

CCASE:
C AND S COAL V. SOL (MSHA)
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March 28, 1994

C AND S COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. VA 94-20-R
v.	:	Citation No. 3773701; 6/8/93
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Docket No. VA 94-21-R
ADMINISTRATION (MSHA),	:	Order No. 3773702; 6/8/93
Respondent	:	
	:	Docket No. VA 94-22-R
	:	Order No. 3773703; 6/8/93
	:	
	:	Docket No. VA 94-23-R
	:	Order No. 3773704; 6/8/93
	:	
	:	Docket No. VA 94-24-R
	:	Order No. 3773705; 6/8/93
	:	
	:	Mine No. 3
	:	
	:	Mine ID 44-03465

ORDER OF DISMISSAL

Before: Judge Merlin

On December 14, 1993, the operator filed notices of contest in the above captioned actions. Each case contains one alleged citation dated June 8, 1993, and all of them were issued on the ground that the operator had submitted invalid respirable dust samples. On February 2, 1994, the Solicitor filed a motion to dismiss these cases as untimely. On February 15, 1994, the operator filed a response.

The Federal Mine Safety and Health Act affords an operator two ways to challenge a citation. First, the operator may file a notice of contest under Section 105(d), 30 U.S.C. 815(d), which provides in relevant part as follows:

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 * * * *.

The second way that an operator may challenge a citation is through the penalty assessment procedure. Under the Act the Secretary of Labor must propose a civil penalty for every violation and notify the operator. Section 105(a), 30 U.S.C. 815(a), provides in this respect as follows

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. A copy of such notification shall be sent by mail to the representative of miners in such mine. If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, 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. Refusal by the operator or his agent to accept certified mail containing a citation and proposed assessment of penalty under this subsection shall constitute receipt thereof within the meaning of this subsection.

In his motion the Solicitor seeks dismissal on the ground that the contests filed on December 14 for review of the citations dated June 8 were untimely under 30 U.S.C. 815(d), 29 C.F.R. 2700.20.

In its response the operator mixes up the two avenues of relief available to operators. It cites 29 C.F.R. 2700.20 as indicating that an operator can challenge a proposed penalty assessment within 30 days of notification and the Secretary must thereafter answer. However, the cited section has nothing to do with penalty assessments. It is 29 C.F.R. 2700.25 which provides that an operator has 30 days to notify the Secretary it wishes to contest a proposed penalty and that the Secretary will then notify the Commission. Under 29 C.F.R. 2700.27 the Secretary must file with the Commission a petition for the assessment of civil penalties and under 29 C.F.R. 2700.29 the

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operator thereafter must file an answer. Clearly, therefore, the operator has confused the filing of a notice of contest to a citation with the challenge to a penalty proposal which as set forth herein, has its own distinct procedures.

A long line of decisions going back to the Interior Board of Mine Operation Appeals holds that cases contesting the issuance of a citation must be brought within the statutory prescribed 30 days or be dismissed. Freeman Coal Mining Corporation, 1 MSHC 1001 (1970); Consolidation Coal Co., 1 MSHC 1029 (1972); Island Creek Coal Co. v. Mine Workers, 1 MSHC 1029 (1979), aff'd by the Commission, 1 FMSHRC 989 (August 1979); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982); Peabody Coal Company, 11 FMSHRC 2068 (October 1989); Big Horn Calcium Company, 12 FMSHRC 463 (March 1990); Energy Fuels Mining Company, 12 FMSHRC 1484 (July 1990); Prestige Coal Company, 13 FMSHRC 93 (January 1991); Costain Coal Inc., 14 FMSHRC 1388 (August 1992); Cf. Rivco Dredging Corp, 10 FMSHRC 889 (July 1988); Northern Aggregates Inc., 2 FMSHRC 1062 (May 1980); Wallace Brothers, 14 FMSHRC 596 (April 1992). The notices of contest in these cases filed 189 days after the issuance of the citations, were therefore, 159 days late and must be dismissed as untimely.

However, it is noted that under the regulations the operator in the penalty assessment case may challenge not only the penalty assessment, but also the fact of the violation or any special findings contained in the citation. 29 C.F.R. 2700.21. The operator has properly filed a contest to the proposed assessments which it received on December 6, 1993, and contested within 30 days on December 14, 1993. This penalty case has been docketed with the Commission and assigned Docket No. VA 94-27. The Solicitor filed a penalty petition on February 4, 1994, and the operator apparently answered on March 7, 1994, but improperly used the docket numbers of these cases instead of the docket number for the penalty proceeding.

In light of the foregoing, it is ORDERED that these cases be, and are hereby, DISMISSED.

Paul Merlin
Chief Administrative Law Judge

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