

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

January 22, 2007

SECRETARY OF LABOR,	:	Docket Nos. KENT 2006-189-R
MINE SAFETY AND HEALTH	:	KENT 2006-190-R
ADMINISTRATION (MSHA)	:	KENT 2006-194-R
	:	KENT 2006-195-R
	:	KENT 2006-196-R
	:	KENT 2006-201-R
v.	:	KENT 2006-202-R
	:	KENT 2006-227-R
	:	KENT 2006-228-R
HIGHLAND MINING COMPANY, LLC	:	KENT 2006-229-R

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

DIRECTION FOR REVIEW AND DECISION

BY THE COMMISSION:

These proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act” or “Act”), involve Notices of Contest filed by Highland Mining Company, LLC (“Highland”) pursuant to section 105(d) of the Act, 30 U.S.C. § 815(d), and were on stay pending the filing of corresponding civil penalty proceedings. The Secretary of Labor issued proposed civil penalties for the citations being contested, Highland contested those penalties pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a), and the Secretary has filed petitions for assessment of the penalties in Commission Docket Nos. KENT 2006-340 and KENT 2006-406. Consequently, in a sua sponte Order issued January 17, 2007, the judge lifted the stays and dismissed the contest cases, because “with the filing of the civil penalty cases, the contest proceedings are moot.”

In *Energy Fuels Corp.*, 1 FMSHRC 299 (May 1979), the Commission stated:

Inasmuch as a citation and related withdrawal orders may be issued before the Secretary has proposed a penalty, the operator’s interest in immediately contesting the allegation of violation and the special findings in a citation may be considerable.

As we have said, affording the operators this opportunity will not adversely affect the interests of miners. The Secretary has not convinced us that the interest in avoiding piecemeal litigation necessarily outweighs the interests of the operators, for we think that the Commission both could allow operators to immediately contest all parts of citations, and largely accommodate the interest cited by the Secretary. If the citation lacked special findings, and the operator otherwise lacked a need for an immediate hearing, we would expect him to postpone his contest of the entire citation until a penalty is proposed. Even if he were to immediately contest all of a citation but lacked an urgent need for a hearing, we see no reason why the contest of the citation could not be placed on the Commission's docket but simply continued until the penalty is proposed, contested, and ripe for hearing. *The two contests could then be easily consolidated* for hearing upon motion of a party or the Commission's or the administrative law judge's own motion.

Id. at 308 (emphasis added); *see also* Commission Procedural Rule 12, 29 C.F.R. § 2700.12 (“The Commission and its judges may at any time, upon their own motion or a party's motion, order the consolidation of proceedings that involve similar issues”).

The judge's order does not explain why the initiation of the civil penalty proceedings should result in the dismissal of the contest proceedings, as opposed to the consolidation of the contest and civil penalty proceedings, a procedure set forth in *Energy Fuels*. Accordingly, the Commission directs these cases for review on a question of law and Commission policy, and summarily vacates the judge's order and remands the cases for further proceedings. *See The Anaconda Co.*, 3 FMSHRC 299, 301-02 (Feb. 1981) (remanding for failure to provide supporting reasons). If on remand the judge elects to dismiss this matter, he should provide a rationale explaining why he chose to dismiss the cases instead of consolidating them with the penalty proceedings.¹

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

¹ Presently pending before the Commission on review is *Marfork Coal Co.*, Docket Nos. WEVA 2006-788-R, etc., which presents the issue of whether the judge properly dismissed contest proceedings prior to the issuance of proposed civil penalties. The issue presented in *Marfork* remains open notwithstanding our disposition of the instant cases.

Distribution

Rebecca J. Oblak, Esq.
Susan E. Wolford, Esq.
Atkins & Oblak, PLLC.
5000 Hampton Center, Suite 4
Morgantown, WV 26505

Neil A. Morholt, Esq.
Office of the Solicitor
U.S. Department of Labor
618 Church Street, Suite 230
Nashville, TN 37219-2456

Administrative Law Judge T. Todd Hodgdon
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001-2021