

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

August 7, 1996

DAY BRANCH COAL COMPANY, INC. :  
and BOBBY JOE HENSLEY :  
 : Docket Nos. KENT 94-1077-R  
v. : through KENT 94-1190-R  
 :  
SECRETARY OF LABOR, :  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), :

Before: Jordan, Chairman; Holen, Marks and Riley, Commissioners

ORDER

BY THE COMMISSION:

These contest proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). On August 30, 1994, the Secretary of Labor filed an unopposed motion to hold the contest cases in abeyance pending the issuance of proposed civil penalties. Administrative Law Judge Roy J. Maurer granted the motion on October 7, 1994. On December 5, 1994, the Secretary filed an unopposed request for stay of proceedings. This was based on the request of the United States Attorney for the Eastern District of Kentucky, who asked that the civil litigation be held in abeyance during the pendency of potential criminal proceedings involving individuals at the mine.

On June 19, 1996, the Secretary filed a motion to dismiss the notices of contest, asserting that the operator did not file notices of contest of the proposed penalties. The Secretary contended that proposals for assessment of civil penalties regarding the above-captioned citations were made on January 17, and September 17, 1995. On June 27, 1996, the judge issued an order lifting the stay and dismissing the cases.

On July 2, 1996, Day Branch Coal Company and Bobby Hensley (collectively “operators”) filed with the administrative law judge a Motion to Reconsider and Vacate Order Entered June 27, 1996 (“Mot. to Reconsider”). The operators subsequently filed a petition for discretionary review on August 2, 1996. Counsel for operators contends that he did not contest penalties filed in these proceedings because he never received notice that penalties had been assessed. PDR at 1-2; Mot. to Reconsider at 1. Indeed, as recently as February 5, 1996, an

attorney in the Secretary's Office of the Solicitor represented to the judge that the Secretary had not yet assessed civil money penalties. Letter from Malecki to Judge Maurer of 2/5/96. Counsel for operators also states that, pursuant to 29 C.F.R. §§ 2700.8 and 2700.10, the time to respond to the Secretary's June 19 motion had not expired when the judge issued his order on June 27, 1996. Mot . to Reconsider at 2. On July 16, 1996, the Secretary filed his opposition to the motion to reconsider.

The Commission's procedural rules, codified at Part 2700 of 29 C.F.R., state that an opposition to a motion may be filed within ten days after service upon the party. 29 C.F.R. § 2700.10(c). Furthermore, the rules permit an additional five days for filing a response when the initial document was served by mail. 29 C.F.R. § 2700.8. The Secretary served his motion by mail on June 19, 1996. S. Certificate of Service to Motion to Dismiss. By issuing his order on June 27, the judge did not allow operators the time permitted to respond under the Commission's rules.

Accordingly, we grant the operators' petition for discretionary review, vacate the dismissal order, and remand this matter to the judge for further appropriate proceedings. Operators' motion for reconsideration, which requests the same relief as its petition, is moot.

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Mary Lu Jordan, Chairman

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Arlene Holen, Commissioner

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner