

CCASE:  
UTAH POWER & LIGHT V. SOL (MSHA)  
DDATE:  
19920612  
TTEXT:

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges  
2 SKYLINE, 10TH FLOOR  
FALLS CHURCH, VIRGINIA 22041

IN RE: CONTESTS OF RESPIRABLE  
DUST SAMPLE ALTERATION  
CITATIONS

UTAH POWER & LIGHT COMPANY,  
MINING DIVISION,  
CONTESTANT  
v.

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

MASTER DOCKET NO. 91-1

Docket Nos. WEST 91-357-R  
through WEST 91-361-R

Citation Nos. 9860864  
through 9860868

Cottonwood Mine

Docket Nos. WEST 91-362-R  
through WEST 91-364-R

Citation Nos. 9860819  
through 9860821

Docket Nos. WEST 91-467-R  
through WEST 91-468-R

Citation Nos. 9862937  
through 9862938

Docket No. WEST 92-31-R

Citation No. 9862981

Deer Creek Mine

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

ENERGY WEST MINING COMPANY,  
RESPONDENT

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 91-482  
A.C. No. 42-00121-03744D

Docket No. WEST 92-116  
A.C. No. 42-00121-03754D

Deer Creek Mine

Docket No. WEST 91-483  
A.C. No. 42-01944-03590D

Cottonwood Mine

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BENTLEY COAL COMPANY,  
CONTESTANT

v.

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

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

v.

BENTLEY COAL COMPANY,  
RESPONDENT

KENTUCKY PRINCE COAL COMPANY,  
CONTESTANT

v.

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

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

v.

KENTUCKY PRINCE COAL COMPANY,  
RESPONDENT

CONTEST PROCEEDINGS

Docket No. WEVA 91-783-R  
Citation No. 9862628

Long Run Deep Mine No. 1

CIVIL PENALTY PROCEEDING

Docket No. WEVA 92-316  
A.C. No. 46-07609-03518D

Long Run Deep Mine No. 1

CONTEST PROCEEDINGS

Docket Nos. KENT 91-309-R  
through KENT 91-310-R

Citation Nos. 9858895  
through 9858896

Kentucky Prince Unit  
Train Loadout

Docket No. KENT 91-311-R  
Citation No. 9858714

Jeff Tipple Mine

Docket No. KENT 91-312-R  
Citation No. 9859438

Grae No. 2 Mine

CIVIL PENALTY PROCEEDINGS

Docket No. KENT 91-1166  
A.C. No. 15-05151-03513D

Jeff Tipple Mine

Docket No. KENT 91-1167  
A.C. No. 15-11719-03518D

Kentucky Prince Unit  
Train Loadout

Docket No. KENT 91-1168  
A.C. No. 15-16349-03526D

Grae No. 2 Mine

ORDER DENYING MOTIONS TO VACATE CITATIONS

On May 4, 1992, Contestant Utah Power & Light, Mining Division (now known as Energy West Mining Company)<sup>1</sup> (Energy West) filed a motion for an order vacating the 11 citations issued by the Secretary of Labor (Secretary) to Contestant on April 4, 1991, June 7, 1991, and September 11, 1991. Each citation alleged a violation of 30 C.F.R. 70.209(b) because the respirable dust sample submitted by Contestant had been altered by removing a portion of the dust from the sample. As grounds for the motion Contestant states that the Secretary failed to issue the citations with the "reasonable promptness" required by section 104(a) of the Mine Act. The motion was accompanied by a memorandum in support of the motion and an appendix including affidavits, MSHA documents, copies of correspondence, and excerpts of deposition testimony. On May 19, 1992, the Secretary filed a statement in opposition to the motion with an appendix including affidavits and excerpts of deposition testimony.

On May 22, 1992, Contestants Bentley Coal Company (Bentley) and Kentucky Prince Coal Company (Kentucky Prince) filed a motion for an order vacating the five citations issued to Bentley and Kentucky Prince on April 4, 1991, alleging violations of 30 C.F.R. 70.209(b) or 71.209(b). The motion was accompanied by a memorandum and an appendix including an affidavit, MSHA documents, and discovery responses. On June 8, 1992, the Secretary filed a response to the motion.  
Docket No. WEST 92-31-R, Citation No. 9862981

Citation No. 9862981 was issued September 11, 1991. The Notice of Contest was filed by Utah Power & Light Company, Mining Division on October 9, 1991. The Secretary filed her answer on October 18, 1991. On November 4, 1991, Chief Judge Paul Merlin issued an order staying proceedings in this docket until the first decision is rendered in Master Docket No. 91-1.

Docket No. WEST 92-31-R is not part of the Master Docket and has not been assigned to me. For these reasons, this order will

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not consider the motion to vacate insofar as it relates to Docket No. WEST 92-31-R and Citation No. 9862981.

