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BIG HORN CALCIUM 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

BIG HORN CALCIUM COMPANY,
CONTESTANT

CONTEST PROCEEDING

v.

Docket No. WEST 90-31-RM
Citation No. 3455166; 7/24/89

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

Granite Canyon Quarry

ORDER DISMISSING CONTEST PROCEEDING

Before: Judge Cetti

I have before me the Secretary of Labor's Motion to "Dismiss" the contest of Citation No. 3455166, issued on July 24, 1989, for the failure of Big Horn Calcium to contest the Citation within 30 days of receipt, as required by Section 105(d) of the Mine Act, 30 U.S.C. 815(d), and Section 2700.20 of the Commission's Rules.

The Secretary in support of the motion states that on July 24, 1989, MSHA Inspector Thomas L. Markve issued Citation No. 3455166 for violation of 30 C.F.R. 56.11001 to Big Horn Calcium Company, a contractor working at the Granite Canyon Quarry. The Secretary contends that the facts clearly establish that Mike Latka, Big Horn Calcium's supervisor and company agent on the property, was served with the citation on July 24, 1989, and Mr. Latka participated in the close-out conference on July 25, 1989, where both Citation Nos. 3455165 and 3455166 were discussed.

I issued a Notice of Intention advising the parties of my intention to grant the Motion of Dismissal unless good cause to the contrary be shown in writing within the next 10 days.

In response to the "Notice of Intention" Big Horn stated in part as follows:

"2. Big Horn does not maintain a corporate office at the Granite Canyon Quarry or in Cheyenne, Wyoming, staffed by corporate officers. Citation No. 3455166 was not received by Big Horn at its corporate office in Billings, Montana.

3. Citation No. 3455166 apparently was tendered by an MSHA inspector to local personnel at Big Horn's Granite Canyon Quarry. The receipt by subordinate personnel at the Granite Canyon Quarry of Citation 3455166 does not constitute receipt within the meaning of the Act. See, *J.I. Hass Co. Inc.*, 1981 CCH OSHD 25,375 (3d Cir. 1981); *Buckley & Company Inc. v. Secretary of Labor*, 507 F.2d 78 (3d Cir. 1975).

4. Local quarry personnel inadvertently failed to notify and provide Big Horn a copy of this citation. The administrative error and neglect of subordinate personnel at the Granite Canyon Quarry to promptly forward Citation No. 2455166 to authorized corporate representatives was excusable and inadvertent. See, *P & A Construction Co., Inc.*, 1981 CCH OSHD 25,783 (1981); *Special Coating Systems of New Mexico, Inc.*, 1980 CCH OSHD 24,904 (1980). Big Horn did not initially submit a notice of intent to contest Citation 3455166 due to mistake, inadvertent surprise and excusable neglect within the meaning of Rule 60(b), Federal Rules of Civil Procedure.

5. Big Horn has made a good faith effort to comply with the procedural requirements of the Act, and has promptly responded to all known citations received by it within the meaning of the Act. Upon receipt in late September, 1989, of an Accident Investigation Report Big Horn became aware of a reference to Citation 3455166. Big Horn attempted to locate a copy of that citation but could not find a record of having received the citation. . . . Big Horn subsequently obtained a copy from the MSHA office in Denver, Colorado, and filed its notice of contest."

The Secretary replied to Big Horn's response in part as follows:

"Big Horn's legal position is clearly wrong. The statutory scheme of the 1977 Mine Act is very different from the 1970 Occupational Safety and Health Act. Section 104(a) of the Mine Act, requires that MSHA issue citations and withdrawal orders for violations of Mine Act, or any mandatory health or safety standards, with reasonable promptness. Requiring MSHA inspectors to issue citations

to mine operators at their corporate offices, instead of to their agents on mine property, would restrict MSHA's enforcement actions and limit the mine operator's ability to abate violations rapidly.

It is beyond dispute that mine operators are liable for the acts of their agents under the Mine Act. *Allied Products Co. v. FMSHRC*, 666 F.2d 890 (5th Cir. 1982). Mr. Latka was clearly an agent as defined by Section 3(e) of the Mine Act, and his receipt of the citation is binding on Big Horn.

The OSHA cases cited by Big Horn relate to a regulatory and statutory scheme in which the notice of proposed penalties are served upon a corporate employer at the same time the citation is issued. Thus, there is always a delay between the date of the inspection and the issuance of citations under OSHA.

Mine Act citations and orders are issued at the time of the inspection in most cases, and such documents are served on a responsible official at the mine site. Furthermore, a mine operator may challenge the citation either immediately after its issuance or during a later penalty proceeding. An OSHA contest of a citation always occurs after both the citation and penalty proposed have been issued. Therefore, the rationale concerning receipt of a citation by a corporate employer in an OSHA case does not apply to serving an operator's agent on the mine property in a MSHA case."

On March 2, 1990, the parties filed joint written stipulations so as to avoid need for a hearing on the Secretary's pending Motion to Dismiss.

Agreed Stipulations

1. On July 24, 1989, MSHA Inspector Thomas L. Markve issued Citation No. 3455166 to Mike Latka, a supervisor employed by Big Horn at the Granite Canyon Quarry, located in Granite, Wyoming.

2. Big Horn states, and the Secretary does not dispute, that Mr. Latka did not forward a copy of Citation No. 3455166 to Big Horn's corporate office located in Billings, Montana.

3. Big Horn and the Secretary stipulate that with the exception of the jurisdictional issue raised herein, all other issues raised in this contest proceeding can also be raised in the pending civil penalty proceeding in Docket No. WEST 90-80-M.

Discussion

Upon careful review of the entire record I adopt and incorporate by reference the rationale set forth in the Secretary's above quoted reply to Big Horn.

It is also noted that 30 C.F.R. 41.1 and 30 C.F.R. 52.2 (c)(2) and several other 30 C.F.R. sections define "Operator" as including any agent or person charged with the responsibility for the operation or supervision of a mine and 30 C.F.R. 41.11 requires an operator to notify MSHA of "the name and address of the person at the mine in charge of health and safety." (Emphasis added).

In *Island Creek Coal Company v. Secretary of Labor and United Mine Workers of America*, FMSHRC Docket No. PIKE 79-18 (August 3, 1979), the Review Commission affirmed the Administrative Law Judge's dismissal of Island Creek Coal Company's Application for Review "as not having met the jurisdictional filing period established by Section 105(d) of the Act." In that case the Application for Review was not received until 3 days after the 30-day filing period.

Stipulation No. 2 quoted above, conforms with existing practice. Under *Quinland Coals, Inc.*, 9 FMSHRC 1641 (September 1987) the failure to file a notice of contest does not preclude the mine operator from challenging in a penalty proceeding the fact of violation or any special findings contained in a citation or order including that the violation was of a significant and substantial nature or was caused by the operator's unwarrantable failure to comply with the standard.

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ORDER

The Secretary's motion to dismiss the contest of Citation No. 3455166 as not having met the filing period established by Section 105(d) of the Mine Act is granted. The above captioned contest proceeding is dismissed.

August F. Cetti
Administrative Law Judge