

CCASE:
DIABLO COAL V. SOL (MSHA)
DDATE:
19930809
TTEXT:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DIABLO COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 93-307-R
v.	:	Citation No. 4001352; 4/9/93
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 93-308-R
MINE SAFETY AND HEALTH	:	Order No. 4001353; 4/9/93
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEVA 93-309-R
	:	Order No. 4001354; 4/9/93
	:	
	:	Docket No. WEVA 93-310-R
	:	Order No. 4001355; 4/9/93
	:	
	:	Docket No. WEVA 93-311-R
	:	Citation No. 4001356; 4/9/93
	:	
	:	Mine No. 2

DISMISSAL OF PROCEEDINGS

Before: Judge Barbour

On July 23, 1993, the Secretary served upon the Respondent and the Commission a motion to dismiss asserting the subject Notice of Contest was not timely filed. The motion states the contested citations and orders were issued to the operator on April 9, 1993, and that the Notice of Contest was served upon the Secretary and the Commission on May 12, 1993.

As the Secretary notes, Commission Procedural Rule 20(1) requires the operator to file a contest of a citation or order issued under section 104 "within thirty (3) days of receipt by the operator of the contested citation, order, or modification." 30 C.F.R. 2700.20(b). Commission Procedural Rule 5(d) states: "When filing is by mail, filing is complete upon mailing . . ." 29 C.F.R. 2700.5(d). Thus, in this instance, the operator filed its contest thirty-three (33) days after the contested orders and citations were received by the operator.

The Secretary argues that late filing of the contest has deprived the Commission of jurisdiction and that these matters must therefore be dismissed. The Secretary quotes Chief Administrative Law Judge Merlin's statement that "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 brought within the statutory prescribed 30 days or be dismissed." Prestige Coal Co., 13 FMSHRC 93, 94-95, citing to

Freeman Coal Mining Corporation, 1 MSHRC 1001 (1970);

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Consolidation Coal Co., 1 MSHRC 1029 (1972); Island Creek Coal Co. v. Mine Workers, 1 MSHRC 1029 (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) Peabody Coal Co., 11 FMSHRC 2068 (October 1989); Big Horn Calcium Company, 12 FMSHRC, 2068 (October 1989); Big Horn Calcium Company, 12 FMSHRC 463 (March 1990); Energy Fuels Mining Company, 12 FMSHRC 1484 (July 1990).

The Secretary correctly has stated the law. Even though Diablo Coal Company was but three (3) days out-of-time in filing its Notice of Contest, it's late filing has deprived me of jurisdiction and I must grant the Secretary's motion.(Footnote 1)

Although, the Secretary's motion is granted, the issues Diablo Coal Company seeks to raise may be litigated in the civil penalty proceedings when the Secretary proposed civil penalty assessments for the violations alleged.

ACCORDINGLY, it is ORDERED that these cases be, and are hereby DISMISSED and the hearing previously scheduled in these matters is CANCELED.

David F. Barbour
Administrative Law Judge
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The Secretary further supports his motion by arguing the operator's use of first class mail rather than registered or certified mail, return receipt requested to file its Notice of Contest likewise deprives me of jurisdiction. Citing to 29 C.F.R. 2700.7(c). I need not and do not base the dismissal of these matters upon this part of the Secretary's argument.