#### Motion for Summary Decision

The facts and legal principles applicable to these motions are similar to those involved in the motion to vacate citations filed by Southern Ohio Coal Company (SOCCO) and Windsor Coal Company (Windsor). On May 22, 1992, I issued an order denying the motions to vacate filed in those proceedings. As in the SOCCO and Windsor order, the motions to vacate citations here are treated as motions for summary decision under Commission Rule 64(b). Resolving ambiguities in the Secretary's favor, the motions may be granted only if the entire record shows that there is no genuine issue as to any material fact, and movants are entitled to summary decision as a matter of law.

#### Facts

The samples which resulted in the citations contested by Energy West were taken between September 14, 1989, and March 26, 1991. All but two of the citations were issued April 4, 1991. For the two samples taken March 25 and 26, 1991, the citations were issued June 7, 1991. Robert Thaxton, MSHA's Supervisory Industrial Hygienist and an authorized representative of the Secretary made the determination in the case of each sample that it showed an abnormal white center which established tampering. Thaxton received the first eight cited samples involved in these proceedings between September 27, 1989, and June 25, 1990. The samples taken March 25 and 26, 1991, were received by Thaxton on April 17, 1991.

The samples which resulted in the citations contested by Bentley and Kentucky Prince were taken between August 24, 1989, and July 26, 1990. The citations were all issued April 4, 1991. The samples were received by Thaxton between September 14, 1989, and August 20, 1990.

With respect to the samples taken before November 1990, I found in the SOCCO/Windsor order that the Secretary's belief that the samples showed violations did not come about before November 1990. The same findings apply here. Thus, for the purpose of ruling on the motions, the delay between the time the Secretary believed that violations occurred and the issuance of the citations was approximately 4 months. With respect to the samples from Energy West taken in March 1991, the delay was approximately 2 months (April 17 to June 7, 1991). I find that there is no genuine issue as to these material facts.

Reasonable Promptness

In my SOCCO/Windsor order, I concluded that the Secretary established adequate justification for her 4-month delay in issuing the contested citations, namely her wish to avoid premature disclosure of a pending criminal investigation. The same consideration applies to the motions filed by Energy West, Bentley, and Kentucky Prince with respect to the citations issued on April 4, 1991. For those citations, I conclude that the Secretary has established adequate justification for the delay in their issuance, namely the government's interest in avoiding disclosure of a pending criminal investigation.

No such interest existed with regard to the two citations issued June 7, 1991. The only reason the Secretary has advanced for the delay in issuing them is her decision to issue citations in groups after sufficient numbers of violative samples were collected, which occurred every 2 to 3 months. I am not persuaded that the Secretary needed 2 to 3 months after she determined that a violation occurred to administratively accomplish the issuance of a citation. Therefore, I conclude that the Secretary has failed to establish an adequate justification for her 2-month delay in issuing these contested citations.

For all of the citations, I must determine whether the delay was prejudicial to the Contestants. See *Old Dominion Power Co.*, 6 FMSHRC 1886 at 1894 (1984), rev'd on other grounds sub nom., *Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985); *Emery Mining Corp. v. Secretary*, 10 FMSHRC 1337 at 1354 (ALJ) (1988). Energy West has not asserted that the 2-month delay in issuing the citations on June 7, 1991, prejudiced its ability to defend itself. With respect to all the citations issued to Energy West, it advanced the same arguments advanced by SOCCO and Windsor. As in the SOCCO/Windsor order, I conclude that prejudice has not been established.

Contestants Bentley and Kentucky Prince state that mining operations in the subject mines have ceased "and many--if not all--of the witnesses on whom Contestants would have relied are no longer available." The Bentley employees were terminated or transferred "in 1991" and the mine has been closed and reclaimed. The Secretary's response includes an affidavit that the mine was not abandoned until August, 1991. It further points out that the cited samples were taken by an independent contractor, and not by Bentley employees. Contestants state that operations ended at two of the Kentucky Prince mines in 1991 and most of the employees were terminated or transferred. In April 1992, Kentucky Prince was sold to a third party, and most of the employees involved in the dust sampling no longer work for Kentucky Prince.

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Contestants' affidavit does not specify the dates when mining operations at Bentley and Kentucky Prince ceased, only that it occurred in 1991. Because it is not clear whether it occurred during the period from November 1990 to April 1991, the ambiguity must be resolved in the Secretary's favor, i.e., that it occurred after April 4, 1991. Hence, prejudice has not been shown. The facts that coal extraction ceased at Kentucky Prince in January 1992, and that the mines were sold to a third party in April 1992 are not relevant to the question of prejudice since these events occurred after the citations were issued and, therefore, after the delay complained of.

Based on the above considerations and the considerations in the SOCCO/Windsor order, I conclude that Contestants have not shown that the delays in issuing the contested citations were prejudicial to their ability to defend themselves in these proceedings, and consequently, they are not entitled to summary decision as a matter of law.

ORDER

Accordingly, the motions to vacate citations filed on behalf of Utah Power & Light/Energy West, Bentley, and Kentucky Prince are DENIED.

James A. Broderick  
Administrative Law Judge

Footnote starts here:

1. The contested citations were issued to Utah Power & Light Company, Mining Division. The related civil penalty petitions were issued under Contestant's current name, Energy West Mining Company.