

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
601 New Jersey Avenue N.w., Suite 9500
Washington, D.C. 20001

January 4, 2007

ARACOMA COAL COMPANY,
Contestant

- : CONTEST PROCEEDINGS
- :
- : Docket No. WEVA 2007-2-R
- : Citation No. 7259833; 09/26/2006
- :
- : Docket No. WEVA 2007-3-R
- : Citation No. 7259836; 09/26/2006
- :
- : Aracoma Alma Mine #1
- : Mine ID 46-08801
- :
- : Docket No. WEVA 2007-8-R
- : Citation No. 7241546; 09/18/2006
- :
- : Docket No. WEVA 2006-9-R
- : Citation No. 7244581; 09/07/2006
- :
- : Hernshaw Mine
- : Mine ID 46-08802
- :
- : Docket No. WEVA 2007-50-R
- : Citation No. 7259837; 09/27/2006
- :
- : Docket No. WEVA 2007-51-R
- : Citation No. 7259838; 09/27/2006
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- : Docket No. WEVA 2007-52-R
- : Citation No. 7259839; 09/27/2006
- :
- : Docket No. WEVA 2007-53-R
- : Citation No. 7259840; 09/27/2006
- :
- : Docket No. WEVA 2007-54-R
- : Citation No. 7259841; 09/27/2006
- :
- : Docket No. WEVA 2007-55-R
- : Citation No. 7259842; 09/27/2006
- :
- : Docket No. WEVA 2007-56-R
- : Citation No. 7259843; 09/27/2006

v.

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

- :
: Docket No. WEVA 2007-57-R
: Citation No. 7259844; 09/27/2006
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: Docket No. WEVA 2007-58-R
: Citation No. 7259846; 09/28/2006
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: Docket No. WEVA 2007-46-R
: Citation No. 3999565; 09/13/2006
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: Docket No. WEVA 2007-66-R
: Citation No. 7259847; 10/10/2006
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: Docket No. WEVA 2007-67-R
: Citation No. 7259848; 10/10/2006
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: Docket No. WEVA 2007-68-R
: Citation No. 7259849; 10/10/2006
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: Docket No. WEVA 2007-69-R
: Citation No. 7259850; 10/10/ 2006
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: Docket No. WEVA 2007-70-R
: Citation No. 7259853; 10/11/2006
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: Docket No. WEVA 2007-71-R
: Citation No. 7259854; 10/10/2006
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: Docket No. WEVA 2007-72-R
: Citation No. 7259855; 10/10/ 2006
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: Docket No. WEVA 2007-73-R
: Citation No. 7259856; 10/12/2006
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: Docket No. WEVA 2007-74-R
: Citation No. 7259857; 10/12/2006
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- :
: Docket No. WEVA 2007-75-R
: Citation No. 7259858; 10/12/2006
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- :
: Docket No. WEVA 2007-76-R
: Citation No. 7259859; 10/15/2006
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: Docket No. WEVA 2007-77-R
: Citation No. 7259860; 10/15/2006
:
: Docket No. WEVA 2007-78-R
: Citation No. 7259861; 10/15/2006
:
: Aracoma Alma Mine #1
: Mine ID 46-08801
:
: Docket No. WEVA 2007-167-R
: Citation No. 7261885; 10/23/2006
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: Docket No. WEVA 2007-168-R
: Citation No. 7261886; 10/23/2006
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: Docket No. WEVA 2007-169-R
: Citation No. 7261887; 10/24/2006
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: Docket No. WEVA 2007-170-R
: Citation No. 7261888; 10/24/2006
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: Docket No. WEVA 2007-171-R
: Citation No. 7261889; 10/25/2006
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: Docket No. WEVA 2007-172-R
: Citation No. 7261890; 10/30/2006
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: Docket No. WEVA 2007-173-R
: Citation No. 7261891; 10/30/2006
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: Docket No. WEVA 2007-174-R
: Citation No. 7261892; 10/31/2006
:
: Docket No. WEVA 2007-175-R
: Citation No. 7261893; 10/31/2006
:
: Hernshaw Mine
: Mine ID 46-08802

DISMISSAL ORDER

Before: Judge Hodgdon

These 36 cases are before me on Notices of Contest pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). The Secretary, by counsel, has filed motions 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 motions state that the Contestant does not object to them.

Because the Commission has been inundated with notices of contest in which the contestant immediately acquiesces in the proceedings being stayed, some of the Commission judges issued orders to show cause requesting the Contestant to show cause why the contests should not be dismissed. *See, e.g., Spartan Mining Co.*, 28 FMSHRC 768 (Aug. 2006) (ALJ); *Aracoma Coal Co, Inc.*, 28 FMSHRC 763 (Aug. 2006) (ALJ); *Marfork Coal Co., Inc.*, 28 FMSHRC 745 (Aug. 2006) (ALJ). The Contestants' responses were that the Act permits it. *See, e.g., Spartan Mining Co.*, 28 FMSHRC 892 (Sept. 2006) (ALJ). 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. *Id.*

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. 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.*)

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 has no interest in an immediate hearing. Such filings unnecessarily clog up the system. Unlike the Secretary, I am not of the opinion that the Commission is without recourse to remedy this abuse of its processes.

As the Commission noted in *Energy Fuels*, the purpose of permitting the filing of a notice of contest is to allow an operator an expeditious hearing on an order or citation without waiting for the penalty to be assessed. In these cases, however, the contestant never desired an immediate hearing since in every case it routinely and without delay agreed to having the proceedings stayed until the civil penalty was assessed.

"Abuse of process" is "generally defined as the misuse of a legal process . . . against another primarily to accomplish a purpose for which the process is not designed." 1 Am. Jur. 2d *Abuse of Process* § 1 (1994). While this is the definition of the tort of "abuse of process" and the filing of these notices of contest obviously does not rise to that level, they do involve the misuse

of a legal process for a purpose for which it was not designed. And they clearly require the Secretary to respond to them and the Commission to deal with them for no apparent purpose whatsoever.

Dismissing these contests will not deny the Contestant due process. Due process would only be denied if the dismissing them would result in the Contestant having no chance for a hearing on the order or citation. The failure to file a notice of contest does not preclude an operator from challenging, in a penalty proceeding, the fact of violation or any special findings contained in the citation or order. 29 C.F.R. § 2700.21; *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1621 (Sept. 1987). Similarly, dismissing these contests will not preclude the Contestant from challenging the orders or citations in a penalty proceeding. Indeed, the end result of the Contestant's actions in these matters is exactly that, waiting until the penalty proceeding is filed to hear the cases. It just involves extensive and ultimately unnecessary actions in the interim.

I am not issuing an order to show cause in these cases because Aracoma has already had an opportunity to offer its justifications for filing such contests in another proceeding. *Aracoma Coal Co., Inc.*, 28 FMSHRC ____ (Nov. 2006). Like Judge Feldman, I find the Contestant's reasons without merit.

Accordingly, these contest proceedings are **DISMISSED**.

T. Todd Hodgdon
Administrative Law Judge

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