

CCASE:  
ALLENTOWN CEMENT V. SOL (MSHA)  
DDATE:  
19861001  
TTEXT:

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

ALLENTOWN CEMENT COMPANY,  
INC.,

CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. PENN 86-229-RM  
Citation No. 2625709; 5/12/86

Docket No. PENN 86-230-RM  
Citation No. 2625710; 5/12/86

Docket No. PENN 86-231-RM  
Citation No. 2625712; 5/12/86

Docket No. PENN 86-232-RM  
Citation No. 2625713; 5/13/86

Docket No. PENN 86-233-RM  
Citation No. 2625714; 5/13/86

Docket No. PENN 86-234-RM  
Citation No. 2625715; 5/13/86

Docket No. PENN 86-235-RM  
Citation No. 2625716; 5/13/86

Docket No. PENN 86-236-RM  
Citation No. 2625717; 5/14/86

Docket No. PENN 86-237-RM  
Citation No. 2625718; 5/14/86

Docket No. PENN 86-238-RM  
Citation No. 2625719; 5/14/86

Docket No. PENN 86-239-RM  
Citation No. 2625720; 5/15/86

Docket No. PENN 86-240-RM  
Citation No. 2625650; 5/12/86

Docket No. PENN 86-241-RM  
Citation No. 2625651; 5/12/86

Docket No. PENN 86-242-RM  
Citation No. 2625652; 5/12/86

Docket No. PENN 86-243-RM  
Citation No. 2625653; 5/12/86

Docket No. PENN 86-244-RM  
Citation No. 2625654; 5/12/86

Docket No. PENN 86-245-RM  
Citation No. 2625655; 5/13/86

Docket No. PENN 86-246-RM  
Citation No. 2625656; 5/13/86

Docket No. PENN 86-247-RM  
Citation No. 2625657; 5/13/86

Docket No. PENN 86-248-RM  
Citation No. 2625658; 5/13/86

Docket No. PENN 86-249-RM  
Citation No. 2625659; 5/13/86

Docket No. PENN 86-250-RM  
Citation No. 2625660; 5/13/86

Docket No. PENN 86-251-RM  
Citation No. 2626521; 5/14/86

Docket No. PENN 86-252-RM  
Citation No. 2626522; 5/14/86

Docket No. PENN 86-253-RM  
Citation No. 2626523; 5/14/86

Docket No. PENN 86-254-RM  
Citation No. 2626524; 5/14/86

Docket No. PENN 86-255-RM  
Citation No. 2626525; 5/14/86

Docket No. PENN 86-256-RM  
Citation No. 2626526; 5/15/86

Docket No. PENN 86-257-RM  
Citation No. 2626527; 5/19/86

Docket No. PENN 86-258-RM  
Citation No. 2626532; 5/13/86

Evansville Quarry & Mill

ORDER OF DISMISSAL

Before: Judge Merlin

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The operator filed the above-captioned thirty notices of contest on July 28, 1986. The contests seek review of citations issued from May 12, 1986 to May 19, 1986.

The Solicitor has filed a motion to dismiss on the ground that the notices of contest are untimely filed. The operator has opposed the motion. Both parties have filed memoranda in support of their positions.

The operator contends that its notices of contest are timely because they were filed within thirty days of the MSHA's notification of the proposed penalty assessments. The operator has failed, however, to submit copies of the notifications it alleges it received from MSHA or even to give their dates. In no event, could the operator's opposition to the Solicitor's dismissal motion be sustained without the necessary documentary support. In any event, in order to expedite consideration of these cases it will be assumed that the notices of contest were filed within 30 days of the operator's notification of the proposed assessments.

Section 105(a) of the Act, 30 U.S.C. 815(a) provides in pertinent part:

Sec. 105(a) If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty . . . . If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, . . . the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency . . . .

Section 105(d) of the Act, 30 U.S.C. 815(d), provides in pertinent part:

(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, . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), 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 . . . .

