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 11, 2006

MARFORK COAL COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2006-788-R
	:	Citation No. 7257574; 06/27/2006
	:	
v.	:	Docket No. WEVA 2006-789-R
	:	Citation No. 77257575;06/27/2006
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2006-790-R
ADMINISTRATION, (MSHA),	:	Citation No. 7257568;06/27/2006
Respondent	:	
	:	Slip Ridge Cedar Grove Mine
	:	Mine ID

ORDER TO SHOW CAUSE

These proceedings are before me based on a Notice of Contest of the subject citations filed with the Commission 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). In its contests, Marfork Coal Company, Inc., (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). Such an Order can only be issued after a hearing on the merits of the contested citations.

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). 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.

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.

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. The relief requested by Marfork is a Commission hearing on the merits of the citations without waiting for the Secretary's proposed civil penalties.

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, it appears that Marfork is, in substance, waiting for a disposition on the merits *after* the civil penalty is proposed. In other words, Marfork has not adequately articulated the relief it seeks in its 105(d) notice of contest, since it has elected to wait for the 105(a) civil penalty matter.

The Commission's processing of Marfork's 105(d) contests requires the duplication of docket files with incidental copying and storage for both the contest dockets and the ultimate civil penalty docket. Moreover, Marfork's 105(d) Notice of Contest requires *pro forma* rulings on stay motions that are lacking in substance. I am also cognizant of the Secretary's burden of answering multitudes of 105(d) contests, only to await duplication of her answers in the ultimate civil penalty proceedings. Simply put, a stay order postpones the pre-civil penalty hearing requested by Marfork; a hearing that Marfork implicitly concedes it does not want. I miss the point. I look forward to Marfork's explanation.

In view of the above, Marfork **IS ORDERED TO SHOW CAUSE**, in writing, **within 21 days from the date of this Order**, why its 105(d) Notice of Contest of the subject citations should not be dismissed because of its apparent contravention of Commission Rule 20(e)(1)(ii), and because it is a duplicative and needless consumption of the Commission's resources. The Secretary shall be afforded the opportunity to reply to Marfork's response to the Order to Show Cause within 10 days thereafter.

Jerold Feldman
Administrative Law Judge

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