

CCASE:
CONSOLIDATION COAL V. (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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CONSOLIDATION COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 94-157-R
	:	Citation 3305270; 12/28/93
	:	
SECRETARY OF LABOR, Mine	:	Humphrey No. 7 46-01453
Safety and Health	:	
Administration, (MSHA),	:	Docket No. WEVA 94-158-R
Respondent	:	Citation 3305893; 12/29/93
	:	
	:	Docket No. WEVA 94-159-R
	:	Order No. 3305392; 12/30/93
	:	
	:	Loveridge No. 22 46-01433

ORDER DENYING CONTESTANT'S MOTION FOR EXPEDITED HEARING
ORDER DENYING RESPONDENT'S MOTION FOR CONTINUANCE
NOTICE OF CONSOLIDATED HEARING

These contest proceedings concern two 104(d)(1) citations and a 104(d)(1) order issued at the above captioned mine facilities on December 28 through December 30, 1993. The contestant's January 18, 1994, Notice of Contest regarding the two citations and one order in issue was accompanied by a Motion for Expedited Hearing. Not to be outdone, the Secretary countered on January 27, 1994, by opposing the contestant's request for expedited proceedings and by moving to delay these proceedings by seeking to have these matters continued pending consolidation with the forthcoming civil penalty proceedings. Both parties have filed responsive pleadings opposing each other's motions.

The contestant's motion for expedited proceedings is based on its assertion that the issuance of the instant citations and order have placed it in a "d" chain, which may subject its mines to subsequent withdrawal orders and increased civil penalties. The Secretary, citing the fact that several thousand "d" citations and orders are issued every year, opposes the contestant's request noting there are neither extraordinary nor unique circumstances that warrant the requested relief. In this regard, the Secretary properly emphasizes that there are no closure orders at issue as the alleged violations were apparently promptly abated.

While Commission Rule 52, 29 C.F.R. 2700.52, sets forth the procedures for requesting an expedited hearing, it is silent with regard to the prerequisites for granting such a request. However, this rule contemplates circumstances exigent enough to permit the scheduling of a hearing on as little as five days notice. (Commission Rule 52(b)). Consequently, my colleagues, in denying similar requests for expedited hearings, have consistently held that for the contestant to prevail, it must bear the burden of showing extraordinary or unique circumstances resulting in continuing harm or hardship. See Energy West Mine Company, 15 FMSHRC 2223 (Judge Hodgdon, October 1993); Pittsburg & Midway Coal Mining Company, 14 FMSHRC 2136 (Judge Fauver, December 1992); and Medicine Bow Coal Company, 12 FMSHRC 904 (Judge Morris, April 1990). For example, the Commission has stated that a closure order that remains in effect, a circumstance which is absent in the current cases, may provide a basis for an expedited proceeding. Wyoming Fuel Company, 14 FMSHRC 1282, 1287 (August 1992).

As a threshold matter, I note the contestant's claimed need for expedited resolution is speculative in that subsequent "d" orders are a condition precedent to any asserted hardship. Moreover, the Commission has recognized that the threat of a 104(d) chain "...provides a powerful incentive for the operator to exercise special vigilance in health and safety matters..." Nacco Mining Co., 9 FMSHRC 1541, 1546 (September 1987). While I am cognizant the alleged violations and related unwarrantable failure conduct are yet to be proven by the Secretary, the contestant's protestations that it must now exercise "special vigilance" is, on balance, unconvincing.

With respect to the issue of unique circumstances, the Commission stated there were 3,572 unwarrantable failure citations issued in 1986. Emery Mining Corp., 9 FMSHRC 1997, 2002 (December 1987). I concur with the Secretary that there is no reason to believe the rate of alleged unwarrantable failure violations has materially changed. While I am certain the contestant finds little comfort in the fact that thousands of "d" orders are issued every year, it is nonetheless not alone in its alleged predicament. Consequently, there are no special circumstances justifying an expedited hearing. Accordingly, the contestant's motion will be denied.

Although I have concluded that the expedited hearing process provided in Commission Rule 52 is inappropriate, there is a statutory basis for providing a hearing forum in these cases on an expeditious basis. The contestant has availed itself of this statutory solution by invoking the contest provisions of Section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. 815(d), wherein an operator may elect to contest a citation without waiting for a civil penalty to be proposed.

The Secretary, relying on Energy Fuels Corp., 1 FMSHRC 299 (May 1979) seeks to thwart the contestant's desire for a speedy hearing by filing a Motion for Continuance. The Secretary notes that, in Energy, the Commission opined there was no reason why a contestant that "lacked an urgent need" for a hearing could not wait for the docketing of a civil penalty proceeding so the contest and civil penalty proceeding could be consolidated. Id. at 308. (Emphasis added.) However, the Secretary's reliance on Energy is misplaced. In Energy, the Commission, after discussing the "d" chain withdrawal order process, stated:

Inasmuch as a citation and related withdrawal orders may be issued before the Secretary has proposed a penalty, the operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable (emphasis added). Id. at 308.

In Energy, the Commission concluded that "...the purposes of the Act and the interests of the parties are best served by permitting an operator [facing a "d" chain] to contest the citation immediately upon its issuance." Id. at 309. Consistent with Energy, the Secretary's Motion for Continuance shall be denied.

Having determined that the relief sought by both parties is inappropriate, I will proceed with routinely setting these cases for hearing. Accordingly, these proceedings are scheduled for hearing on the merits on March 30, 1994, in Morgantown, West Virginia, at a site to be designated by subsequent order. The issues will be whether the contestant has committed the violations as alleged, and, if so, whether the violations occurred as a result of the contestant's unwarrantable failure.

The parties shall send to each other and to me no later than March 16, 1994, synopses of their anticipated legal arguments, lists of exhibits and any stipulations which may be jointly introduced at trial.

ORDER

The contestant's Motion for Expedited Hearing IS DENIED. The Secretary's Motion for Continuance IS DENIED. As noted above, these cases ARE SCHEDULED for consolidated hearing on March 30, 1994.

Jerold Feldman
Administrative Law Judge
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