FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

September 27, 2006

MARFORK COAL COMPANY, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2006-788-R
	:	Citation No. 7257574; 06/27/2006
v.	:	Docket No. WEVA 2006-789-R
	:	Citation No. 7257575;06/27/2006
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent	:	Docket No. WEVA 2006-790-R
	:	Citation No. 7257568;06/27/2006
	:	Slip Ridge Cedar Grove Mine
	:	Mine ID No. 46-09048

ORDER OF DISMISSAL

Before: Judge Feldman

These proceedings are before me based on a Notice of Contest of the subject citations filed with the Commission by Marfork Coal Company, Inc. (Marfork) on July 10, 2006, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, (the Mine Act), 30 C.F.R. § 815(d).

An operator served with a citation alleging a violation of the Mine Act, or alleging a violation of a mandatory safety standard that has been abated, may immediately contest the citation under section 105(d) of the Mine Act without waiting for notification of the proposed penalty assessment. 30 C.F.R. § 815(d). In such cases, section 105(d) provides that "the Commission shall afford an opportunity for a hearing." An operator may have an interest in an early hearing, such as in cases where continued abatement is expensive, or where the validity of the citation or order impacts on an operator's continued exposure to 104(d) withdrawal sanctions. *Energy Fuels Corporation*, 1 FMSHRC 299, 307-08 (May 1979). Thus, the purpose of a 105(d) contest proceeding is to adjudicate the validity of a citation without waiting for the Secretary's proposed civil penalty.

Alternatively, if the operator does not immediately contest a citation after it is issued, the operator may wait to contest the citation in a civil penalty proceeding pursuant to section 105(a) of the Mine Act. 30 C.F.R. § 815(a). Waiting to contest citations until after the civil penalty is proposed facilitates settlement negotiations and limits discovery to citations that can only be resolved through litigation. In addition, as discussed below, postponing a contest until after the proposed civil penalty provides the opportunity for informal settlement conferences between mine operators and MSHA personnel wherein citations frequently are vacated by MSHA without the need for litigation.

Commission Rule 20, 29 C.F.R. § 2700.20, implements the contest provisions of section 105(d). Commission Rule 20(e)(1)(ii) provides that a notice of contest shall provide a plain statement of the relief requested.

In its contests, Marfork denies each and every allegation contained in the contested citations. Marfork identifies the relief sought in its contest as "issuance of an Order directing that all the subject Citations be vacated and dismissed." (*Marfork Contest*, p.3). The Order sought can only be issued after a hearing on the merits. Thus, the relief requested by Marfork is a Commission hearing on the merits of the citations without waiting for the Secretary's proposed civil penalties.

The Secretary filed an answer to Marfork's contests on July 27, 2006, in which she moved to stay these matters pending the related civil penalty cases. The Secretary's answer noted that "*counsel for the Contestant has indicated . . . that he has no objection to this motion*." (*Sec'y Mot.*, p.2). (Emphasis added). The Secretary's answer was accompanied by a cover letter stating:

> [Marfork's] Counsel has also indicated that it is the operator's intention to file notices of contest of all significant and substantial citations and orders but will agree to continuances of those cases involving 104(a) citations. While it is the Contestant's prerogative to file duplicative contest and civil penalty proceedings pursuant to the Commission's rules, the Contestant's policy of always filing a notice of contest and then agreeing to a stay seems to be a needless use of the Commission's and Secretary's resources. This is especially true when the operator can contest both the civil penalty and the underlying citation when the civil penalty is proposed.

By filing a contest on July 10, 2006, seeking an early adjudication, only to agree shortly thereafter to stay its contest pending the civil penalty case, Marfork apparently does not want a disposition on the merits *before* the civil penalty is proposed. In other words, Marfork's contest does not adequately articulate the relief it seeks in its 105(d) notice of contest, since it has elected to wait for the 105(a) civil penalty matter.

