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SOUTHWESTERN CEMENT V. SOL (MSHA)
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SOUTHWESTERN PORTLAND : CONTEST PROCEEDING
CEMENT COMPANY, :
Contestant : Docket No. CENT 94-239-RM
 : Citation No. 4117681; 7/27/94
v. :
 :
SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION, (MSHA), : Odessa Plant
Respondent : Mine ID 41-00060

ORDER DENYING MOTION TO STAY
ORDER DENYING MOTION TO EXPEDITE
ORDER OF ASSIGNMENT

The above-captioned action is a notice of contest filed by the operator under section 105(d) of the Federal Mine Safety and Health Act, 30 U.S.C. 815(d), challenging the issuance of a 104(d)(1) unwarrantable failure citation.

On September 16, 1994, the Solicitor filed his answer and a motion for continuance until the related penalty proceeding is filed.

On September 19, 1994, the operator filed an opposition to the motion for continuance and a motion for expedited hearing pursuant to 29 C.F.R. 2700.52(a). The operator asserts that because of the unwarrantable failure finding it is exposed to elevated enforcement actions under section 104(d) of the Act, it will be subject to a possible special investigation under section 110(c) of the Act, and the violation will receive a special assessment which will result in elevated penalties.

Section 2700.52(a), supra, does not specify the basis upon which an expedited hearing may be sought and granted. The Commission has held that consideration of an expedited hearing request remains within the discretion of the judge. Wyoming Fuel, 14 FMSHRC 1282 (August 1992). Commission Judges have held that in order to be entitled to such consideration, an operator must show extraordinary or unique circumstances resulting in continuing harm or hardship. Consolidation Coal Company, 16 FMSHRC 495 (February 1994); Energy West Mining Company, 15 FMSHRC 2223 (October 1993); Pittsburgh and Midway, 14 FMSHRC 2136 (December 1992); Medicine Bow Coal Company, 12 FMSHRC 904 (April 1990). In the foregoing cases, it was held that the possibility operators could be subject to withdrawal orders under section 104(d) of the Act, 30 U.S.C. 815(d), did not justify expedited hearings. I concur with these holdings and note in addition that so many of the cases that are filed with the Commission involve 104(d) citations and orders, that it would be impossible to hold

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expedited hearings in all of them. The operator in the instant matter has offered the same arguments that were rejected in the cases noted above.

However, the operator's assertion that this matter should not be stayed is well taken. Because of the operator's potential exposure to a 104(d) chain, this case should not be stayed the several months it takes for a penalty to be assessed and a petition filed.

In light of the foregoing, it is ORDERED that the Solicitor's motion for continuance be DENIED.

It is further ORDERED that the operator's motion for expedited hearing be DENIED.

It is further ORDERED that this case be assigned to Administrative Law Judge Manning.

All future communications regarding this case should be addressed to Judge Richard W. Manning at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Colonnade Center
Room 280, 1244 Speer Boulevard
Denver, CO 80204

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Paul Merlin
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