

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
**1730 K STREET, N.W., 6<sup>TH</sup> FLOOR**  
**WASHINGTON, D. C. 20006-3868**

**July 30, 1998**

BRAUNTEX MATERIALS,	:	CONTEST PROCEEDINGS
INCORPORATED,	:	
Contestant	:	Docket No. CENT 98-154-RM
	:	Citation No. 4444397; 9/5/97
	:	
v.	:	Docket No. CENT 98-155-RM
SECRETARY OF LABOR,	:	Citation No. 4444398; 11/14/97
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA)	:	Docket No. CENT 98-156-RM
Respondent	:	Citation No. 4109013; 11/14/97
	:	
	:	Brauntex Materials
	:	Mine ID 41-02743

**ORDER OF DISMISSAL**

**Before: Judge Merlin**

The issue presented for determination is whether these cases were timely filed.

The cases were received on June 9, 1998, by the Mine Safety and Health Administration and forwarded to this Commission where they were received on June 10, 1998.

Citation No. 4444397 (Docket No. CENT 98-154 RM) was issued on September 5, 1997, under section 104(a) of the Mine Act, 30 U.S.C. ' 814(a). It was modified on November 14, 1997, and November 26, 1997. An order of termination was issued on April 12, 1998.

Citation No. 4444398 (Docket No. CENT 98-155-RM) was issued on November 14, 1997, under section 104(d)(1), 30 U.S.C. ' 814(d)(1). It was modified on November 21, November 26, December 4 and December 18, 1997. An order of termination was issued on April 12, 1998.

Citation No. 4109013 (Docket No. CENT 98-156-RM) was also issued on November 14, 1997, under section 104(d)(1), supra. It was modified on November 21, November 26 and December 18, 1997. An order of termination was issued on April 12, 1998.

Section 105(d) of the Act, 30 U.S.C. ' 815(d), provides that within 30 days of the receipt thereof an operator may contest the issuance or modification of an order or citation.

The operator alleges that it received the termination orders on May 12, 1998, and argues that a termination is the same as a modification for purposes of deciding timeliness. Under the operator's approach, its filing on June 9, 1998, fell on the 28<sup>th</sup> day.

The termination orders dated April 12, 1998, contain the name of the individual upon whom service was made. I take judicial notice that service is customarily made on the day the citation or order is issued. Even if service had been by mail, it would not have taken 30 days, absent some unusual circumstance. The operator has submitted nothing to support its claim that it did not receive orders of the termination until May 12, 1998, and I, therefore reject it. On this basis, I find these cases were untimely filed.

Moreover, even if the receipt date for the termination orders is accepted as May 12, the operator cannot prevail. The operator attempts to treat terminations and modifications as though they are interchangeable and in this way have the 30 days begin to run upon receipt of the terminations. However, the Act makes clear that they are not the same. Section 105(d) which as already noted, gives operators the opportunity to contest citations/orders and modifications of them, also gives a miner and miner representative the opportunity to contest the issuance, modification or termination of an order. If modifications and terminations were the same, there would be no need to separately identify terminations. Clearly, the Act does not give operators the right to challenge terminations, whereas miners and their representatives are given that right. Commission regulations follow the distinction between modifications and terminations. 29 C.F.R. ' 2700.20.

Commission case law also makes clear that modifications and terminations are separate and distinct actions. In Nacco Mining Company, 11 FMSHRC 1231, (July 1989), the Commission expressly stated that a modification differs from a termination, explaining that termination occurs when the Secretary determines that the cited condition has been abated. 11 FMSHRC at 1236. The Commission further said that depending on the nature of a modification, the substantive effect of the underlying enforcement action may or may not be changed, but that the enforcement action remains in effect as modified. Id. Subsequently, in Wyoming Fuel Company, 14 FMSHRC 1282 (August 1992), the Commission reiterated that termination was merely an administrative action used to indicate to an operator that it had successfully abated the cited violation and was no longer subject to a potential withdrawal order for failure to abate under section 104(b), 30 U.S.C. ' 814(b). 14 FMSHRC at 1288.

In light of the foregoing, I conclude that the date of termination is not the date from which the 30 day contest begins to run.

It is well established that contests by operators of citations and orders must be brought within 30 days or be dismissed. Island Creek Coal Co. v. Mine Workers, 1 FMSHRC 989 (August 1979); Alexander Brothers, 1 MSHC 1760 (1979); Old Ben Coal Co., 1 MSHC 1330 (1975); Consolidation Coal Company, 1 MSHC 1029 (1972); M.A. Walker Co., Inc., 19 FMSHRC 897 (May 1997); Asarco, Incorporated, 16 FMSHRC 1328 (June 1994); C and S Coal Company, 16 FMSHRC 633 (March 1994); Diablo Coal Company, 15 FMSHRC 1605 (August 1993); Costain Coal Inc., 14 FMSHRC 1388 (August 1992); Prestige Coal Co., 13 FMSHRC 93 (January 1991); Big Horn Calcium, 12 FMSHRC 463 (March 1990); Rivco Dredging Corporation, 10 FMSHRC 889 (July 1988); Allentown Cement Company, Inc., 8 FMSHRC 1513 (October 1986); Industrial Resources, Inc., 7 FMSHRC 416 (March 1985); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982); See also, ICI Explosives USA, Inc., 16 FMSHRC 1794 (August 1994).

Accordingly, regardless of which termination date is used, these cases are untimely filed. On this ground also they must be dismissed.

In light of the foregoing, it is **ORDERED** that these cases are **DISMISSED**.

Paul Merlin  
Chief Administrative Law Judge

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