Accordingly, on August 11, 2006, Marfork was ordered to show cause why its contest of the subject citations should not be dismissed because of its apparent disinterest in a Commission hearing in contravention of Commission Rule 20(e)(1)(ii), and because it is a duplicative and needless consumption of the Commission's resources. 28 FMSHRC 745. The Secretary was provided the opportunity to reply to Marfork's response to the Order to Show Cause.

Marfork responded to the show cause order on September 1, 2006. In its response Marfork does not even express a pretense that it seeks an early adjudication on the merits. Rather, Marfork asserts it is contesting all citations, with the exception of those designated as non-significant and substantial, for the purpose of initiating discovery and informal negotiations with the Secretary. (*Marfork resp.*, p.5)

The Secretary replied to Marfork's response in correspondence dated September 7, 2006. While the Secretary opined that there was "no discernable reason" served by Marfork's contest, and that discovery cannot properly be characterized as "relief sought" by a contestant, the Secretary did not provide any meaningful analysis of Commission case law, or relevant statutory and Commission Rule provisions. (Letter from Glenn Loos, Esq., to Judge Feldman of 9/7/06). Nor did the Secretary articulate whether or not Marfork's contest should be dismissed.

Consequently, on September 11, 2006, the Secretary was ordered to state in writing, with specificity, whether she believes the subject Notice of Contest should be dismissed. The Secretary was requested to provide the relevant statutory and rule provisions and/or case law in support of her position. The Secretary responded on September 19, 2006. Without providing the analysis requested by the September 11 Order, the Secretary stated she "is unaware of any statutory provision, any procedural rule, or any case law that requires dismissal of the operator's contest in the circumstances [of this case]." To the extent that there is no case law involving frivolous operator requests for over 600 contests,[1] with contemporaneous expressions by the contestants that they are not really interested in prosecuting their contests, I agree with the Secretary's perfunctory analysis. However, the analysis must not stop here.

As noted, Marfork's contest has not even been filed under the guise of pursuing its contest prior to the Secretary's civil penalty proposal. Thus, Marfork has removed all genuine issues of fact. Fundamental questions of law concerning defective filings that are tantamount to an abuse of process cannot be ignored. Although the Commission long ago recognized an operator's right to an early hearing under section 105(d), the right to an early hearing must be accompanied by an operator's desire for an early hearing - - a desire Marfork admittedly does not possess. *Energy Fuels, supra*. Although the Commission noted in *Energy Fuels* that it saw no

[1] The law firm representing Marfork has recently filed approximately 250 section 105(d) contests on behalf of its clients. This law firm is not alone. For example, another law firm has filed more than 375 contests on behalf Aracoma Coal Company (Aracoma). All of these contestants have agreed to stay their contests immediately after filing them. An Order to Show Cause has been issued to Aracoma.

reason why operators that filed *bona fide* contests seeking early hearings could not be persuaded to postpone their contests until the civil penalty is proposed, surely *Energy Fuels* did not sanction, or even contemplate, the current folly that is being thrust on this Commission. 1 FMSHRC at 308. The unprecedented filing of voluminous contests under these circumstances results in the needless expense and wasted effort associated with extensive photocopying, meaningless assignment, pre-hearing and stay orders, and the preparation and storage of contest docket files for no legitimate reason.[2]

As a threshold matter, Marfork's policy of contesting all significant and substantial citations, regardless of the underlying facts, lacks any considered thought. Thus, there is no consideration of the underlying facts of a particular citation to support a need for an early hearing.

Moreover, Marfork's contest is defective. Commission Rule 20(e)(1)(ii) requires a contestant to state the relief requested. The desire to start discovery is not relief and does not provide a basis for a 105(d) contest. In addition, discovery during a 105(d) stay is counterproductive because it can result in needless interrogatories and depositions of MSHA inspectors concerning citations that the operator may not contest after the Secretary proposes her penalty. Unnecessary deposition of mine inspectors interferes with their primary responsibility of inspecting the nation's mines. In this regard, I am no longer inclined to allow discovery during a stay in light of the multitude of unnecessary 105(d) contests. Thus, absent a request for a hearing, Marfork's contest serves no purpose.

