

CCASE:  
WESTMORELAND COAL V. SOL (MSHA)  
SOL (MSHA) V. WESTMORELAND COAL  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

WESTMORELAND COAL COMPANY,  
CONTESTANT

v.

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

CONTEST PROCEEDING

Docket No. VA 88-49-R  
Citation No. 2965807; 5/16/88

Bullitt Mine  
Mine ID 44-00304

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

v.

WESTMORELAND COAL COMPANY,  
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. VA 88-58  
A.C. No. 44-00304-03598

Bullitt Mine

DECISION

Appearances: Thomas C. Means, Esq., Crowell & Moring,  
Washington, D.C. for the Contestant/Respondent;  
F. Thomas Rubenstein, Esq., Big Stone Gap,  
Virginia, for the Contestant/Respondent;  
Sheila K. Cronan, Esq., Office of the Solicitor,  
U.S. Department of Labor, Arlington, Virginia, for  
the Respondent/Petitioner.

Before: Judge Maurer

In these proceedings, Westmoreland Coal Company  
(Westmoreland) is contesting the validity of a section 104(a)  
citation purportedly issued by Inspector Kenneth L. Card on May  
16, 1988. Pursuant to notice, the case was heard on September 19,  
1988 in Abingdon, Virginia.

At the conclusion of the Secretary's presentation of her  
case, I granted the Contestant's motion, essentially made  
pursuant to FED.R.CIV.P. 41(b), that the Secretary had not made  
out a prima facie case because she could not get a copy of the  
citation at issue into evidence.

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This rather strange turn of events started out routinely enough. Government Exhibit No. 8 was marked and identified by Inspector Card as the citation he wrote the operator for failure to submit an accident report to MSHA. It was offered into evidence and received without objection--at least initially.

During cross-examination of Inspector Card, it became obvious that the citation marked and received as Government Exhibit No. 8 was different in a few respects from the citation that Westmoreland had contested, and that I held in my file appended to the Notice of Contest. Significantly, one of the gravity marks and the negligence mark were altered.

A brief recess was had while counsel for the Secretary investigated the apparent discrepancy. When we went back on the record, she represented that she had spoken to someone at the Norton office who told her that the original citation on file there had been whited out in the aforementioned two places and improperly altered.

In the meantime, Respondent's counsel had now objected to the relevancy of Government Exhibit No. 8, the altered citation, as not being at issue in this case, as well as never having been served on the operator. I sustained that objection and Government Exhibit No. 8 was now excluded from the record of trial.

Counsel for the Secretary thereupon marked a copy of the citation that was attached to the Notice of Contest as Government Exhibit No. 11 and offered it into evidence through Inspector Card. However, upon voir dire, Inspector Card was unable to decide which document, Exhibit No. 8 or No. 11 was actually the one he wrote the operator on May 16, 1988. Upon objection for lack of foundation for the exhibit, I excluded it from evidence as well.

The upshot of the whole episode was that unable to get either version of the citation into evidence with the witnesses present and available to lay an acceptable evidentiary foundation, the Secretary rested her case.

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Whereupon, on motion, I granted the operator's contest and vacated Citation No. 2965807 in all its versions, and closed the hearing. Pursuant to 29 C.F.R. 2700.65, this decision announced orally from the bench is hereby reduced to a writing and ordered executed this date. Therefore, MSHA's petition for assessment of a civil penalty is dismissed.

Roy J. Maurer  
Administrative Law Judge