Commission lacks jurisdiction to consider a claim for damages against the Secretary of Labor since the Federal Mine Safety and Health Act of 1977 does not waive the sovereign

immunity of the United States. A procedure awarding damages for a future set off 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.

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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

~FOOTNOTE\_ONE

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.

~FOOTNOTE\_TWO

2 75.503 Permissible electric face equipment; maintenance. Statutory Provisions The operator of each coal mine shall maintain in permissible condition all electric face equipment required by 75.500, 75.501, 75.504 to be permissible which is taken into or used in by the last open crosscut of any such mine.

~FOOTNOTE\_THREE

3 No party questions the propriety of the service of the notice of contest under these circumstances, and that issue is not addressed in this decision.