I am not persuaded by Marfork's assertion that its contests are remedial in nature in that they alleviate harm caused by any delay in the Secretary's proposal of civil penalties by initiating the discovery and settlement negotiations process. (*Marfork resp.*, p.5). In fact, Marfork's contest is an impediment to the settlement negotiations process. Informal MSHA safety conferences offer operators the best opportunity for expeditious and simple resolution of operator concerns. However, as the Secretary explained, contests place citations in litigation under the exclusive direction of the solicitor and preclude the availability of informal MSHA safety settlement conferences. (Letter from Glenn Loos, Esq., to Judge Feldman of 9/7/06, p.2). As noted by the D.C. Court of Appeals, although the statutory provision in section 104(a) of the Mine Act requires the Secretary to propose a civil penalty within a "reasonable time," this

[2] I am not suggesting that administrative burden provides a basis for denying an operator the right to file a *bona fide* 105(d) contest. However, administrative expenditures incurred as a result of frivolous filings are wasteful and must not be ignored.

provision is intended to "spur the Secretary to action" rather than confer rights on mine operators. *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005). Tardiness by the Secretary does not justify the filing of an avalanche of meaningless contests with the Office of the Secretary and with this Commission. In the final analysis, section 105 of the Mine Act does not confer on Marfork the right to be frivolous.

Finally, dismissal of Marfork's contest is consistent with the classic tenets of statutory construction. "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Section 105(d) provides:

> *If, within 30 days of receipt thereof, an operator of a . . . mine notifies the Secretary that he intends to contest the issuance . . . of an order issued under section 104, or citation* or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation . . . Issued under section 104, . . . *the Commission shall afford an opportunity for a hearing . . . And thereafter shall issue an order . . . affirming, modifying, or vacating the Secretary's citation*, order, or proposed penalty, or directing other appropriate relief.

(Emphasis added.)

The plain meaning of section 105(d) provides an operator with the right to contest a citation within 30 days of its issuance, rather than wait for the Secretary's civil penalty proposal, if the operator wants an expeditious Commission hearing. In other words, section 105(d) affords an operator with a right to an early hearing that should be given priority by this Commission. The abuse of section 105(d) by filing disingenuous contests interferes with the Commission's orderly processes. In other words, if everything is a priority, nothing is a priority.

Moreover, statutes must be interpreted reasonably when Congress has not spoken on the matter in issue. *See, eg.*, *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (April 1996). Congress has not directly spoken on, nor could it contemplate, the precise question in issue - - does a mine operator have an unfettered right to contest a citation even if it does not want an early hearing? Put another way, can any reasonable statutory interpretation of section 105(d) confer on an operator the absolute right to file a contest for no apparent reason? Surely, the answer is no.

Even in the absence of an articulated opposition by the Secretary, I cannot ignore the fact that Marfork's contest is contrary to section 105(d) as well as Commission Rule 20(e)(1)(ii) because it is devoid of relief sought, notwithstanding the abuse of process it creates. In other words, I decline to be a patron of the theater of the absurd. Accordingly, **IT IS ORDERED** that Marfork's contest **IS DISMISSED**.[3]

Jerold Feldman
Administrative Law Judge

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[3] On September 13, 2006, Massey Energy Company (Massey), of which Marfork is a subsidiary, reached an informal agreement with the Secretary that all subsidiaries "agree to refrain from filing Notices of Contest on 104(a) Significant and Substantial citations until the proposed penalty is assessed unless there is something particular to be immediately addressed with an individual citation." In recognition of Massey's restraint, I will stay all other pending contests that Massey has agreed to stay without formal discovery being authorized during the pendency of the stay. I have dismissed this contest on the merits because of the important issues raised, and the effect of this decision on similar contests that do not involve Massey.