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PEABODY COAL V. SOL (MSHA)
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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PEABODY COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. KENT 94-308-R
	:	Citation No. 3860043; 12/08/93
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Camp No. 1 Mine I.D. No. 15-02709

DECISION

Before: Judge Melick

This case is before me upon the motion for summary decision filed by Peabody Coal Company (Peabody) pursuant to Commission Rule 67, 29 C.F.R. 2700.67. Peabody seeks to vacate the Secretary's attempted modification of Citation No. 3860043 on the grounds that there is no genuine issue of material fact as to a controlling legal question and that Peabody is entitled, as a matter of law, to a summary decision vacating the attempted modification. The underlying question presented is whether the Secretary can modify a citation after the citation has been terminated and the civil penalty thereon has been assessed and paid by the mine operator.

The undisputed facts are as follows. Citation No. 3860043 was issued at Peabody's Camp No. 1 Mine on July 14, 1993, for its alleged failure to comply with the mine's approved roof control plan. The citation was issued under Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, the "Act," 30 U.S.C. 801 et seq. On September 8, 1993, following a health and safety conference, the citation was modified from "high" to "moderate" negligence and by changing its format from a citation issued under Section 104(d)(1) of the Act to one

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FOOTNOTE 1

Commission Rule 67(b) provides as follows:

"Grounds. A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions and affidavits, shows:

(1) That there is no genuine issue as to any material facts; and

(2) That the moving party is entitled to summary decision as a matter of law."

issued under Section 104(a) of the Act. The modified citation was thereafter assessed a civil penalty of $1,155.00 and, on November 10, 1993, Peabody paid that penalty by check. The check was cashed on November 15, 1993.

Thereafter, on December 8, 1993, the Secretary attempted to further modify the citation. This attempted modification did not change the description of the condition or practice alleged to constitute the violation but altered the charges from an alleged violation of the roof control plan to a violation of 30 C.F.R. 75.212(c) and changed the citation to a section 104(d)(1) citation with "high" negligence. The attempted modification stated that "[e]vidence developed during a Section 110 investigation, which was not known at the time of the Health and Safety Conference (September 8, 1993), established that the operator knew or should have known of the violative condition, and there are no mitigating circumstances."

Peabody served interrogatories on the Secretary requesting identification of the "[e]vidence developed during a Section 110 investigation" referred to in the December 8, 1993 modification of the citation. The Secretary responded, in pertinent part, as follows:

> On or about December 1, 1993, I [Conference Officer Arthur J. Parks] was notified that Citation No. 3860043 as modified to 104(a) was inconsistent with the 110(c) charges filed against the individuals involved in the citation. At that time, I reevaluated the case and determined that 30 C.F.R. 75.212(c) was the more appropriate section to cite for this situation and since it was regulation as opposed to plan requirements these individuals should have known the violation existed, and were acting in disregard to the law.

Upon these undisputed facts Peabody maintains it is entitled to summary decision. Peabody argues that a citation may not be modified after it has been terminated, assessed a civil penalty and the penalty thereupon paid. It maintains that such a citation has thereby become a final order of the Commission and cannot thereafter be modified except by leave of the Commission under Fed. R. Civ. P. 60(b). In support of its argument Peabody cites Jim Walter Resources, Inc., 15 FMSHRC 782 (1983). In that case the operator paid, without contest, the civil penalties assessed under the Secretary's 1990 "excessive history" program policy letter and sought to reopen those cases and obtain a partial refund after the Commission validated the program policy letter in Drummond Company, Inc., 14 FMSHRC 661 (1992). In Jim Walters, the Commission held that an uncontested assessment became a final

order of the Commission which the Commission could reopen in accordance with Fed. R. Civ. P. 60(b). 14 FMSHRC at 786-789. Jim Walters dealt however with a challenge to the civil penalty itself and not to the underlying citation.

The Commission has also held that payment of a civil penalty ordinarily moots any pending pre-penalty contest proceeding. In Old Ben Coal Co., 7 FMSHRC 205 (1985), the Commission stated:

> ... an operator cannot deny the existence of a violation for purposes connected with the Mine Act and at the same time pay a civil penalty. For purposes of the Act, paid penalties that have become final orders reflect violations of the Act and the assertion of violation contained in the citation is regarded as true. See generally Amax Lead Co. of Missouri, 4 FMSHRC 975, 977-80 (June 1982).
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> Therefore, in view of the language of sections 105(a) and 105(d), and Congress' intent to tie penalties to the particular facts surrounding a violation, we hold that the fact of violation cannot continue to be contested once the penalty proposed for the violation has been paid.

See also Local U. 2333, UMWA v. Ranger Fuel Corp., 19 FMSHRC 612 (1988); and Westmoreland Coal Co., 11 FMSHRC 275 (1989). Within this framework, I conclude that once Citation No. 3860043 was paid, it became a final order of the Commission. It would therefore be necessary for the Secretary to apply to the Commission by motion under Fed. R. Civ. P. 60(b)in order to reopen the citation and modify it. Rule 60(b) authorizes relief from final judgments and orders under certain circumstances, including mistake, inadvertence, surprise, excusable neglect and fraud.

The Secretary argues, however, citing Wyoming Fuel Co., 14 FMSHRC 1282 (1992) and Ten-A Coal Co., 14 FMSHRC 1296 (1992), that a citation may be modified after it has been terminated, assessed and even paid. In the above cases, the Commission held that a citation may be modified by the Secretary after it has been terminated (but not in those cases yet paid) if the operator suffers no legal prejudice thereby. The Commission further noted that "the modifications, alleging, based on the same facts, that a different standard has been violated, are essentially proposed 'amendments' to the initial complaints, i.e., citations." The Commission analogized the modification of a citation to an amendment of pleadings under Fed. R. Civ. P. 15(a).

As Peabody observes, however, neither Wyoming Fuel nor Ten-A Coal dealt with an attempted modification, as in the case herein, of an uncontested and paid citation. I agree that the above cited cases are inapposite because of the distinguishing finality in this case attached to the payment of and acceptance by the Secretary of the penalty for the citation. Clearly, Fed. R. Civ. P. 15(a) providing for amendment of pleadings is no longer applicable once there is a final disposition of the citation. Even should amendment of pleadings be permitted after final disposition of the citation, Peabody would be prejudiced by such an amendment in this case since the time for contesting the underlying violation has long since expired.

The Secretary argues, alternatively but only hypothetically, that if the citation were to be considered a final order of the Commission, Fed. R. Civ. P. 60(b) would allow it to be reopened for modification. The Secretary however has not in fact filed a motion under that rule, nor has he asserted any specific grounds for obtaining relief under that rule. Whether the citation could be reopened for modification under Rule 60(b) is therefore conjecture and is not therefore before me.

Under the circumstances, Peabody's Motion for Summary Decision and the Contest herein is GRANTED. The modification of Citation No. 3860043 on December 8, 1993, is VACATED.

Gary Melick
Administrative Law Judge

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