

CCASE:
ASARCO, INC. V. SOL (MSHA)
DDATE:
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

ASARCO, INCORPORATED,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 94-443-R
	:	Citation No. 3904841; 3/30/94
v.	:	
SECRETARY OF LABOR,	:	Leadville Unit
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Mine ID 05-00516
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On May 27, 1994, the operator filed a notice of contest of Citation No. 3904841 which was issued on March 30, 1994, in the above-captioned action. On May 31, 1994, the Solicitor filed a motion to dismiss this case. On June 7, 1994, the operator filed its response to the Solicitor's motion.

The Federal Mine Safety and Health Act affords an operator the opportunity to challenge a citation 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 * * * *.

In her motion the Solicitor seeks dismissal on the ground that the notice of contest was untimely.

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

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Inc., 14 FMSHRC 1388 (August 1992); C and S Coal Company, 16 FMSHRC 633 (March 1994); Cf. Rivco Dredging Corp, 10 FMSHRC 889 (July 1988); Northern Aggregates Inc., 2 FMSHRC 1062 (May 1980); Wallace Brothers, 14 FMSHRC 596 (April 1992).

As quoted above, Section 105(d) requires that the operator notify the Secretary of its intent to contest the citation within 30 days of issuance. Notice is completed upon mailing. J.P. Burroughs, 3 FMSHRC 854 (1981). The citation was issued on March 30, 1994, and the operator was required to notify the Secretary on or before April 29, 1994. The operator mailed its contest on May 23 which was therefore, 24 days late.

The operator argues that its contest was timely filed because the inspector on April 14, 1994, and again on May 17, 1994, issued subsequent actions extending the citation. The May 17 action extended the citation until May 31 and it is this date the operator relies upon. Thus the operator characterizes the inspector's action as an extension of time to respond and contends that because of it the instant suit did not have to be filed until May 31. The operator's position is without merit. An MSHA inspector has no authority to extend the filing deadlines mandated by Congress in the Act. And it is clear that the inspector did not purport to do any such thing. In giving the reason for his action he referred to the further investigation and inspection by MSHA to determine methods of abatement or application of a petition for modification. There is no indication that in allowing the operator time to discuss the cited condition with its legal department, the inspector even thought that he was extending the time for the operator to file its notice of contest. What the inspector did was extend the time for abatement and termination of the citation. That was all he did and all he could do.

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

Paul Merlin
Chief Administrative Law Judge

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