

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021
September 29, 2006

HIGHLAND MINING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2006-712-R
v.	:	Citation No. 7244885; 05/25/2006
	:	
	:	Docket No. WEVA 2006-713-R
	:	Citation No. 7244889; 05/25/2006
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Highland Coal Handling
ADMINISTRATION (MSHA),	:	Mine ID: 46-06558
Respondent	:	

ORDER STAYING PROCEEDINGS

These cases are before me on Notices of Contest pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Secretary, by counsel, has filed a motion to stay the cases pending assessment of civil penalties on the contested citations so that the contest and civil penalty proceedings can be consolidated for hearing. The motion states that the Contestant does not object to it.

Because the Commission was being inundated with notices of contest in which the contestant immediately acquiesced in the proceedings being stayed, I issued an order to show cause in these Notices of Contest requesting the Contestant to show cause why the contests should not be dismissed. The Contestant's response was that the Act permits it. The Secretary, while asserting "that such 'pre-penalty' notices of contest are not an appropriate or reasonable use of the litigation process unless the contestant has an urgent or specific need for a hearing on the underlying violation," agreed.

Certainly, section 105(d), which permits filing a notice of contest within 30 days of receipt of a citation or an order, does not state that filing a notice of contest even though the party does not desire a hearing is prohibited. Further, early in its existence, the Commission held that when a party had an interest in "immediately" challenging an allegation, filing a notice of contest was proper. *Energy Fuels Corp.*, 1 FMSHRC 299, 308 (May 1979). It also opined that if the party lacked an urgent need for a hearing, the contest proceeding could be continued to be tried with the penalty proceeding. (*Id.*) It went on to state, however, that if there were no need for an immediate hearing, "we would expect [the operator] to postpone his contest of the entire citation until a penalty is proposed." (*Id.*) For almost 30 years that is the way things have proceeded, notices of contest were the exception, not the rule.

However, neither Congress, in drafting section 105(d), nor the Commission, in *Energy Fuels*, could have anticipated the current routine filing of literally hundreds of notices of contest when the operator had no interest in an immediate hearing. Such filings clog up the system. While they may not violate the letter of the law, they clearly violate its spirit. Unlike the Secretary, I am not of the opinion that the Commission is without recourse to remedy this abuse of its processes.

Nevertheless, I am aware that the attorneys for Massey Energy subsidiaries have agreed with the Secretary to refrain from filing notices of contest on section 104(a), 30 U.S.C. § 814(a), citations until a penalty is assessed, unless there is an immediate need for a hearing. Since that reaches the practical result sought by the order to show cause, I see no need to dismiss these cases.

Accordingly, the motion of the Secretary is **GRANTED** and further proceedings in the above captioned cases are **STAYED** pending the filing of the corresponding civil penalty proceedings in these matters. Counsel for the Secretary is directed to inform the judge, in writing, of the status of the civil penalty cases on **December 29, 2006**, and on the last working day of each quarter thereafter until all of the cases have been docketed.

T. Todd Hodgdon
Administrative Law Judge
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