

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

August 14, 1992

COSTAIN COAL INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. KENT 92-868-R
v.	:	Citation No. 3805836; 2/25/92
	:	
	:	Millers Creek Mine No. 1
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mine ID 15-16855
ADMINISTRATION (MSHA),	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On May 11, 1992, the Commission received the operator's notice of contest of Citation No. 3805836 which was dated May 8, 1992. The contest was assigned the above docket number.' Notice is completed upon mailing, therefore, the case is accepted as filed on May 8, 1992. J. P. Burroughs, 3 FMSHRC 854 (1981). On June 15, 1992, the Solicitor filed a motion to dismiss the operator's notice of contest. On June 22, 1992, the operator filed a response to the motion to dismiss.

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 \* \* \* \*.

---

<sup>1</sup> The operator did not attach a copy of the citation to its contest as required by Commission rule **20(c)**. 29 C.F.R. § 2700.20(c). The Commission's Docket Office contacted the operator on May 14, 1992, and requested that a copy of the citation be sent, but no copy was received. Upon request the Solicitor on August 3, 1992 faxed a copy of the citation to the Commission.

In her motion to dismiss, the Solicitor represents that the citation was issued on February 25, 1992 and was **conferenced** on April 4, 1992 and that the notice of contest was filed on May 8, 1992. The Solicitor therefore, calculates that the notice was filed 72 days after the citation **was issued**. Relying upon section 105(d) of the Act, Commission rules and decisions, the Solicitor asserts that a notice of contest must be filed within 30 days of receipt of the citation. Therefore, the Solicitor argues that this contest should have been filed by March 26, 1992, and that since it was not filed until May 8, it must be dismissed as untimely.

The operator in opposing the motion to dismiss represents that the conference was held on April 6, 1992, not April 4. The operator alleges it was then advised "**by MSHA personnel**" at the conclusion of the conference that if it wished to pursue its action, the operator had 30 days to file a notice of contest. The operator states that it contested the citation within 30 days after the conference was held by mailing its notice on May 5, 1992. Finally, the operator claims that it requested the conference within 6 days after the citation was issued and that if MSHA had granted the conference within the 15 days set out in its guidelines, the operator would have been able to contest the citation within the statutory thirty days.

The operator's position is without merit. Its contention that the notice was mailed on May 5 must be rejected since the notice itself which is in the form of a letter, is dated May 8. Moreover, the date of the conference is not controlling. As the statute unequivocally provides, the 30 day filing period runs from the date the citation was issued. Therefore, this contest was filed 42 days late.

A long line of decisions going back to the Interior Board of Mine Operation Appeal<sup>6</sup> has held that cases contesting the issuance of a citation must be brought within the statutory prescribed 30 day<sup>6</sup> or be dismissed. Freeman Coal Minins Corporation, 1 MSHC 1001 (1970); Consolidation Coal Co., 1 MSHC 1029 (1972); Island Creek Coal Co. v. Mine Workers, 1 MSHC 2143 (1979); aff'd by the Commission, 1 FMSHRC 989 (August 1979); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982); Rivco Dredging Corp., 10 FMSHRC 889 (July 1988); Prestige Coal Company, 13 FMSHRC 93 (January 1991); See Also, Peabody Coal Co., 11 FMSHRC 2068 (October 1989); Bia Horn Calcium Company, 12 FMSHRC 463 (March 1990); Energy Fuels Minins Company, 12 FMSHRC 1484 (July 1990); Wallace Brothers, 14 FMSHRC 586 (April 1992). The time limitation for contesting the issuance of citations must therefore, be viewed as jurisdictional.

The notice in this case was filed more than 70 days after the citation was issued. I have held previously that the Mine Act and applicable regulations afford no basis to excuse **tardi-**

ness because the operator believed it could pursue other avenues of relief with MSHA before coming to this separate and independent Commission to challenge a citation. Prestise Coal Company supra, at 95. Furthermore, the operator's assertion that certain MSHA personnel advised that the operator could contest the citation within 30 days from the conference, even if true, is of no effect. The provisions of the law are clear and the Secretary would not be estopped even assuming such misinformation had been given. Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411 (10th Cir. 1984); U. S. Steel Mining Co., Inc., 6 FMSHRC 2305 (Oct. 1984); King Knob Coal Co., Inc., 3 FMSHRC 1417 (June 1981); See Also, Skelton Incorporated, 13 FMSHRC 294 (Feb. 1991); and Featherlite Buildina Products, 12 FMSHRC 2580 (Dec. 1990).

Although the foregoing is dispositive, it is noted that the operator has filed a timely notice of contest of the penalty assessment for Citation No. 3805836 in Docket No. KENT 92-723. Commission rules provide that an operator's failure to file a notice of contest of a citation or order does not preclude the operator from challenging the citation in a penalty proceeding. 29 C.F.R. § 2700.22. Therefore, the operator has the opportunity in KENT 92-723 to contest this citation.

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



Paul Merlin  
Chief Administrative Law Judge

Distribution:

Mr. David A. Sparks, General Manager, Costain Coal Inc., Box 170,  
**Tollage** Creek Road, Pikeville, KY 41501 (Certified Mail)

Mary Sue Taylor, Esq., Office of the Solicitor, U. S. Department  
of Labor, Suite B-201, 2002 Richard Jones Road, Nashville, TN  
37215 (Certified Mail)

Richard G. High, Jr., Director, Office of Assessments, MSHA,  
U. S. Department of Labor, 4015 Wilson Boulevard, Arlington, VA  
22203

/gl