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MSHA V. EASTERN ASSOC. COAL  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
WASHINGTON, DC  
October 9, 1980

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

v. Docket No. WEVA 79-117-R

EASTERN ASSOCIATED COAL  
CORPORATION

DECISION

The administrative law judge in this case dismissed without prejudice an operator's notice of contest of a withdrawal order, after having ordered the operator to show cause why the contest of the withdrawal order should not be stayed until an associated penalty contest arose. We granted discretionary review to determine (1) whether the judge erred in dismissing without prejudice when the show cause order mentioned only a stay as a possible consequence of failing to show cause; (2) whether the judge erred in his implicit holding that a dismissal without prejudice is a permissible substitute for a stay; and (3) whether the judge erred in holding that no immediate hearing was necessary because the operator had failed to show an "urgent need" for one before an associated penalty contest arose. We hold that the judge erred in all of these respects.

An inspector from the Department of Labor's Mine Safety and Health Administration (MSHA) issued to Eastern Associated Coal Corporation a withdrawal order under section 104(d)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (Supp. III 1979). The withdrawal order, having been complied with, was terminated an hour later. Eastern Associated then filed a notice of contest under section 105(d) of the Act.

After responses were filed by both the Secretary of Labor and the United Mine Workers of America, the judge issued on his own motion to all parties an order to show cause why proceedings on the withdrawal order should not be "stayed" until either (1) a penalty contest concerning the same alleged violation that gave rise to this withdrawal

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order under sections 105(a) and (d) was filed and could be consolidated with the contest of the withdrawal order; or (2) Eastern Associated waives further proceedings under 30 CFR Part 100 and agrees to consolidation. The order stated that its purpose was "to conserve scarce judicial resources, and to expedite the disposition in one proceeding of all claims pertaining to the conditions or practices giving rise to the contest of the violation charged in the [withdrawal order]". 1/

Eastern Associated's response to the show cause order objected to the proposed stay and stated that Eastern did not waive further proceedings under 30 CFR Part 100. Eastern Associated argued that it had a special interest in avoiding a stay because a stay "could subject [Eastern Associated] to potentially damaging closure orders based on the order and underlying citation involved in this case." The Secretary of Labor's response stated that he had no objection to a stay.

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1/ The full text of the order is as follows:

Pursuant to Rule 14 of the Commission's Rules of Practice, to conserve scarce resources, and to expedite the disposition in one proceeding of all claims pertaining to the conditions or practices giving rise to the contest of the violation charged in the captioned review proceeding, it is ORDERED that on or before Wednesday, June 20, 1979, counsel for each party SHOW CAUSE why the captioned application for review should not be stayed until (1) a petition for the assessment of civil penalty is filed and consolidated with the review proceeding; or (2) applicant waives further proceedings under 30 CFR Part 100 and agrees to consolidation and determination in one proceeding of the issues of fact and law common to a disposition of the application for review and the amount of the penalty, if any, found warranted for the violation charged.

30 CFR Part 100 contains a series of MSHA regulations governing the MSHA Office of Assessments' procedures for issuing notifications of proposed assessment of penalty under section 105(a) and (b) of the Act. The regulations provide operators with an opportunity to review the Assessment Office's tentative penalty proposal (i.e., before it becomes a formal notification of proposed assessment of penalty). Operators may request a conference or may submit additional evidence pertaining to the penalty amount tentatively proposed by the Assessment Office. Thereafter, the Assessment Office, which may or may not change its tentative amount, issues a notification of proposed assessment of penalty under the statute. The operator may then pay the proposed assessment, or contest it before the Commission and

obtain a de novo determination as to the fact of violation and assessment of a penalty.

