CCASE:
ONEIDA COAL V. MSHA
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IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS	MASTER DOCKET NO. 91-1
	CONTEST PROCEEDINGS
ONEIDA COAL COMPANY, INC., Contestant,	Docket Nos. WEVA 91-1041-R through WEVA 91-1055-R
v.	Citation Nos. 9862040 through 9862054
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Oneida Mine No. 1
ONEIDA COAL COMPANY, INC., Contestant,	Docket No. WEVA 91-1056-R
v.	Citation No. 9862222
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	Oneida Mine No. 4
ONEIDA COAL COMPANY, INC., Contestant,	Docket Nos. WEVA 91-1057-R through WEVA 91-1065-R
v.	Citation Nos. 9862257 through 9862265
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	Oneida Mine No. 11

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ONEIDA COAL COMPANY, INC.,          )
                    Contestant,     )   Docket Nos. WEVA 91-1066-R
                                    )   through     WEVA 91-1073-R
          v.                        )
                                    )   Citation Nos. 9862311
SECRETARY OF LABOR,                 )   through       9862318
  MINE SAFETY AND HEALTH            )
  ADMINISTRATION (MSHA),            )   Oneida Mine No. 12
                    Respondent.     )
                                    )
                                    )
ONEIDA COAL COMPANY, INC.,          )
                    Contestant,     )   Docket No. WEVA 91-1074-R
                                    )
          v.                        )   Citation No. 9862687
                                    )
SECRETARY OF LABOR,                 )   Oneida Mine No. 16
  MINE SAFETY AND HEALTH            )
  ADMINISTRATION (MSHA),            )
                    Respondent.     )
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ORDER DENYING MOTION TO DISMISS

On April 4, 1991, the Secretary of Labor (Secretary) issued 34 citations to five mines operated by Oneida Coal Company, Inc. (Oneida). On April 29, 1991, Oneida filed notices of contest with the Commission for all of the citations. Each notice asserted that there was no violation of 30 C.F.R. 70.209(b) as alleged, and that the actions described in the citation did not occur. On May 9, 1991 (received by the Commission May 10), the Secretary filed an answer and a motion for stay of proceedings until June 25, 1991, in each of the contest cases. On May 15, 1991, the cases were assigned to me. Because of inadvertence, I did not act on the motions for stay.

On June 17, 1991, the Secretary issued proposed penalty assessment notices to Oneida proposing penalties of $1,200, $1,300, and $1,400 for the alleged violations. The form notice states in part:

> Pursuant to 30 C.F.R. 100.7, you have 30 days from receipt of this proposed assessment to either pay the penalty, or notify MSHA that you wish to contest the proposed assessment and that you request a hearing on the violations in question before the Federal Mine Safety and Health Review Commission. If you do not exercise the rights herein described within 30 days of receipt of this proposed assessment, this proposed assessment will become a final order of the Commission

and will be enforced under provisions of the Federal Mine Safety and Health Act of 1977.

Each notice included a form entitled "Request for Hearing with Review Commission" (the "blue card") intended to be used by the operator to request a hearing on the penalty assessment. Oneida did not return the blue card or otherwise notify MSHA that it wished to contest the proposed penalties and request a hearing before the Commission. On July 30, 1991, the MSHA Civil Penalty Compliance Office sent letters to Oneida demanding payment for the penalties proposed on June 17, on the ground that the penalties "became delinquent 30 days after the final order of the ... Review Commission." On August 11, 1991, Oneida's Safety Director wrote to the Compliance Office informing it that Oneida had filed notices of contest for each of the citations on April 29, 1991. MSHA replied by letter dated October 15, 1991, that because Oneida failed to request a Commission hearing within 30 days of its receipt of the proposed penalty assessments, the penalties were deemed by operation of law final orders of the Commission. It further stated that "[c]ontest of the underlying citations does not constitute a contest of the associated proposed civil penalty." On November 5, 1991, Oneida's counsel wrote MSHA stating that he was "reiterating for the record our intention to challenge not only the citations themselves, but also the related proposed civil penalties." The letter argued that Oneida believed that the notices of contest had indicated its intention to challenge the citations and that a further response to the penalty documents was unnecessary.

