

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268

March 20, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2001-162-M
Petitioner	:	A.C. No. 35-03297-05511
	:	
v.	:	
	:	J. Davidson & Sons
J. DAVIDSON & SONS CONSTRUCTION	:	
COMPANY, INC.,	:	
Respondent	:	

ORDER DENYING MOTION FOR A SHOW CAUSE ORDER

J. Davidson & Sons Construction Company, Inc., (“Davidson”) requested a hearing on the citation, orders, and the \$16,000 penalty proposed in this case, in accordance with the provisions of Section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (“Mine Act”) and 29 C.F.R. § 2700.25 *et seq.* Davidson moved for an order compelling the Secretary to produce evidence establishing good cause for its failure to timely answer Davidson’s notice of contest of citation and penalties. The Secretary opposes the motion. For the reasons set forth below, Davidson’s motion is denied.

On May 4, 2000, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued one citation and two orders to Davidson under section 104(d)(1) of the Mine Act. Under section 105(d) of the Mine Act, Davidson was afforded the right to contest the citation and orders (the “citations”) within 30 days of receipt thereof. Davidson did not notify the Secretary that it wished to contest the citations.

Davidson received the Secretary’s proposed assessment of penalties for the citations on November 27, 2000. Davidson returned the proposed assessment form on December 22, 2000, and stated on that form that it wished to contest all of the citations. On that same date, Davidson also submitted a document entitled “Notice of Contest of Citation and Penalties.” The Secretary received these documents on or about December 26, 2000. On February 12, 2001, the Secretary filed her petition for assessment of penalty with the Commission.

Davidson maintains that 29 C.F.R. § 2700.20(f) required the Secretary to file an answer responding to each allegation contained in Davidson’s notice of contest within 20 days of service. Thus, the Secretary was required to file her answer on or before January 15, 2001. Davidson believes that the Secretary’s failure to file an answer should result in the dismissal of this case and it asks that I issue an order to show cause under section 2700.66(a).

The Secretary opposes Davidson's motion. She states that because Davidson failed to contest the citations within 30 days after it received them, the provisions of 29 C.F.R. § 2700.20(f) do not apply. Consequently, the Secretary maintains that she was not required to file an answer to Davidson's notice of contest. She states that Davidson's rights are fully protected because, by contesting the Secretary's proposed penalties, Davidson can also dispute the validity of citations in this civil penalty case.

In reply to the Secretary's response, Davidson maintains that if the Secretary believed that Davidson did not timely contest the citations, she was required to file a motion to dismiss its notice of contest. Second, Davidson contends that the Secretary's position is contrary to the provisions of section 105(a) of the Mine Act. It believes that the 30-day period to contest a citation only begins to run after the operator's receipt, via certified mail, of notification from the Secretary of the proposed penalty assessment and the operator's right to contest either the citation or proposed penalty within 30 days. The critical date, under the statutory framework, is the date the operator receives certified mail notification of its right to contest the citation within 30 days. In order to be valid and enforceable, the phrase "within 30 days of receipt by the operator of the contested citation" in 29 C.F.R. § 2700.20(f) must be interpreted to mean "receipt via certified mail of notice of its right to contest the citation within 30 days." (Reply at 7). Finally, it argues that 29 C.F.R. § 2700.21, which allows an operator to challenge a citation in a penalty case, is limited in its application to cases in which only the penalty has been contested. Davidson argues that it directly contested the citations in this case and that the Secretary was obligated to file an answer to its notice of contest within 20 days.

The arguments of Davidson are rejected. Section 105(a) of the Mine Act concerns contests of citations and civil penalties after the Secretary has issued her proposed assessment of penalties. Under that section, the Secretary must notify the mine operator by certified mail of the civil penalty she proposes to be assessed under section 110(i) of the Mine Act. This notice must advise the mine operator that it has 30 days from receipt of the proposed penalty assessment to notify the Secretary that it wishes to contest the citation or proposed civil penalty. The Commission's procedural rules that implement this provision are 29 C.F.R. § 2700.25 and 2700.26. Although section 2700.26 does not explicitly state that by contesting the penalty an operator is also contesting the citation, the form that the Secretary sends by certified mail to notify a mine operator of its contest rights asks the operator to designate which "violations" it wishes "to contest and have a formal hearing on." It is this form, designated as "Exhibit A," that operators use to contest penalties and citations under section 2700.26.

After a mine operator files this contest, the Secretary files the petition for assessment of penalty under section 2700.28. The operator must file its answer within 30 days of service of this petition for penalty under section 2700.29. The answer must contain a short and plain statement responding to each allegation in the petition. Each petition alleges that the operator violated a mandatory safety or health standard as described in the citation and that the specified penalty proposed under section 110(i) should be assessed. The citation is attached to the petition along with information concerning the calculation of the proposed civil penalty. The operator must state in its answer whether it is contesting the citation, the penalty, or both.

Normally, the Secretary does not propose penalties until the citation has been terminated. As a result, the proposed penalty assessment is not sent by certified mail to the operator until the condition described in the citation has been abated. There are circumstances under which a mine operator may wish to contest a citation before a penalty has been proposed. The citation may cite a condition that exists at numerous locations throughout a mine where the operator believes that the condition does not violate the cited safety standard. Abating the condition throughout the mine may be very expensive or may require that the mine be shut down for a lengthy period of time. Under these circumstances, the operator may desire a hearing solely on the citation before abatement of the condition or before a penalty has been proposed. Often operators request an expedited hearing under such circumstances. *Getchell Gold Corp*, 21 FMSHRC 507 (May 1999) is an example of such a case.

Section 2700.20 of the Commission's procedural rules are applicable only in such pre-penalty contests of citations. Section 2700.20 does not apply to civil penalty cases, such as this case. Section 2700.20 implements section 105(d) of the Mine Act, not section 105(a) as alleged by Davidson. The notice of contest sent by Davidson on December 22 was not a notice of contest filed under section 2700.20 because it was not served within 30 days after receipt of the citations. Instead, it was a notice of contest filed under section 2700.26 because it was served within 30 days after receipt of the Secretary's proposed penalty assessment. Since Davidson also served "Exhibit A" on the Secretary, the Commission's docket office construed the notice of contest as Davidson's answer under 2700.29, even though it was received before the petition for penalty was filed under 2700.28.

Section 2700.21 of the Commission's procedural rules makes clear that an operator's failure to contest a citation under section 2700.20 does not preclude the operator from challenging the citation in a civil penalty case. In addition, section 2700.27 provides that an operator does not waive its right to contest a citation or penalty unless it fails to contest the Secretary's proposed penalty assessment. A citation becomes a final order of the Commission by operation of law only if the operator fails to contest the proposed penalty under 2700.26. The fact that Davidson did not contest the citation under section 2700.20 has no legal consequences. All of its rights are preserved in this case.

Based on the above, I conclude that the Secretary was not required to file an answer, under section 2700.20(f), to Davidson's notice of contest dated December 22, 2000. Consequently, Davidson's motion for a show cause order is **DENIED**.

Richard W. Manning
Administrative Law Judge

Distribution:

William W. Kates, Esq., Office of the Solicitor, U.S. Department of Labor, 1111 Third Avenue, Suite 945, Seattle, WA 98101-3212

George W. Goodman, Esq., Cummings, Goodman, Fish & Platt, P.O. Box 17, McMinnville, OR 97128

RWM