

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET, N.W., Room 6003

WASHINGTON, D. C. 20006-3867

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November 3, 2000

WHITE CONSTRUCTION CO. INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. SE 2000-228-RM
	:	A. C. No. 7759166;8/9/2000
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	:	Docket No. SE 2000-229-RM
	:	A.C. No. 7759167; 8/9/2000
	:	
	:	Docket No. SE 2000-230-RM
	:	A. C. No. 7759168;8/9/2000
	:	
v.	:	Docket No. SE 2000-231-RM
	:	A. C. No. 7759169;8/9/2000
	:	
	:	Docket No. SE 2000-232-RM
	:	A. C. No. 7759170;8/9/2000
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE 2000-233-RM
Respondent	:	A. C. No. 7759171;8/9/2000
	:	
	:	Docket No. SE 2000-234-RM
	:	A. C. No. 7759172;8/9/2000
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	:	Docket No. SE 2000-235-RM
	:	A. C. No. 7759173;8/9/2000
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	:	Docket No. SE 2000-236-RM
	:	A. C. No. 7759174; 8/9/2000
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	:	Docket No. SE 2000-237-RM
	:	A. C. No. 7759175;8/9/2000
	:	
	:	Docket No. SE 2000-238-RM
	:	A. C. No. 7759176;8/9/2000
	:	
	:	Docket No. SE 2000-239-RM
	:	A. C. No. 7759177; 8/9/2000
	:	
	:	Docket No. SE 2000-240-RM
	:	A. C. No. 7759178; 8/9/2000
	:	
	:	Docket No. SE 2000-241-RM
	:	A. C. No. 7759187;8/9/2000

ORDER OF DISMISSAL

Before: Judge Barbour

On September 8, 2000, counsel for the operator filed with the Commission notices of contest for fourteen citations that were issued against the operator on August 9, 2000 by an MSHA inspector. On September 11, 2000, I issued a letter acknowledging receipt of the notices of contest and advising the parties the docket numbers assigned to these matters. The September 11 acknowledgment letter was mailed to counsel for the operator and the Department of Labor's Solicitor's office in Arlington Virginia who represents MSHA.

On October 10, 2000, the Solicitor filed a motion to dismiss the notices of contest and memorandum in support of the motion. The Solicitor argues that the operator failed to notify the Secretary that it was contesting the citations as required by the Mine Act and Commission procedural rules. 30 U.S.C. § 815(d); 29 C.F.R. § 2700.20(b). According to the Solicitor, the Secretary first became aware of the contests when the Solicitor's Arlington office received the September 11 acknowledgment letter on September 12, 2000, which was forwarded to the Atlanta Regional office on September 18, 2000. On September 25, 2000, the Solicitor contacted the Commission and a copy of the notice of contest was faxed to him on that day. The Solicitor asserts that the Commission and the Secretary are two distinct entities under the Act and that service on one is not service on the other. The Solicitor also notes that in Diablo Coal Co., 15 FMSHRC 1605 (August 1993), I dismissed a notice of contest that was three days late because it deprived the Commission of jurisdiction.

On October 16, 2000, counsel for the operator filed a response to the Solicitor's motion to dismiss. Counsel asserts that he timely filed the notices with the Commission which was confirmed by the September 11 acknowledgment letter. In addition, counsel claims that White Construction filed its notice of contest with the Commission based on oral advice it had received from the Commission. Counsel alleges that White Construction was only instructed to file its notices with the Commission and to attach copies of all fourteen violations which it did. Counsel also distinguishes Diablo Coal noting that the operator in that case served neither the Secretary nor the Commission with its notice within the requisite thirty days. By contrast, the notices in these cases were timely filed with the Commission. Counsel asserts that this case is more like Rivco Dredging Corp., 10 FMSHRC 624 (1988), where the Commission held that "innocent procedural missteps alone should not operate to deny a party the opportunity to present its objections to citations or orders."

Section 105(d) of the Mine Act, 30 U.S.C. § 815(d), provides in relevant part:

If, within 30 days of receipt thereof, an operator . . . notifies the Secretary that he intends to contest the issuance . . . of an order issued under section 104(a), or citation . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing.

