CCASE:

ENERGY COAL V. SOL (MSHA)

DDATE: 19821108 TTEXT: Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

ENERGY COAL CORPORATION,
CONTESTANT

v.

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

Notices of Contest

Docket No. WEVA 82-371-R Citation No. 1071316 5/19/82

Docket No. WEVA 82-372-R Citation No. 1071318 5/20/82

Docket No. WEVA 82-373-R Citation No. 1071319 5/24/82

Docket No. WEVA 82-374-R Citation No. 1071321 5/24/82

Docket No. WEVA 82-375-R Citation No. 1071329 5/27/82

No. 14 Mine

ORDER OF DISMISSAL

On August 20, 1982, Energy Coal Corporation filed a "Notice of Appeal And/Or Request For A Hearing" with respect to the above-captioned citations. The Notice of Appeal which has been given the designated docket numbers indicated that the operator had had a conference with the MSHA District Manager and that no penalty proposals had then been issued. The Notice stated that it was being filed to preserve the record and in order to notify MSHA of the intention to contest the proposed violations and/or the proposed penalties.

On September 20, 1982, the Solicitor filed a motion to dismiss the notices of contest for untimely filing. The Secretary's motion explained that the citations were received by the operator from May 19, 1982 to May 27, 1982. The Solicitor cited section 105(d) of the Act which provides that a notice of contest to a citation be filed within 30 days of its receipt. Based thereon the Solicitor argued that since the notices of contest were not contested until

August 18, 1982 (FOOTNOTE 1), they were not filed within the requisite 30-day period. The Secretary further stated that if Energy Coal intended to contest the civil penalties arising from the five citations, the cases were not yet ripe for docketing because the penalties had yet to be proposed.

On October 1, 1982, the operator filed a response to the Secretary's motion to dismiss alleging that it had 30 days from the date of its July 21, 1982 safety and health conference with MSHA within which to contest the citations at issue.

The Solicitor's motion to dismiss must be granted. Section 105(d) of the Act is clear in directing that an operator contest issuance of a citation within 30 days from the citation's receipt. 29 CFR 2700.20. Island Creek Coal Company, 1 FMSHRC 989 (August 3, 1979) affirming PIKE 79-18 (January 30, 1979) reported at 1 MSHC 2143-2144. In these cases, the operator waited for periods ranging from 83 to 91 days before mailing the notices of contest. No reason has been given for the long delay. Even if I accepted the operator's allegation that on July 21, 1982 the conference officer stated that the 30 days ran from the date of the conference, the notices could not be accepted as timely. The 30 days for appealing the notices had long since run by then and in any event, the conference officer could not change the requirements of the Act and regulations.

It appears that the operator may be confusing an appeal from issuance of the citations with an appeal from proposed penalty assessments. The penalty aspects are still open. However, this period does not begin to run until MSHA has proposed the penalty. 29 CFR 2700.26. From the materials before me it appears that penalties have not yet been proposed for these citations. Therefore, it is too early for the operator to request a hearing regarding penalties.

In light of the foregoing, these cases are DISMISSED.

Paul Merlin Chief Administrative Law Judge

~FOOTNOTE ONE

1 They were mailed to the Commission and the Secretary by certified mail on August 18, 1982 and received by the Commission on August 20, 1982.