

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue N.w., Suite 9500  
Washington, D.C. 20001  
August 23, 2006

INDEPENDENCE COAL COMPANY, : CONTEST PROCEEDINGS  
Contestant :  
: Docket No. WEVA 2006-537-R  
: Order No. 6690161; 05/14/2006  
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: Docket No. WEVA 2006-538-R  
: Citation No. 6690162; 05/14/2006  
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: Docket No. WEVA 2006-539-R  
: Citation No. 6690163; 05/14/2006  
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: Docket No. WEVA 2006-543-R  
: Citation No. 7583418; 05/13/2006  
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: Docket No. WEVA 2006-544-R  
: Citation No. 7583422; 05/13/2006  
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: Docket No. WEVA 2006-545-R  
: Citation No. 6690079; 05/13/2006  
v. :  
: Docket No. WEVA 2006-546-R  
: Citation No. 6690080; 05/13/2006  
:  
: Docket No. WEVA 2006-547-R  
: Citation No. 7427042; 05/13/2006  
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: Docket No. WEVA 2006-548-R  
: Citation No. 6690076; 05/13/2006  
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: Docket No. WEVA 2006-549-R  
: Citation No. 7583425; 05/13/2006  
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: Docket No. WEVA 2006-550-R  
: Citation No. 7583426; 05/13/2006  
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: Docket No. WEVA 2006-551-R  
: Citation No. 7583427; 05/13/2006  
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: Docket No. WEVA 2006-552-R  
: Citation No. 7583420; 05/13/2006

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION, (MSHA),  
Respondent

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: Docket No. WEVA 2006-553-R  
: Citation No. 7583421; 05/13/2006  
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: Docket No. WEVA 2006-554-R  
: Citation No. 7427036; 05/12/2006  
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: Docket No. WEVA 2006-555-R  
: Citation No. 7583406; 05/12/2006  
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: Justice #1 Mine  
: Mine ID 46-07273

**ORDER DENYING**  
**MOTION FOR RECONSIDERATION**

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These cases are before me on Notices of Contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). At the request of the Secretary, and without objection by the Contestant, proceedings in these matters were stayed on July 14, 2006. The Secretary has now filed a Motion for Reconsideration of the stay order. The Contestant objects to part of the Secretary's motion. For the reasons set forth below, the motion is denied.

The Secretary first requests that "a clarification be issued to make clear that only the scheduling of a hearing date . . . is being stayed and that the parties are permitted to engage in discovery and other prehearing matters." (Mot. at 2.) The Secretary asserts that this "is necessary to avoid any misunderstanding between the parties that may occur." (Mot. at 2-3.) The Respondent does not object to this part of the motion.

Section 105(d) of the Act and Commission Rule 20, 29 C.F.R. § 2700.20, permit an operator to contest an order or citation without waiting for a civil penalty to be assessed. *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). In *Energy Fuels*, the Commission noted that the reason for this is that "the operator's interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable" when "related withdrawal orders may be issued before the Secretary has proposed a penalty." (*Id.*) However, the Commission went on to say that if "the operator . . . lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed." (*Id.*)

Clearly, the operator in these cases does not have an immediate need for a hearing as it has agreed to the stay. Nevertheless, rather than follow the advice of the Commission, the operator's counsel has expressed the intention, according to the Secretary, of filing notices of contest of all citations and orders that contain a finding of "significant and substantial." The Secretary states that it has "received more than 200 notice of contest cases from this law firm over the past month." (Mot. At 3.) In its response, the Contestant does not deny this assertion, it merely asseverates its right to file a notice of contest.

Although not expressly stating so, it is apparent that the practice of filing a notice of contest for every citation or order containing special findings is placing a significant burden on the Secretary. More importantly, processing notices of contests requires the Commission's Docket Office to prepare duplicate files for the same violation, with the incidental copying associated therewith, and necessitates twice the storage space. It also requires the *pro forma* ruling on unopposed stay motions in cases that were never intended to be contested immediately.

Permitting discovery in these cases may well result in needless time and expense for the parties, who may conduct discovery on citations which would not even be contested once the civil penalty is assessed. Moreover, superfluous discovery could involve the Commission in mediating unnecessary discovery disputes. Therefore, pursuant to Commission Rule 56(c), 29 C.F.R. § 2700.56(c), discovery will be limited to periods when these matters are not stayed.

The Secretary also requests reconsideration of the requirement in the stay order that she periodically report on the status of the civil penalty cases corresponding to the contest cases and asks that this requirement be placed on the Contestant. Not surprisingly, the Contestant objects to this request.

This part of the motion is also denied. The Secretary requested the stay in these cases. Of greater significance, the Secretary assesses the penalty in these cases and, therefore, is in a much better position to know the status of the civil penalty cases than is the Contestant. Furthermore, since the Secretary is in control of penalty assessments, she can determine how long the cases are on stay by how quickly she assesses the penalty. For all of these reasons, I find that counsel for the Secretary is the appropriate party to report on the status of the civil penalty cases.

### **Order**

The filing of notices of contest for no apparent purpose places unnecessary burdens on all areas of the system. There is no reason to add to those burdens by permitting discovery while the cases are on stay. Additionally, the Secretary is the appropriate party to file status reports on civil penalty cases being processed for orders and citations which are the subjects of notices of contest. Accordingly, the Motion for Reconsideration is **DENIED**.

T. Todd Hodgdon  
Administrative Law Judge  
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