Commission Rule 20(b) carries over the requirements of section 105(d) and states:

Contests filed by an operator. . . shall be filed with the Secretary at the appropriate Regional Solicitor's Office or at the Solicitor's Office, Mine Safety and Health Division, Arlington Virginia, within 30 days of receipt by the operator of the contested citation, order, or modification.

Commission Rule 20(c), 29 C.F.R. § 2700.20(c), requires the Secretary to notify the Commission immediately when a notice of contest has been filed.

A long line of cases dating back to the Interior Board of Mine Operation Appeals have held the late filing of notices of contest of citations is not permissible under the Mine Act and under its predecessor the Federal Coal Mine Health and Safety Act of 1969. Consolidation Coal Company, 1 MSHC 1029 (1972); Old Ben Coal Co., 1 MSHC 1330 (1975); Alexander Brothers, 1 MSHC 1760 (1979); Island Creek Coal Co. v. Mine Workers, 1 FMSHRC 989 (Aug 1979); Amax Chemical Corp., 4 FMSHRC 1161 (June 1982); Industrial Resources, Inc., 7 FMSHRC 416 (March 1985); Allentown Cement Company, Inc., 8 FMSHRC 1513 (October 1986); Rivco Dredging Corporation, 10 FMSHRC 889 (July 1988); Big Horn Calcium, 12 FMSHRC 463 (March 1990); Prestige Coal Co., 13 FMSHRC 93 (January 1991); Costain Coal Inc., 14 FMSHRC 1388 (August 1992); Diablo Coal Company, 15 FMSHRC 1605 (August 1993); C and S Coal Company, 16 FMSHRC 633 (March 1994); Asarco, Incorporated, 16 FMSHRC 1328 (June 1994); See also, ICI Explosives USA, Inc., 16 FMSHRC 1794 (August 1994). However, late filing of a contest of a citation or order has been allowed where the Secretary's own conduct is responsible for the operator's delay in filing a notice of contest. Blue Diamond Coal Company, 11 FMSHRC 2629 (Dec. 1989), See also, Consolidation Coal Co., 19 FMSHRC 816 (April 1997); Freeman Coal Mining Corporation, 1 MSHC 1001 (1970).

The Mine Act and Commission rules are explicit in requiring the Secretary to be notified of the operator's intent to contest within 30 days of the issuance of a citation. It is clear in the instant matters that counsel did not notify the Secretary as required by the Mine Act and Commission Rules. The notices were sent to the Commission and not to the Secretary. Notification of the Secretary was only achieved when the September 11 acknowledgment letter was mailed which was more than 30 days after the citations were issued. Therefore, the contests were untimely and it must be determined whether these cases should be dismissed in accordance with established precedent or whether the operator's failure to timely contest falls within the exception as set forth above where actions of the Secretary cause an operator to be late.

Counsel does not allege that the Secretary engaged in conduct that resulted in the delay, rather he alleges the actions of the Commission that were to blame. Counsel claims that the operator was only instructed to file the notices with the Commission and to attach copies of the violations. Counsel does not state who was contacted at the Commission with respect to the filing of the contests or the questions asked that individual, but simply identifies one alleged statement made by a Commission employee regarding the requirements for filing a contest with

the Commission. The Commission has no record of receiving a telephone call concerning these matters.

Moreover, a review of the notices of contest shows that counsel was unaware of the independent role of the Commission. Counsel erroneously addressed his contests to the “United States Department of Labor, Federal Mine Safety and Health Review Commission.” I can only assume he did so because he did not familiarize himself with the Mine Act or the rules of the Commission prior to contacting the Commission or making his filing. Had he consulted the rules or the Act it should have been evident that the Secretary and the Commission are independent entities and that he was required to file his contests in a timely fashion with the Secretary. Because counsel has failed to demonstrate that misconduct by the Commission occurred in these matters and because counsel has failed to justify why he was unaware of the Commission’s rules and the Mine Act’s requirements, I find that sufficient reasons do not exist to permit these untimely notices of contest to proceed and therefore these matters must be dismissed.

In light of the foregoing, the Solicitor’s motion to dismiss these case is **GRANTED** and it is **ORDERED** that these cases are **DISMISSED**. Counsel for the operator should note, however, that the failure properly to contest a citation does not preclude the operator from challenging in a subsequent civil penalty proceeding the violation alleged in the citation and/or any of the findings associated with the alleged violation.

David F. Barbour
Chief Administrative Law Judge

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