On September 18, 1992 (more than one year after the letters demanding payment), the Secretary filed a motion to dismiss the notices of contest cases on the ground that Oneida failed to timely request a hearing after the notices of assessment of civil penalties were served. On October 2, 1992, Oneida filed an opposition to the motion to dismiss.

Issue

The question presented by the motion is whether Oneida's failure to contest proposed penalty assessments within 30 days of their receipt mandates dismissal of previously timely filed notices of contest.

Section 105 of the Mine Act

Section 105(a) of the Mine Act provides that if an operator fails to notify the Secretary within 30 days from the receipt of the Secretary's notification of the civil penalty proposed to be assessed that the operator intends "to contest the citation or the proposed assessment of penalty, ... the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency."

Section 105(d) provides that if an operator notifies the Secretary within 30 days of receipt 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" that he intends to contest it, the Secretary shall immediately advise the Commission of the notification, and the Commission shall afford an opportunity for a hearing. Thus the Mine Act, unlike the 1969 Coal Act, provides two avenues by which a mine operator may challenge a citation.

Commission Decisions

In an early decision under the Mine Act, Energy Fuels Corporation, 1 FMSHRC 299 (1979), the Commission, after reviewing the legislative history of the Act, found that section 105(d) permitted an operator to contest an abated citation immediately upon its issuance prior to the assessment of a penalty for the violation charged. The Commission stated that absent an urgent need for an immediate hearing, the contest proceeding would be continued and subsequently consolidated with the penalty case, after "the penalty is proposed, contested, and ripe for hearing." In Old Ben Coal Company, 7 FMSHRC 205 (1985), the Commission affirmed the dismissal of a contest proceeding after the mine operator paid the proposed penalty. The Commission held that an operator cannot deny the existence of a violation and at the same time pay a civil penalty because "paid penalties that have become final orders reflect violations of the Act and the assertion of violations contained in the citation is regarded as true." Id. at 209. In a concurring opinion, Commissioner Nelson stated that "while I agree that an operator cannot pay the penalty proposed ... and thereafter maintain before the Commission its challenge to the underlying citation, I do not share the view that absent such a payment, an operator must file a notice of contest of the Secretary's subsequently proposed civil penalty in order to continue to press its earlier filed challenge to the underlying citation" Id. at 211. The Commission considered the relationship between the two subsections at some length in Quinland Coals, Inc., 9 FMSHRC 1614 (1987) and observed at pages 1620-21:

> The contest provisions of section 105 are an interrelated whole. We have consistently construed section 105 to encourage substantive review rather than to foreclose it.
>
> The interrelationship between a contest proceeding and a civil penalty proceeding has, in the past, been a source of confusion and dispute over the issues that may be raised properly in each proceeding and over

their preclusive effect once raised. In resolving these arguments we have afforded a wide latitude for review and eschewed preclusion.

More recently, with respect to the payment of the penalty, the Commission stated in Westmoreland Coal Company, 11 FMSHRC 275, 276 (1989), that "where a civil penalty has been paid by genuine mistake, the operator's right to contest the violation may not be lost." In a compensation proceeding, Local 2333 v. Ranger Fuel, 10 FMSHRC 612, 618 (1988), the Commission held that "once a civil penalty is paid or becomes a final order by operation of section 105(a), the assertion of violation contained in the citation cannot be contested in a subsequent proceeding under the Mine Act." (emphasis added). In Rivco Dredging Corporation, 10 FMSHRC 624 (1988), the Commission vacated an order of dismissal of contest proceedings because the operator apparently acting in good faith, misunderstood the need to object to the proposed penalty assessment in addition to its prior contest of the citations and orders. The Commission order stated that "in cases like this, innocent procedural missteps alone should not operate to deny a party the opportunity to present its objections to citations or orders." See also Blue Diamond Coal Company v. Secretary, 11 FMSHRC 2629 (1989) (ALJ) (allowed late filing of notice of contest of citation). In Beaver Creek Coal Company v. Secretary, 11 FMSHRC 1213 (1989) (ALJ), Commission Judge Cetti, during the course of a hearing on the merits of contest proceedings, approved a settlement between the parties which in part granted the operator's motion to vacate the final order to pay resulting from its failure to contest the penalty assessments.

