

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

December 12, 2006

MARFORK COAL COMPANY, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEVA 2006-755-R
v.	:	Citation No. 7254911; 06/12/2006
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	River Fork Powellton #1
Respondent	:	Mine ID 46-08914

DISMISSAL ORDER

Before: Judge Feldman

The captioned contest concerns a citation alleging a violation of section 75.1100(2)(b), 30 C.F.R. § 75.1100(2)(b), because of the contestant’s failure to provide a fire valve handle necessary for the connection of a fire hose located along the No. 2 beltline. This mandatory safety standard requires functional firehose outlets at 300-foot intervals along the entire length of a belt conveyor.

Marfork Coal Company, Inc. (Marfork) filed its contest of Citation No. 7254911 and then contemporaneously agreed to stay its contest until the Secretary proposed her civil penalties.¹ Marfork’s agreement to stay its contest immediately after instituting this proceeding is identical to the circumstances that resulted in the dismissal of its contests in Docket Nos. WEVA 2006-788-R through WEVA 2006-790-R, 28 FMSHRC 842 (Sept. 2006) (ALJ), *appeal docketed* (Nov. 3, 2006), because, *inter alia*, it has failed to state the relief it is seeking as required by Commission Rule 20(e)(1)(ii), 29 C.F.R. § 2700.20(e)(1)(ii).

Marfork asserts it has an absolute and unqualified right to file its contest under section 105(d) without being required to wait to file its contest of the proposed civil penalty under section 105(a). *Opening Br.* in WEVA 2006-788-R through WEVA 2006-790-R at p.9. However, Marfork’s “contest” elevates form over substance because, although it styles its filing as a 105(d) contest - - by routinely agreeing to stay its “105(d) contests” until the Secretary’s civil

¹ Marfork’s characterization of its action as a request for continuance of a hearing, rather than a request to stay the proceeding, is a distinction without a difference.

penalty proposal, it indeed is waiting to contest the subject citation in a 105(a) civil penalty proceeding. In other words, Marfork is kicking and screaming over being required to do what it expressly wants to do anyway. Thus, Marfork's contest is frivolous and an abuse of process.

Accordingly, the captioned contest proceeding **IS DISMISSED** because by agreeing to stay this matter rather than requesting an early hearing,² Marfork has failed to state the relief it is seeking as required by Commission Rule 20(e)(1)(ii).³

Jerold Feldman
Administrative Law Judge

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² The terms "early hearing" and "expedited hearing" should not be confused. An early hearing before the Commission is granted in response to the filing of a 105(d) contest when the operator elects to institute a contest proceeding without waiting for the Secretary's civil penalty proposal. *Energy Fuels Corporation*, 1 FMSHRC 299, 307-08 (May 1979). An expedited hearing is authorized under Commission Rule 52, 29 C.F.R. § 2700.52, upon a showing of extraordinary circumstances that warrant an expedited adjudication.

³ The September 27, 2006, Dismissal Order currently before the Commission noted that I would stay, rather than dismiss, other Marfork 105(d) contests pending the docketing of the related civil penalty cases. 28 FMSHRC at 847 n.3. While the Commission is not a party to, or bound by, this agreement, my forbearance was based on the September 13, 2006, informal agreement between Massey Energy Company (Massey), Marfork's parent company, and the Secretary. The agreement specified that Massey subsidiaries would refrain, except in unusual circumstances, from routinely contesting, and then agreeing to stay, all significant and substantial citations until after the civil penalty was proposed. However, despite this agreement, Massey subsidiaries, such as Aracoma Coal Company, continue to file a multitude of frivolous 105(d) contests.