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Eastern Associated's concern with further withdrawal orders derives from the enforcement scheme set out in sections 104(d) and (e) of the Act. Section 104(d) of the Act permits an MSHA inspector to include in citations issued under section 104(a) "unwarrantable failure" and "significant and substantial" findings. If, within the 90-day period following the issuance of the citation, an inspector finds what he believes to be another violation of a standard, and finds that the second violation was also caused by an unwarrantable failure to comply, an order is issued requiring withdrawal of miners until the inspector finds that the violation has been abated. Thereafter, additional withdrawal orders must be issued if, prior to an inspection that discloses no similar violations, an inspector finds violative conditions similar to those that precipitated the first withdrawal order. Section 104(e) also permits the issuance of withdrawal orders if an operator has a "pattern" of "significant and substantial" violations, and within 90 days after the issuance of a notice to that effect, another significant and substantial" violation is found. Further withdrawal orders may be precipitated by subsequent "significant and substantial" findings:

Despite Eastern Associated's desire not to postpone adjudication of the withdrawal order, the judge issued the following order of "dismissal":

Applicant having failed to show urgent need why the subject 104(d)(1) order should be immediately reviewed, it is hereby ORDERED that the captioned application for review be DISMISSED without prejudice to reinstatement at such time as petition for assessment of civil penalty is filed so that the matters may be consolidated for disposition. See Energy Fuels Corp., DENV 78-410, FMSHRC 79-5-1, at p. 10.

Eastern then filed a petition for discretionary review, which we granted.

We first examine whether the administrative law judge erred in dismissing Eastern Associated's notice of contest when the order to show cause mentioned only a stay. We conclude that the judge erred. The problem is essentially one of fair notice. Section 5(b) of the Administrative Procedure Act, 5 U.S.C. 554(c), required that the parties be afforded the opportunity for "the submission and consideration of facts [and] argument...." This opportunity was not afforded by the judge; the parties had no inkling that a dismissal might occur. Had the parties been fairly informed of the action the judge might take, they could have presented to him the arguments

against the use of a dismissal without prejudice as a technique for staying a case that they have presented to us. Although the judge may have believed that there is little or no practical difference between a stay and a dismissal without prejudice, the parties had the right to at least try to convince him otherwise. Accordingly, we hold that the judge erred in dismissing the notice of contest when he had mentioned only a possible stay of proceedings.

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Further, we hold as a matter of Commission policy that a stay, rather than a dismissal without prejudice, is the appropriate procedural device for postponing adjudication of a contest of a withdrawal order, when a postponement is otherwise warranted. 2/ As a practical matter, the difference between a dismissal without prejudice and a stay is merely one of convenience. A dismissal is convenient to the judge because it removes a case from his docket and inconvenient to the operator who must later refile his pleadings; a stay causes the operator no additional administrative inconvenience, but is "inconvenient" to the judge who must carry the case along on his docket. We believe a balancing of these conveniences and inconveniences requires the use of a stay, rather than a dismissal without prejudice, in a withdrawal order case. Additionally, use of a stay avoids any legal questions that might arise concerning the effect of a dismissal, even though labelled without prejudice, on the section 105(d) requirement that contests of withdrawal orders be made within thirty days of the issuance of the order.

Finally, we hold that even a stay would have been inappropriate in this case and that the judge erred in requiring the operator to show an "urgent need" in order to receive a prompt hearing on its notice of contest before an associated penalty proceeding arose. The final sentence of section 105(d) of the Act reads:

The Commission shall take whatever action is necessary to expedite proceedings for hearing appeals of orders issued under section 104.

The reason for this provision is obvious. Not only is an operator subject to a continuing shutdown of all or a part of its mine in the case of an unterminated withdrawal order, but even in the case of a terminated order, as here, the operator remains subject to the sanctions of additional withdrawal orders under sections 104(d) and (e). The judge's requirement that there be a showing of urgent need is clearly inconsistent with the mandate of section 105(d). It was error to require the unwilling operator to wait until an associated penalty proceeding arose before providing an adjudication of its contest of the withdrawal order.

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2/ Republic Steel Corporation, Docket No. PENN 80-56-R, etc. (decided this date), presented such a situation, where the operator consented to postponing adjudication of its withdrawal order contest.

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Accordingly, we reverse and remand for further proceedings consistent with this opinion. 3/

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3/ Our disposition makes it unnecessary to address the operator's arguments relating to waiver of 30 CFR Part 100 proceedings.



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