Rule 60(b)

The Commission's Procedural Rules provide that the Commission and its judges "shall be guided so far as practicable by any pertinent provisions of the Federal Rules of Civil Procedure ..." 29 C.F.R. 2700.1. Oneida argues that the principles and policies underlying Rule 60(b)(1) of the Federal Rules of Civil Procedure, which authorizes a court on motion to relieve a party from a final judgment or order because of mistake, inadvertence, surprise, or excusable neglect, require denial of the Secretary's motion. However, Rule 60(b) requires that such a motion be filed within a reasonable time, and if based on mistake, inadvertence, surprise, or excusable neglect, "not more than one year after the judgment, order or proceeding was entered or taken." In this case, if the proposed assessment became a final order of the Commission, it did so on July 17, 1991. Oneida's response to the Secretary's motion, which it asks be deemed a motion for relief from the Secretary's demand orders, was not filed until October 1, 1992. I note that the Secretary waited for more than one year to file her motion to dismiss.

However, I cannot consider the November 5, 1991 letter from Oneida's counsel to MSHA as a motion for relief from a final order. I conclude that relief under Rule 60(b) is not available to Oneida.

Mistake, Procedural Missteps

It is clear that Oneida in the person of Edward Bauer, its Director of Safety and Training, believed that the notices of contest filed on April 29, 1991, with the Commission were sufficient to indicate that it contested the citations and the subsequent penalty assessments. There is nothing in the record to indicate that its belief was other than a good faith mistake. Unlike Rivco, Oneida was represented by counsel. Unlike Beaver Creek, Oneida's counsel is experienced in mine safety matters and has handled many cases before the Commission. On the other hand, the notices of the proposed assessments were not sent to Oneida's counsel although he had filed the contest cases many months before and the Secretary was aware of his representation. I conclude that Oneida's failure to file notices contesting the penalty assessments resulted from a good faith misunderstanding of "the need to object separately to the two different aspects of the same dispute." Rivco, supra. The dual requirements of sections 105(a) and 105(d), and their relationship are misunderstood by many mine operators and attorneys. I was one of the drafters of the Commission's Interim Procedural Rules in 1978, and they were less than crystal clear to me. A misunderstanding such as happened here is not an uncommon occurrence and is not surprising.

Prejudice

In the case of any failure to comply with time limitations, the question whether it resulted in prejudice to the other party is a very important consideration. The Secretary has not contended that she was prejudiced by Oneida's failure to file timely contests of the penalty assessments, and prejudice is not apparent from the record before me. Therefore, I conclude that she was not prejudiced.

Substance v. Formalism

Realistically, there is no doubt that Oneida intended to contest the citations and the violations alleged in the citations. It clearly indicated that intention to the Secretary by filing the notices of contest. Requiring Oneida to again notify the Secretary that it objected to the proposed penalty assessments (a "different aspect of the same dispute" as the

Rivco order terms it) is to elevate formalism (Footnote 1) over substance. Oneida's failure to return the forms contesting the penalty proposals was a mistake. The mistake has not misled the Secretary or the Commission. It should not operate to severely penalize Oneida and deny it the opportunity to present its objections to the proposed penalties in proceedings before the Commission. I hold that under the circumstances present here, where the operator filed timely notices of contest of the citations, but mistakenly failed to contest the proposed penalty assessments, the citations and proposed penalties did not become final orders of the Commission.

ORDER

Accordingly, the motion to dismiss the above captioned contest cases is DENIED.

James A. Broderick
Administrative Law Judge

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1 Formalism is defined in the Concise Oxford Dictionary (8th ed. 1990) as "excessive adherence to prescribed forms ..." It is defined in the American Heritage Dictionary of the English Language (3rd ed. 1992) as "[r]igorous or excessive adherence to recognized forms ..."