

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

January 15, 1991

PRESTIGE COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. KENT 91-25-R
v.	:	Citation No. 3416484: 8/29/90
	:	
	:	Docket No. KENT 91-26-R
SECRETARY OF LABOR,	:	Order No. 3416485; 8/29/90
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 91-27-R
Respondent	:	Order No. 3416486; 8/29/90
	:	
	:	Mine ID 15-16582

ORDER OF DISMISSAL

Before: Judge Merlin

These cases are notices of contest filed by the operator seeking to challenge citations issued 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 citations were issued on August 29, 1990. The notices were not received by the Commission until October 19, 1990.

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 * * * *

On November 9, 1990, the Solicitor filed her answer to the notices of contest in which she stated that the citations were properly issued and therefore the contests should be denied. The

Solicitor's answer did not raise the issue of timeliness.' Thereafter, on November 20, 1990, an order **was** issued pointing out the time interval between the issuance of the citations and the filing of the notices. In addition, the order noted the general view that the 30 day filing requirement of section 105(d) is jurisdictional and that unless the contest is brought within the prescribed time, it must be dismissed. In light of these circumstances, the parties were ordered to submit memoranda setting forth their positions with respect to the timeliness of the operator's pleadings which they have now done.

The Solicitor's memorandum concurs with the November 20th order regarding the date the citations were issued and date the contests were served on the Commission. The Solicitor argues that the notices of contest were due on October 3, 1990.² According to the Solicitor, the cases cited in the November 20, 1990, order regarding timeliness supports the conclusion that the 30-day requirement for contesting the issuance of a citation or order is jurisdictional. Therefore, the Solicitor moves that these cases be dismissed for the operator's failure to serve the notices within the statutorily prescribed time.

The operator asserts that the notice of contests were not filed earlier because it had sought to exhaust other administrative remedies provided by the Mine Act, referring to its attendance at a conference with MSHA on September 28, 1990. The operator notes that the contests were filed within 30 days of that conference. In the alternative, the operator argues that since the three citations were subsequently modified by MSHA on November 13, 1990, in a manner favorable to it, MSHA has acquiesced in the timeliness of its filing.

As stated in the November 20th order, a long line of decisions going back to the Interior Board of Mine Operation Appeals has held that cases contesting the issuance of a citation must be

¹ In her memorandum filed in response to the November 20 order, the Solicitor defends this oversight by highlighting the short time frame in which she has to answer the contests. While I understand that the short period does not allow an in-depth review of the citations, it would appear rudimentary that the timeliness of the contests would be checked and that it would be possible to alert this matter to the presiding judge.

² The **Solicitor's** reference to 29 C.F.R. 2700.8(b) is erroneous since that provision applies to responsive pleadings. In her answer the Solicitor had used the date October 15, 1990, as the date of service, referring to 29 C.F.R. § 2700.7(b), which provides that service is complete upon mailing. Whether the filing date is October 15 or October 19 has no effect on the result.

rought within the statutory prescribed 30 days or be dismissed. reeman Coal Mining 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 89 (August 1979); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982); Rivco Dredaina Corp., 10 FMSHRC 889 (July 1988); See also, Peabody Coal Co., 11 FMSHRC, 2068 (October 1989); Big Horn Calcium Company, 12 FMSHRC 463 (March 1990); Energv Fuels Mining company, 12 FMSHRC 1484 (July 1990). The time limitation for contesting issuance of citations must therefore, be viewed as **jurisdictional**.

The notices of contest in these cases were filed **over 50 days after the citations were issued which was 20 days late**. The **Mine Act and applicable regulations afford no basis to excuse tardiness because the operator mistakenly believes it can pursue venues of relief with MSHA before coming to this separate and independent Commission to challenge a citation**. The Act clearly **provides otherwise**. Nor does relevant case law suggest support for any such approach. Finally, the subsequent modifications of the citations cannot affect the operator's duty to file its **contests** within the prescribed time. Accordingly, the operator's arguments 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 these cases be, and are hereby, **DISMISSED**.



Paul Merlin
Chief Administrative Law Judge

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