

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 31, 1990

DUININCK COMPANIES,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. LAKE 90-126-R
v .	:	Citation No. 3445314; 5/9/90
	:	
	:	KK003 Crushing Unit
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine ID 21-02845
ADMINISTRATION (MSHA),	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

This case is a notice of contest filed by the operator seeking to **challenge** the issuance of a citation by an inspector of the Mine Safety and Health Administration under section 104(a) of the Federal Mine Safety and Health Act of 1977.

The citation was issued on May 9, 1990. The contest was not received by the Commission until September 4, 1990. However, as set forth in the order dated September 24, 1990, previously entered herein, the contest was treated as filed on August 20, 1990, because that was the date of receipt indicated by the MSHA stamp on the letter from operator's counsel. In its most recent response the operator advises that its notice of contest was received by the Solicitor on August 10, 1990. The photocopy of the return receipt attached by the operator supports the date given in its motion. Accordingly, the date of filing now is accepted as August 10.

There still remains for determination the question whether the **contest** was timely filed. In his answer the Solicitor moves to dismiss on the ground that the contest was untimely. Unfortunately, the Solicitor cites neither applicable statutory provisions nor relevant case law. This experienced Solicitor knows better. However, timeliness clearly is in issue, and therefore, the order of September 24 required the operator to explain its position on the matter. In its response the operator alleges that because it had been given an extension to abate to August 15, it believed it had until then to file its notice of contest.

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

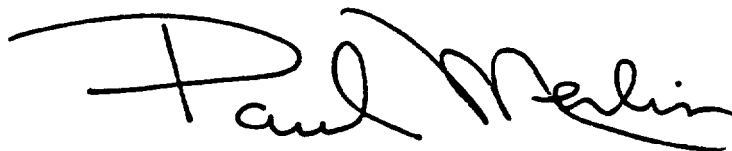
If, within 30 days of receipt thereof, an operator of a coal **or** other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104 * * * the Secretary shall immediately advise the commission of such notification and the Commission shall afford an opportunity for a hearing * * * *

A long line of cases going back to the Interior Board of Mine Operation Appeals has held that cases contesting the issuance of a citation must be brought within the statutorily prescribed 30 days or be dismissed. Freeman Coal Minings Corporation, 1 MSHC 1001 (1970); Consolidation Coal Co., 1 MSHC 1029 (1972); Island Creek Coal Co. v. Mine Workers, 1 MSHC 1029 (1979); aff'd by the Commission, 1 FMSHRC 989 (August 1979); Amax Chemical Corn., 4 FMSHRC 1161 (June 1982); Rivco Dredains Corn., 10 FMSHRC 889 (July 1988); See Also, Peabody Coal Co., 11 FMSHRC, 2068 (October 1989); Bia Horn Calcium Company 12 FMSHRC 463 (March 1990); Enerav Fuels Mining Company 12 FMSHRC 1484 (July 1990). The time limitation for contesting issuance of citations must therefore, be viewed as jurisdictional.

The notice of contest in this case was filed three months after the citation was issued which was two months late. The Mine Act and applicable regulations afford no basis to excuse tardiness because the operator and its counsel mistakenly believe that the time for abatement extends the time to challenge the citation. Nor does relevant case law suggest support for any such approach. Accordingly, the operator's argument cannot be accepted..

The operator should be aware, however, that the issues it seeks to raise here may be litigated in the penalty suit when MSHA proposes a monetary assessment.

In light of the foregoing, it is ORDERED that this case be, and is hereby, DISMISSED.



Paul Merlin
Chief Administrative Law Judge