

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500

WASHINGTON, D.C. 20001

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April 11, 2011

MAPLE COAL COMPANY, : CONTEST PROCEEDINGS
Contestant :
: Docket No. WEVA 2011-1318-R
: Citation No. 8123869;02/25/2011
:
: Docket No. WEVA 2011-1319-R
: Order No. 8123871;02/28/2011
v. :
: Docket No. WEVA 2011-1320-R
: Order No. 8123873;02/28/2011
:
SECRETARY OF LABOR, : Docket No. WEVA 2011-1321-R
MINE SAFETY AND HEALTH : Citation No. 8123876;03/01/2011
ADMINISTRATION, (MSHA), :
Respondent : Maple Eagle No. 1 Mine
: Mine ID 46-04236

MAPLE COAL COMPANY, : CONTEST PROCEEDINGS
Contestant :
: Docket No. WEVA 2011-1403-R
: Citation No. 8123841;02/01/2011
:
: Docket No. WEVA 2011-1404-R
: Citation No. 8123842;02/01/2011
v. :
: Docket No. WEVA 2011-1405-R
: Citation No. 8123844;02/01/2011
:
: Docket No. WEVA 2011-1406-R
: Citation No. 8123856;02/08/2011
:
SECRETARY OF LABOR, : Docket No. WEVA 2011-1407-R
MINE SAFETY AND HEALTH : Citation No. 8123859;02/14/2011
ADMINISTRATION, (MSHA), :
Respondent : Docket No. WEVA 2011-1408-R
: Citation No. 8123864;02/16/2011
:
: Docket No. WEVA 2011-1409-R
: Citation No. 8123866;02/16/2011
:
: Docket No. WEVA 2011-1410-R
: Order No. 8123846;02/01/2011

: Docket No. WEVA 2011-1411-R
: Order No. 8123853;02/08/2011
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: Docket No. WEVA 2011-1412-R
: Order No. 8123855;02/08/2011
:
: Maple Eagle No. 1 Mine
: Mine ID 46-04236

DER PERMITTING LATE FILING OF CONTESTS
AND ORDER OF
CONSOLIDATION

Before: Judge Barbour

On April 13, 2011 counsel for Maple Coal Company ("Maple") moved to late file contests of seven citations issued pursuant to section 104(a) of the Mine Act, 30 U.S.C. § 814(a), and three orders issued pursuant to section 104(d)(2) of the Act, 30 U.S.C. § 814(d)(2). Three of the citations and one of the orders were issued to Maple on February 1, 2011, one of the citations and two of the orders were issued to Maple on February 8, 2011, one of the citations was issued on February 14, 2011, and two of the citations were issued to Maple on February 16, 2011. Section 105(d) of the Act, 30 U.S.C. § 815(d), requires contests of such citations and orders to be filed within 30 days of their issuance.

As grounds for its motion, the Company points out that penalties have not yet been assessed for the violations alleged in the citations and orders. Mtn. 2. Maple also states that prior to the issuance of the subject citations and orders, the Company was advised on December 17, 2010 that its mine was subject to a Potential Pattern of Violations designation. In response, Maple adopted an improvement program designed to reduce the number of S&S violations at its mine. *Id.* It also monitored those citations and orders with S&S findings. As a result, on February 22, 2011 the company's representative, Senior Manager Ronald Wooten, by letter requested a conference with MSHA District 4 personnel to administratively present the company's defenses to the S&S findings contained in the 10 subject citations and orders. Wooten wanted to persuade MSHA to modify the findings. Mtn 2.

Between March 2, 2011 and March 18, 2011 Wooten met with MSHA CLR Dana Hosch to discuss the citations, orders and the S&S findings. Maple contends that Hosch told Wooten that the District Manager would make the final decision regarding any modifications, and that he, Hosch, would write a report to the District Manager presenting Maple's arguments. Mtn. 3. Maple asserts that because it believed its positions with regard to the citations and orders would be considered, it did not file contests of the subject enforcement actions. Mtn. 3.

Maple states that on March 20, 2011 the District Manager informed Wooten that he would need a few days to consider Maple's arguments. However, on April 8, 2011 the District Manager sent a letter to Maple advising the company that its rate of S&S violations for the first quarter of the year exceeded the target goal established by MSHA, and stated that the mine was currently being evaluated by MSHA for Pattern of Violations ("POV") status. Mtn. 3. Maple then sought expedited late review of the citations and orders because they form part of the basis for Maple's potential POV status designation. *Id.* 4. (Four additional citations for which the company had filed timely contests are included in its request for expedited review.)

As grounds for acceptance of its contests Maple asserts it relied to its detriment on MSHA's conferencing process. Motion 5. It also maintains that a balancing of the equities weigh in its favor. Because the facts of violation and the findings of the inspectors, including the S&S findings, will be subject to trial in any event when the forthcoming penalties are contested by the company, the only question is when the merits will be tried, not if they will be tried. *Id.* Further, if late filing is denied Maple will be prejudiced because its mine may be placed in a POV status subjecting it to "one of MSHA's most severe forms of enforcement." *Id.* Thus, if the contests are not allowed, until the penalty proceeding is completed the Company may find itself "erroneously and unjustly" subject to MSHA's POV enforcement, upon which it should not have been placed in the first place." Motion 6.

The Secretary opposes the motion. She notes that there is nothing mutually exclusive about its conference procedures and the right of an operator to contest citations and orders. She asserts Maple could and should have filed timely contests while at the same time pursued the agency's conferencing procedures. Op. Mtn. 2. Rather than file contests, Maple took its chance that a sufficient number of S&S findings would be modified or vacated as a result of its conferences with MSHA. Maple chose how to proceed and now should live with the consequences of its choice. *Id.* 4-5.

The Secretary also argues that the Company is overstating the potential consequences of a POV designation. It is, she suggests, no more onerous than the mine being under a section 104(d) order sequence. 30 U.S.C. §814(d). Op Mtn. 6.

RULING

I am not persuaded by the Company's detrimental reliance argument. I agree with MSHA that the most plausible read of the Company's motion is that it did in fact choose to conference the subject citations and orders and that the Maple only decided to bring the contests after it became clear the result of conferencing the citations and orders would be unsatisfactory to the Company

While its choice was unfortunate, I do not agree with the Secretary that it prevents acceptance of Maple's late filed contests. In my opinion, the equities favor the Company. While it is true the company can contest the S&S findings in a forthcoming civil penalty case, that case is months down the road, and the Company faces the possibility that in the meantime it mine will have

to operate under a POV designation, one that may be invalidated when the civil penalty proceeding is decided. The Secretary's assertion that a POV designation is no more burdensome than being placed on a "d" chain is not convincing. Under section 104(e) of the Act, 30 U.S.C. ' 814(e), a violation issued with an S&S finding requires closure of the affected area and the withdrawal of miners until the violation is abated. Unlike an order issued under section 104(d), an attendant high level of negligence is not required for the closure to take effect. S&S findings are commonly made by the Secretary's inspectors. Under a POV designation an operator faces a sanction that carries a highly disruptive potential. The sooner a mine's POV status is clarified the better.

For these reasons, the motion to permit late filing **IS GRANTED**. In addition, and in order to permit the most expeditious resolution of the POV issue, the motion to consolidate the 10 subject contest proceedings with the previously filed four contest proceedings also **IS GRANTED**. A hearing in these matters will be scheduled subsequently.

David F. Barbour
Administrative Law Judge

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