

CCASE:
ICI V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

ICI EXPLOSIVES USA, INCORPORATED,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 94-283-R
v.	:	Order No. 4195443; 5/3/94
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Pax Surface Mine
ADMINISTRATION (MSHA),	:	Mine ID 46-06877-NTD
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

This case is an application for review of a withdrawal order issued by an inspector of the Mine Safety and Health Administration under section 107(a) of the Federal Safety and Health Act of 1977, 30 U.S.C. . Section 107(e)(1) of the Act, 30 U.S.C. , authorizes the institution of suits for review of such orders and sets forth the conditions under which they may be brought as follows:

Any operator notified of an order under this section or any representative of miners notified of the issuance, modification, or termination of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order.

Accordingly, an application for review of a 107(a) withdrawal order must be filed within 30 days of the date the operator was notified of the order. The order in this case was issued on May 3, 1994, and the application for review was filed on June 3, 1994. It was, therefore, one day late. On this basis the Secretary moves to dismiss.

In its response to the Secretary's motion, the operator argues that under Commission Rule 22(a), 29 C.F.R. 2700.22(a) it had 30 days from the date of the termination of the order to file its application. Rule 22(a) provides that a notice or contest of a 107 order, or any modification thereof, may be brought by a contesting party within 30 days of the order, or modification or termination. However, the rule cannot, and there is no indication that it was intended to, expand the rights afforded by the Act itself. 58 F.R. (May 3, 1993). As set forth above, section 107(e), gives operators only the right to contest an order, while a representative of miners may contest the issuance, modification or termination of an order. The

~1795

legislative history repeats this distinction. S.Rep. No. 181, 95th Cong., 2nd Sess.), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at p. 626.

A long line of decisions going back to the Interior Board of Mine Operations Appeals has held that actions instituted under section 105(d) of the Act, 30 U.S.C. , contesting the issuance of a citation must be brought within the statutorily prescribed period of 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). In Prestige Coal Company, 13 FMSHRC 93, at 94 (January 1991), I adhered to these precedents in dismissing a late filed notice of contest under section 105(d) stating in pertinent part as follows: "*** The time limitation for contesting issuance of citations must therefore, be viewed as jurisdictional. *** Finally, the subsequent modifications the citations cannot affect the operator's duty to file within the prescribed time." See also C and S Coal Company, 16 FMSHRC 633 (March 1994); Asarco, Inc., 16 FMSHRC 1328 (June 1994).

Upon review of the Act and legislative history I find no reason to treat an application under section 107(e) for review an imminent danger withdrawal order differently from notices of contest filed under section 105(d) with respect to citations and other types of withdrawal orders. The statutory provisions provide parallel avenues of relief. In both instances operators have the opportunity subsequently to challenge the penalty aspects of the matters involved.

I recognize that this action was filed one day late. However, consideration of this fact in the matter at hand would open all operator applications and contests to an evaluation of degrees of timeliness and particular circumstances. Since I believe that actions under 105(d) and 107(e) should be viewed in pari materia, acceptance of such an approach would constitute a departure from settled precedent which I am unwilling to undertake.

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

Paul Merlin
Chief Administrative Law Judge

~1796

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