

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 25, 2001

MOUNTAIN CEMENT COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2001-376-RM
	:	Order No. 7919298; 3/26/2001
v.	:	
	:	Docket No. WEST 2001-378-RM
	:	Order No. 7919300; 3/27/2001
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Mountain Cement Company
ADMINISTRATION, (MSHA),	:	Mine Id. 48-00007
Respondent	:	

ORDER GRANTING MOTION FOR EXPEDITED HEARING

On March 26 and 27, 2001, MSHA Inspector John R. King issued at least 20 orders of withdrawal to Mountain Cement Company under section 104(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(d) (“Mine Act”). Mountain Cement received a section 104(d)(1) citation and order during a previous inspection.

Mountain Cement contested the section 104(d)(2) orders under 29 C.F.R. § 2700.20. The Secretary filed a motion to stay all of the proceedings until civil penalties are proposed. I granted the Secretary’s motion to stay with respect to all the cases except the two above-captioned cases. Mountain Cement filed a motion for an expedited hearing in the present cases. The Secretary opposes the motion.

A mine operator has the right under the Mine Act and the Commission’s Procedural Rules to contest citations and orders before a petition for assessment of penalty is filed. A mine operator also has the right to a pre-penalty hearing in contest cases such as these. Mountain Cement asked for an expedited hearing. The Procedural Rules do not specify the basis upon which a motion for expedited hearing shall be granted. 29 C.F.R. § 2700.52. Consideration of such a request is within the discretion of the judge. *Wyoming Fuel*, 14 FMSHRC 1282 (Aug. 1992). Commission judges have held that a mine operator must show “extraordinary or unique circumstances resulting in continuing harm or hardship.” *Southwestern Portland Cement Co.*, 16 FMSHRC 2187 (Oct. 1994) (ALJ). As a general matter, the fact that a mine operator is on a section 104(d) unwarrantable failure chain is not a sufficient basis for granting a motion for expedited hearing. The possibility that an operator could be subject to future withdrawal orders under section 104(d) is neither extraordinary nor unique under the Mine Act.

The circumstances presented by these cases, however, are rather unique and extraordinary. Mountain Cement requested a conference with MSHA on the section 104(d)(2) orders. Representatives of Mountain Cement met with representatives of MSHA on or about May 15, 2001. At this conference, every section 104(d)(2) order was modified to a section 104(a) citation with the exception of the two orders at issue in the present cases and four other orders that were vacated at the conference. Thus, of the 20 orders issued, only two met the requirements of Section 104(d)(2). This fact raises a very real possibility that the MSHA inspector abused his discretion or seriously misapplied the law regarding unwarrantable failure orders. Most of the alleged violations were not designated as significant and substantial (“S&S”) and most of those that were so designated were modified to non-S&S at the conference. As a result, Mountain Cement had to cease all operations while it abated 20 mostly non-S&S violations.

As modified, the two orders at issue allege non-S&S violations. Order No. 7919298 alleges that access in the area of a hopper was obstructed by accumulated material in violation of section 56.20003(a). Order No. 7919300 alleges that spilled material had accumulated on the top deck of the feed tank in violation of section 56.20003(b). The order states that the cited “area is subject to high winds that can cause silica-bearing dust to become airborne” exposing employees to a health hazard. It was designated as an unwarrantable failure for that reason. When the order was modified to delete the S&S determination, the conference officer stated that the “tanks are located indoors, the wind should not be a factor.” This disparity raises serious issues that Mountain Cement is entitled to have resolved. Many of the other modifications issued at the conference set forth facts that are at odds with the original orders. The potential harm to Mountain Cement is continuing in nature.

For good cause shown, Mountain Cement’s motion for an expedited hearing is **GRANTED**. The 90-day period that is set forth in section 104(d) expires on or about June 26, 2001. A hearing cannot be scheduled prior to the expiration of the 90-day period. As a consequence, although I am granting Mountain Cement’s motion, the hearing need not be held within the next two or three weeks.

Mountain Cement did not indicate where it would prefer to hold the hearing. Unless I order otherwise, the hearing will be in the Commission’s Denver courtroom. I am available for hearing on the following dates: the week of July 9, July 19 (Denver only), the week of July 23, August 2, and the week of August 27, 2001. I will not schedule the hearing the week of July 9, without the consent of both parties. Other dates may become available as cases settle. The parties shall discuss potential hearing dates and schedule a conference call with me to discuss these cases as soon as practicable.

Richard W. Manning
Administrative Law Judge

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