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

BEAVER CREEK COAL COMPANY,  
CONTESTANT

v.

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

CONTEST PROCEEDINGS

Docket No. WEST 88-84-R  
Citation No. 3044384; 12/17/87

Docket No. WEST 88-104-R  
Order No. 3044357; 1/6/88

Docket No. WEST 88-106-R  
Citation No. 3227085; 1/6/88

Trail Mountain Mine No. 9  
Mine ID 42-01211

DECISION

Appearances: David M. Arnolds, Esq., Beaver Creek Coal Company,  
Denver, Colorado,  
for Contestant;  
Robert J. Murphy, Esq., John J. Matthew, Esq.,  
Office of the Solicitor, U.S. Department of Labor,  
Denver, Colorado,  
for Respondent.

Before: Judge Cetti

Contestant, Beaver Creek Coal Company, filed Notices of Contest on Citation Nos. 3044384, 3044357 and 3227085 in a timely manner to initiate contest proceedings which are respectively Docket Nos. WEST 88-84-R, WEST 88-104-R and WEST 88-106-R. Beaver Creek, however, failed to file the "Blue Cards" with respect to those citations which were attached to Proposed Assessments. Upon realizing Beaver Creek's failure to file the appropriate Blue Cards, the attorney for Beaver Creek filed a Motion to Vacate the Orders to Pay on the basis of excusable neglect.

The Federal Mine Safety and Health Review Commission has ruled in a similar case Rivco Dredging Corporation v. MSHA, 10 FMSHRC 624. (May 26, 1988), that the operator should be granted relief in that situation "because innocent procedural missteps alone should not operate to deny a party the opportunity to present its objection to citations." In that case, the operator had timely filed a notice of contest relating to the citation but failed to contest the civil penalty proposal and the Administrative Law Judge had issued an order of dismissal. In ruling

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for the operator, the Commission cited Kelley Trucking Co., FMSHRC 1867, [MSHC 1223] (December 19, 1986) and M.M. Sundt Construction Co., 8 FMSHRC 1269 [4 1117] (September 1986) with approval. In Kelley, the Commission stated as follows:

"As to the substantive aspects of Kelley Trucking's request, we have observed repeatedly that default is a harsh remedy and that if the defaulting party can make a showing of adequate or good cause for the failure to respond, the failure may be excused and appropriate proceedings on the merits permitted." 4 MSHC 1225.

The Commission also quoted in pertinent part the standard set forth in Federal Rule of Civil Procedure 60(b)(1) as follows:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . mistake, inadvertence, surprise or excusable neglect; . . . or . . . any other reason justifying relief from the operation of the judgment." (4 MSHC 1225).

The Secretary in her initial response to the motion to vacate order to pay attempted to distinguish Rivco in that there the operator was acting pro se and was unaware that it should file an objection to the proposed penalty. The Secretary argued that Beaver Creek can not claim it misunderstood the requirement because Beaver Creek is a large operator which appears regularly before the Commission. The Secretary further argues that the attorneys for Beaver Creek are experienced, appear regularly before the Commission, and are fully aware of the requirements to file the blue cards.

Beaver Creek contends, however, that the Secretary's argument fails because it is both factually inaccurate and legally wrong. Although Beaver Creek is represented in these contests by an attorney, he is new to the coal industry and has never handled MSHA matters before. Beaver Creek's attorney did not know that, after he initiated a contest proceeding on the citations, he would be denied a hearing and remedy if the mine personnel failed to file the blue cards that were sent to them. MSHA did not send the Notice of proposed assessment to the attorney and, therefore, he was unable to respond to it.

Beaver Creek asserts that the safety supervisor at the mine in Price, Utah who received the proposed assessment with the blue cards and was responsible for handling them was unaware of the procedural requirement of filing blue cards for already initiated contests. The safety supervisor has been in his position at Beaver Creek since the middle of 1985 and during his tenure, Beaver Creek had contested no citations. In 1986 Beaver Creek received four citations, in 1987 it received 13 citations,

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all of which Beaver Creek considered to be valid. As of March 29, 1988, the date of the proposed assessment for the citations at issue, Beaver Creek had received 95 citations or orders for the year 1988.

Beaver Creek also contends that the Secretary's argument is also legally wrong because it ignores the fact that F.R.C.P. 60(b)(1) applies to a party "or his legal representative." Therefore, the fact that Beaver Creek is represented by an attorney is irrelevant to the issue of whether the ruling in Rivco should be followed.

The reasoning of the Commission in Rivco, Kelley and Sundt plus that of F.R.C.P. 60(b)(1) all are focused on the situation in which Beaver Creek finds itself. Beaver Creek clearly intended to seek review of the subject citations and initiated contest proceedings to do so. However, due to the number of citations being received, the lack of experience of Beaver Creek's people in contesting citations, and the geographical distance between the mine in Price, Utah and the attorney's office in Denver, Colorado, Beaver Creek admittedly "failed to jump through the procedural hoop" of filing the Blue Cards.

A grant of Beaver Creek's motion does not prejudice MSHA because contest proceedings were already pending with respect to these citations.

MSHA's practice of sending the proposed assessment for a contested citation, which is in effect a pleading, to the mine personnel instead of the attorney, can result in the blue card not being filed through no fault of the attorney. Only careful coordination between the mine personnel and the attorney could ensure that a proposed assessment does not inadvertently slip by on a pending contest case.

The cases were set for hearing on the merits at the same place and time as other cases involving the same parties and their attorneys were heard on the merits. At the hearing, counsel for the Secretary on the record stated the parties had reached an agreement and the parties jointly moved for approval of the proposed settlement dispositions which provides for granting Beaver Creek's motion to vacate the automatic final order to pay that resulted from the inadvertent failure to file the blue card with respect to the contested citations. The agreement also provides as follows:

Docket No. WEST 88-84-R

Citation No. 3044384

This citation alleges a violation of 30 C.F.R. 75.301. The Secretary agreed and moved to redesignate this Citation from

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Section 104(d)(1) to Section 104(a) - S & S. Beaver Creek Coal Company agreed and moved to withdraw its contest to the newly redesignated Section 104(a) - S & S citation and pay the Secretary's new proposed penalty of \$100.00.

Citation No. 3044357

This citation alleges a violation of 30 C.F.R. 75.316. The Secretary agreed and moved to redesignate this Citation from Section 104(d)(1) to Section 104(a) - S & S. Beaver Creek Coal Company agreed and moved to withdraw its contest to the newly redesignated Section 104(a) - S & S citation and pay the Secretary's new proposed penalty of \$100.00.

Docket No. WEST 88-106-R

Citation No. 3227085

This citation alleges a violation of 30 C.F.R. 75.400. The citation and Docket No. 106-R were stipulated to be tried during the above referenced hearing. Beaver Creek Coal Company agreed and moved to withdraw its contest and pay a proposed penalty of \$50.00.

#### Further Discussion

There was no objection to the motions of the parties. The motions are granted. In support of this proposed disposition of the cases the parties submitted information pertaining to the six statutory civil penalty criteria found in Section 110(i) of the Act. After review and consideration of the pleadings, arguments, and submissions I find that the proposed disposition is reasonable, appropriate, and in the public interest.

#### ORDER

The joint motion for approval of the agreed settlement dispositions is granted. The contestant is directed to pay a civil penalty in the sum of \$250.00 within 30 days of the date of this decision.

August F. Cetti  
Administrative Law Judge