

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

February 6, 2007

CHESTNUT COAL,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2006-145-R
	:	Citation No. 7008707;03/02/2006
	:	
v.	:	Docket No. PENN 2006-146-R
	:	Order No. 7008708;03/02/2006
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. PENN 2006-147-R
ADMINISTRATION, (MSHA),	:	Order No. 7008709;03/02/2006
Respondent	:	
	:	Docket No. PENN 2006-148-R
	:	Citation No. 7008710;03/02/2006
	:	
	:	Docket No. PENN 2006-149-R
	:	Citation No. 7008711;03/02/2006
	:	
	:	No. 10 Slope
	:	Mine ID 36-07059

ORDER OF DISMISSAL WITHOUT PREJUDICE
FOLLOWING REMAND

These cases are before me on Notices of Contest filed pursuant to section 105(d) of the Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). By order dated January 19, 2007, the cases were dismissed without prejudice because the Secretary had issued proposed civil penalties for the alleged violations which the operator had contested pursuant to section 105(a) of the Act, and all issues related to the alleged violations and the amount of the proposed penalties would be resolved in the civil penalty proceeding. The Commission, on its own motion, directed review, summarily vacated the order, and remanded the cases for further proceedings. The Commission's expressed concern was the absence of an explanation of why the cases were dismissed, as opposed to being consolidated with the civil penalty proceeding, an option noted in *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). For the reasons set forth below, dismissal without prejudice is the preferable option for dealing with duplicative litigation in the circumstances of these cases.

Contest proceedings are initiated by the filing of a Notice of Contest pursuant to section 105(d) of the Mine Safety and Health Act of 1977 ("Act") and Commission Procedural Rule 20. 30 U.S.C. § 815(d); 29 C.F.R. § 2700.20. A Notice of Contest of a citation or order issued under

section 104 of the Act must be filed within 30 days of the issuance of the citation or order, and places into issue the fact of violation and any special findings contained in the citation or order. It does not, however, place into issue any proposed penalty assessment that may subsequently be issued by the Secretary. 29 C.F.R. § 2700.21(a). An operator may also contest, pursuant to section 105(a) of the Act, a proposed penalty assessment for a citation or order. A contest of the proposed penalty assessment prompts the filing of a civil penalty proceeding and places into issue not only the proposed penalty, but the fact of violation and any special findings contained in the citation or order. *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1620-23 (Sept. 1987); 29 C.F.R. § 2700.21(b).

An operator's contest of both the issuance of a citation or order and the subsequent proposed penalty assessment for the violation results in two separate proceedings before the Commission. The issues involved in the contest proceeding are entirely duplicative of issues involved in the penalty proceeding. There are two actions in the same forum, involving the same parties, and the same demand for relief. The contest proceeding no longer serves any useful purpose, practically or legally. As a general principle, duplicative litigation is to be avoided in the federal courts, as it undoubtedly is in other courts and adjudicative bodies.¹ See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Federal judges may, exercising their general power to administer their dockets, stay or dismiss a suit that is duplicative of another federal court suit. *Curtis v. Citibank, N.A.*, 226 F.3rd 133, 138-39 (2d Cir. 2000) ("plaintiffs have no right to maintain two actions on the same subject matter in the same court, against the same defendants at the same time"). Enjoining the parties from proceeding in one of the cases, or consolidating the cases are other options available to deal with duplicative litigation.²

Historically, Commission Administrative Law Judges have typically consolidated pending contest cases with subsequently filed penalty proceedings. The practice may have been an outgrowth of the Commission's suggestion in *Energy Fuels*. However, the Commission has recently experienced a substantial increase in the number of contest proceedings filed. See *Spartan Mining Co.*, 28 FMSHRC 892 (Order dated September 28, 2006) (ALJ). Penalty cases may involve as many as 20 citations or orders, all of which may be the subjects of pending

¹ Duplicative *in forma pauperis* proceedings may be dismissed as malicious and abusive pursuant to 28 U.S.C. § 1915(d). *Cato v. United States*, 70 F.3d 1103, 1105 n.2 (9th Cir. 1995).

² On procedural matters, Commission Administrative Law Judges are guided by the Federal Rules of Civil Procedure on questions not regulated by the Act, the Commission's procedural rules or the Administrative Procedure Act. 29 C.F.R. § 2700.1(b). Commission judges have authority comparable to federal district court judges to manage their dockets and deal with duplicative litigation. 30 U.S.C. § 823(d)(1), (e); 5 U.S.C. § 556; 29 C.F.R. § 2700.55.

contest cases.³ Because there is no way to predict how violations will be grouped for penalty assessment purposes, contest cases related to a penalty proceeding may have been assigned to several Commission ALJ's.

Consolidating such contest cases with the penalty action would not eliminate the duplicative litigation problem, and would necessitate the reassignment of numerous cases.⁴ There does not appear to be any reason to place this administrative burden on Commission staff. Moreover, the captions of consolidated actions that include listings of numerous contest proceedings with penalty proceedings produce cumbersome documents, in which titles and substance are not readily apparent due to pages of case listings.

Staying contest proceedings until final disposition of a related penalty case would avoid the need to reassign cases, but would preserve the pendency of duplicative litigation and create docket management problems. A mechanism would have to be developed to notify Judges to whom the various contest cases had been assigned of the disposition of the penalty case.

Dismissal of contest cases, without prejudice, upon filing of the penalty proceeding would eliminate duplicative litigation, avoid reassignment and tracking problems, and result in more concise and efficient case and document captioning.

While these contest cases and the related penalty proceedings are assigned to the undersigned Administrative Law Judge, the advantages of dismissing them without prejudice outweigh the options of staying them or consolidating them with the penalty proceeding.

Accordingly, these contest cases are hereby **DISMISSED WITHOUT PREJUDICE**.

Michael E. Zielinski
Administrative Law Judge
202 434-9981

³ These contest proceedings were originally among a group of 48 such cases. Civil penalties were assessed for virtually all of the alleged violations. The operator did not timely contest many of the proposed assessments, which became final orders of the Commission, prompting dismissal of the related contest proceedings.

⁴ While a split of authority has developed in the federal circuit courts, the better view is that expressed by the Supreme Court prior to adoption of the federal rules, i.e., consolidated cases retain their individual legal identity, they are not merged into a single cause. *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933).

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