

CCASE:
AMAX CHEMICAL V. SOL(MSHA)
DDATE:
19820624
TTEXT:

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

AMAX CHEMICAL CORPORATION,
CONTESTANT

Contest of Citations

v.

Docket Nos. Citation Nos. & Dates

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

CENT 82-93-RM	517729	2/2/82
CENT 82-94-RM	517732	2/4/82
CENT 82-95-RM	517734	2/9/82
CENT 82-96-RM	517738	2/11/82
CENT 82-97-RM	517739	2/11/82
CENT 82-98-RM	517740	2/17/82
CENT 82-99-RM	518049	2/10/82
CENT 82-100-RM	518060	2/18/82

Amax Mine and Refinery

DECISION AND ORDER OF DISMISSAL

Counsel for contestant filed on June 7, 1982, in the above-entitled proceeding a notice of contest seeking review of the validity of the eight citations listed in the caption of this decision. A separate docket number has been assigned to each of the citations, but review of all citations is sought in a single notice of contest, a copy of which has been placed in each of the folders made for the separately docketed cases. All of the cases involve the same operator and raise common questions of law and fact. Therefore, the cases are consolidated for purposes of hearing and decision.

Counsel for the Secretary of Labor filed on June 16, 1982, a timely answer to the notice of contest. The answer alleges that the citations were properly issued under section 104(a) of the Federal Mine Safety and Health Act of 1977, that the citations properly allege violations of the mandatory standards, that contestant's mine produces products which affect interstate commerce, that the time for abatement given in the citations was reasonable, and denies all other allegations made by the notice of contest. The Secretary's answer, however, does not raise any issue about whether the notice of contest was timely filed.

The notice of contest states that it is contesting the eight citations listed in the caption of this decision "in accordance" with section 105(d) of the Act and 29 C.F.R. 2700.20. Section 105(d) reads, in pertinent part, as follows:

(d) If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section

104, * * * the Secretary shall immediately advise the
Commission

of such notification, and the Commission shall afford an opportunity for a hearing * * * and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. * * * [Emphasis supplied.]

Section 105(d) requires that an operator file its notice of contest with the Secretary of Labor within 30 days after the citation or order is issued and the Secretary is required to notify the Commission "immediately" that such a notice of contest has been filed. The question of whether a notice of contest has been filed within the time limitation of section 105(d) depends upon how one interprets the word "immediately" in section 105(d). I issued a decision on January 30, 1979, in *Island Creek Coal Co. v. Secretary of Labor (MSHA) and United Mine Workers of America*, Docket No. PIKE 79-18, in which I treated the provision in section 105(d) that the Secretary notify the Commission "immediately" of the filing of a notice of contest as the equivalent of a requirement that the operator notify the Commission simultaneously with notification of the Secretary. In that decision, I dismissed the operator's pleading because it had not been filed with the Commission within the 30-day time period. The Commission affirmed the dismissal in *Island Creek Coal Co.*, 1 FMSHRC 989 (1979).

Section 2700.20(b) of the Commission's rules provides that an operator may file a copy of its notice of contest "* * *" with the Commission at or following the timely filing of his notice of contest with the Secretary". [Emphasis supplied.] There is no way for me to establish from the notice of contest filed in this proceeding exactly when it was timely filed with the Secretary, but it certainly cannot be considered as a timely filing because it was filed 125 days after the first citation (No. 517729) was issued on February 2, 1982, and was filed 109 days after the last citation (No. 518060) was issued on February 18, 1982.

Contestant states in paragraph 10 of its notice of contest that "[t]he issues and costs involved with these Citations are such that a hearing should not be deferred until penalties are assessed". In *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (1979), the Commission held that an operator may obtain immediate review of a citation, but the Commission indicated that it would normally be possible to postpone the hearing on the notice of contest until such time as the Secretary had proposed penalties so that the civil penalty issues could be considered in a consolidated proceeding. The Commission noted further that "[i]f the operator has an urgent need for a hearing, the Secretary could make it more likely that the two contests would be tried together by quickly proposing a penalty" (1 FMSHRC at 308-309).

Contestant has not specifically shown in its notice of contest why it believes there is an urgent need for a hearing and contestant has not explained how its need for an immediate hearing can be reconciled with its failure to file its notice of contest for from 125 to 109 days after the citations to which it

objects were issued. Section 2700.22 provides that an operator's failure to file a notice of contest "* * *" shall not preclude

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the operator from challenging the citation in a penalty proceeding." Therefore, dismissal of the notice of contest for untimely filing will not prevent contestant from raising in the civil penalty proceedings the same defenses which it seeks to raise in its untimely filed notice of contest.

I am aware of the fact that the Commission has referred to the legislative history and has emphasized the need to give liberal interpretation to the time limitations in the Act in such decisions as Victor McCoy, 2 FMSHRC 1202 (1980), and Salt Lake County Road Department, 3 FMSHRC 1714 (1981), but the McCoy case dealt with a miner who had filed a discrimination complaint and Congress has indicated that the time limitations are not to be treated as jurisdictional in such cases. In the Salt Lake case, the Commission was dealing with the Secretary's obligation to notify the Commission of the filing by an operator of a notice of contest which an operator, if it objects to a proposed penalty, is required to file within 30 days after receiving the Secretary's proposal of a penalty pursuant to section 105(a) of the Act. In the Salt Lake case, the Commission declined to dismiss a civil penalty proceeding because of the Secretary's failure to notify the Commission within 45 days after the operator had filed its notice of contest. That decision did not change the operator's responsibility under section 105(a) to notify the Secretary of its objections to a penalty proposal within 30 days.

The contestant in this proceeding is seeking to obtain an expedited hearing on citations before penalties have been proposed. In such circumstances, contestant should not be permitted to obtain an expedited review of the citations unless it files its notice of contest within the 30-day time limit. Having failed to meet the 30-day time limitation for obtaining expedited review of the citations, the operator must now wait until the Secretary has proposed penalties under section 105(a) of the Act. At that time, the operator may challenge the citations in a civil penalty proceeding in accordance with the provisions of section 2700.22.

WHEREFORE, for the reasons hereinbefore given, it is ordered:

The notice of contest filed June 7, 1982, in Docket Nos. CENT 82-93-RM, et al., is dismissed without prejudice to contestant's right to raise in the civil penalty proceedings the same issues which are given in its notice of contest.

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)