CCASE:

(UMWA) v. SOL (MSHA)

DDATE: 19810828 TTEXT: Federal Mine Safety and Health Review Commission Office of Administrative Law Judges

UNITED MINE WORKERS OF AMERICA (UMWA),

CONTEST OF ORDER

CONTESTANT

Docket No. CENT 81-223-R

v.

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

Order No. 1024387;

5/13/81

RESPONDENT Charleston No. 1 Mine

ORDER OF DISMISSAL

On May 13, 1981, a Federal inspector issued a combined citation and imminent danger withdrawal order to Garland Coal Company.(FOOTNOTE.1) Contestant claims that the citation should be modified to contain a finding that the violation alleged by the inspector constituted an "unwarrantable failure" to comply with the cited standard.(FOOTNOTE.2) The Secretary of Labor contends that under the Act, findings of imminent danger and unwarrantable failure are mutually exclusive. Without passing on the issue raised by the Secretary, I conclude that Contestant does not have the right under the Act to challenge the citation.

~2017

Under 105(d) of the Act, a mine operator may contest "the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty ... or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section (Emphasis added.) A miner or representative of miners (FOOTNOTE.3) may contest "the issuance, modification or termination of any order issued under section 104, or the reasonableness of the length of time set for abatement by a citation of modification thereof issued under section 104." words "or citation" are conspicuously absent from the list of items a miner or representative of miners may contest. Therefore, since Contestant is a representative of miners challenging a citation, the Notice of Contest must be dismissed. (FOOTNOTE.4)

Barring miners and representatives of miners from contestng citations may appear to leave an imbalance in the Act's enforcement scheme, particularly since miners are given a key role in that scheme. But the Act gives the Secretary primary responsibility for enforcing the Act. With that responsibility must come some measure of discretion. (FOOTNOTE.5)

Therefore, the case is DISMISSED.

Section 104(a) directs an inspector to issue a citation if, on the basis of an investigation, he finds that an operator has violated any mandatory safety or health standard. In this case, the Inspector charged that Garland had failed to properly store explosives that had been carried to a blasting site, as required by 30 C.F.R. 77.1303(c).

Section 107(a) requires an inspector who discovers an "imminent danger" to issue an order requiring the operator immediately to withdraw all persons from the affected area. An "imminent danger" is a condition that could be expected to cause death or serious physical harm before it can be corrected. Section 3(j).

The record does not disclose whether Garland has challenged the citation/order before this Commission. Garland has not sought to intervene in this proceeding.

~FOOTNOTE_TWO

There is no provision for unwarrantable failure findings in imminent danger orders issued under 107. Contestant is challenging the citation, not the order.

~FOOTNOTE_THREE

Contestant's status as a representative of miners has not been questioned.

~FOOTNOTE_FOUR

The U.S. District Court for the District of Columbia recently declined to decide whether 105(d) prevents miners and representatives of miners from contesting citations, preferring to have the Commission resolve the issue. Council of the Southern Mountains v. Donovan, No. 79-2982 (D.D.C. 1981), 2 BNA MSHC 1329, 1332, n. 8.

~FOOTNOTE_FIVE

Miners and representatives of miners may participate as parties to Commission proceedings if the mine operator elects to challenge a citation, or a civil penalty based on it. 29 C.F.R. 2700.