

CCASE:
THOMAS J. TABOR V. SOL (MSHA)
DDATE:
19900908
TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

THOMAS J. TABOR, JR.,
CONTESTANT

CONTEST PROCEEDING

v.

Docket No. SE 90-44-R
Citation No. 3180625; 5/18/89

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

Matthews Mine
Mine ID 40-00570

ORDER OF DISMISSAL

Before: Judge Broderick

Contestant filed a Notice of Contest with the Commission on February 12, 1990, contesting order/citation 3180625 issued to Consolidation Coal Company on May 18, 1989. The order/citation was under section 107(a) and 104(a) of the Act and alleges a violation of 30 C.F.R. 75.202(a). A copy of the order/citation was sent to Contestant, with a letter from MSHA District Manager Joseph J. Garcia dated January 3, 1990, in which Contestant was notified that "MSHA is proposing to assess a civil penalty against you for knowingly authorizing, ordering or carrying out a violation of 30 C.F.R. 75.202(a) as cited in Citation No. 3180625 issued May 18, 1989, which is enclosed."

The Secretary filed a Motion to Dismiss on February 16, 1990, on the grounds that the Notice of Contest was filed untimely, in that the citation was issued May 18, 1989, and the notice was filed February 12, 1990.

Contestant responded to the Motion on March 7, 1990. Although filed out of time, I accept and have considered the response.

Section 105(d) of the Act provides in part:

If, within 30 days of receipt thereof, an operator notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation . . . issued under subsection (a) or (b) of this section, . . . or . . . any miner or representative of miners notifies the Secretary of an intention to contest the issuance, modification or termination of any order issued under section 104, or

the reasonableness of the length of time set for abatement by a citation . . . issued under section 104, the Secretary shall immediately notify the Commission . . . and the Commission shall afford an opportunity for a hearing

Section 107(e)(1) provides that an operator or representative of miners may apply to the Commission for review of an order issued under section 107.

The Notice of Contest states that Contestant is a Section Foreman at the subject mine. Assuming this to be true, as I must in considering the motion to Dismiss, he is a miner under the Act. It is not alleged that he is a representative of miners. Contestant argues that he is an "operator" under section 3(d). Without deciding that question, it is evident that the order/citation, which Contestant attempts to contest here was issued to Consolidation Coal Company and not to Contestant. I do not accept Contestant's argument that the January 3, 1990 letter "must be considered an issuance of the citation which was served by mail on the Applicant for purposes of protest by the Applicant." Contestant contests the validity but not the reasonableness of the length of time set for abatement of Citation 3180625. He apparently contests the 107(a) withdrawal order: Paragraph 3(b) "the Contestant was not in violation of 30 C.F.R. 75.202(a) or 107(a) of the Act. . . (d) no alleged violation described in Citation No. 3180625 was of such a nature as could reasonably be expected to cause death or serious physical injury before it could be abated," The Notice further avers that no alleged violation resulted from knowing conduct on the part of the Contestant.

Miners or their representatives do not have the right under the Act to challenge the validity of a citation issued under section 104(a) of the Act, but may only challenge the reasonableness of the abatement time. *UMWA v. Secretary*, 5 FMSHRC 807 (1983), *aff'd sub nom. UMWA v. FMSHRC*, 725 F.2d 126 (D.C. Cir. 1983).

Section 107 permits review by the Commission of a section 107(a) withdrawal order by an operator or representative of miners. There is no provision for a miner to initiate such a review proceeding.

The order/citation does not charge a violation by Contestant of section 110(c) of the Act. Whether Contestant knowingly authorized, ordered, or carried out a violation is not before me in this proceeding.

~427

I therefore conclude that Contestant does not have the right in this proceeding to challenge the order/citation issued to Consolidation Coal Co. On this basis, and not on the basis urged in the Motion to dismiss, this proceeding is DISMISSED. This disposition does not affect Contestant's right to challenge the citation in any proceeding which may be brought against him under section 110(c) of the Act.

James A. Broderick
Administrative Law Judge