The foregoing statutory sections as implemented by Commission regulations establish parallel procedures for the various types of actions an operator can challenge. With respect to each of them there is a filing requirement of 30 days. If an operator desires to challenge the issuance of a citation or order, it must file its notice of contest within 30 days of its receipt of the citation or order. See 29 C.F.R. 2700.20 et seq. under the heading "Contests of Citations and Orders." If an operator wants to question a penalty assessment, it may do so within 30 days from its receipt of the notification of proposed assessments. See 29 C.F.R. 2700.26 et seq. under the heading "Contests of Proposed Assessment of Penalties." By separating notices of contest regarding citations and orders from contests of proposed penalty assessments, the regulations require that citations and orders be contested within 30 days of their receipt by an operator and that likewise, proposed penalty assessments be contested within 30 days of notification by an operator. The regulations do not contemplate that contests of citations be filed within 30 days of proposed penalty assessments. On the contrary, the regulations specifically provide that an operator's failure to file a notice of contest shall not preclude it from challenging the citation in a penalty proceeding. 29 C.F.R. 2700.22. If the operator could file its notice of contest when it receives the penalty proposal, section 2700.22 of the regulations would be unnecessary.

The operator seeks to rely upon certain language in section 105(a) regarding notification by the Secretary of Labor to the operator of a proposed penalty and contest by the operator within 30 days of the citation or proposed assessment. Section 105(a) is principally concerned with notifications by the Secretary to the operator, whereas 105(d) lays down the conditions precedent to hearing and review by the Commission. Giving proper effect to section 105(d) requires a 30-day filing period for notices, orders and proposed penalty assessments respectively, in accordance with Commission regulations, supra.

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Applicable Commission precedent also demonstrates that a notice of contest of a citation must be filed within 30 days of its issuance. In *Energy Fuels Corporation*, 1 FMSHRC 299 (May 1979) the Commission considered whether a notice of contest of a citation could be filed within 30 days of the issuance of a citation and before the Secretary proposes a penalty. Under the prior 1969 Mine Safety Act such immediate reviews of abated citations (as opposed to withdrawal orders) had not been allowed. The Commission decided that under the 1977 Act immediate review of citations was available, explaining why it was necessary in many situations such as expensive abatement, special findings of unwarrantable failure, etc. Since under *Energy Fuels* the operator has the right to contest a citation immediately upon its issuance, giving it the right also to file the same contest later when the Secretary brings the penalty case, would be redundant. The Commission has left open the issue whether an operator who does not file an immediate notice of contest from a withdrawal order can later challenge special findings in a subsequent penalty proceeding, *Black Diamond Coal Mining Company*, 7 FMSHRC 1117, 1122, n. 7 (Aug. 1985). (FOOTNOTE 1) Admittedly, *Black Diamond* concerned a withdrawal order, but that makes no difference. Since the Commission in *Energy Fuels* gave the same right of immediate review to citations as previously had existed with respect to withdrawal orders, there is no reason now to give an additional right of belated review such as that argued for by this operator with respect to the contest of citations. Also, although the Commission reserved the question in *Black Diamond*, it has decided penalty cases which involved the special finding of "significant and substantial." *Cement Division, National Gypsum Company*, 3 FMSHRC 822 (1981); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834 (1984); See also, *C.D. Livingston*, 8 FMSHRC 1006, 1007, n. 2 (1986).

That the operator has no right to file a contest from a citation within 30 days of the proposed assessment notification also is clear from the Commission's decision in *Old Ben Coal Company*, 7 FMSHRC 205 (Feb. 1985). In that case the operator filed an immediate notice of contest of a citation within 30 days from issuance of the the citation but it did not pursue the subsequent penalty case. The Commission held that the failure to contest the penalty extinguished the operator's right to continue with the contest case. The earlier contest in effect, merges with the subsequent penalty. Under such circumstances existence of a right to file a contest when the penalty case begins would make no sense.

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If the operator has timely contested the civil penalties proposed for these citations and requested a hearing, then it will be able to contest the validity of the citations in the civil penalty proceedings.

Accordingly, the Solicitor's motion is GRANTED and these cases are DISMISSED.

Paul Merlin  
Chief Administrative Law Judge

FOOTNOTE START HERE-

1 In this case the operator has not raised the issue of special findings.