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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

PERMAC, INC., APPLICANT	Applications for Review
v.	Docket No. NORT 79-69 Citation No. 0693222
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. NORT 79-70 Citation No. 0693221 Docket No. NORT 79-71 Citation No. 0693223

DECISION GRANTING MOTION TO DISMISS

Appearances: T. E. Stafford, Director of Personnel, Permac, Inc., for Applicant;
Edward Fitch, Esq., Office of the Solicitor, Department of Labor, for Respondent.

Before: Judge Cook

Applications, apparently pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 for review of citations issued pursuant to section 104(a) of the Act, were filed for Permac, Inc. In its application, Permac alleged that all of the citations have been abated.

On March 9, 1979, MSHA filed an answer and a motion to dismiss. In its motion, MSHA alleged, that "section 105(d) of the Act does not authorize review of these abated citations and consequently these actions must be dismissed."

The Applicant filed no response to this motion and the time allowed for such a response has passed.

The motion to dismiss will be granted because the Applicant in these proceedings is not challenging the reasonableness of the length of abatement time fixed in the citations and the Applicant is premature as to a review of the citations on any other issue. There is no showing that a notice of proposed assessment of penalty has been issued in these cases as yet.

Section 104(a) of the 1977 Act provides for the issuance of citations by an inspector for violations committed by an operator of a mine.

Section 105(a) of the 1977 Act provides in pertinent part:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. * * * If, within 30 days from the receipt of the notification issued by the Secretary, the operator fails to notify the Secretary that he intends to contest the citation or the proposed assessment of penalty, and no notice is filed by any miner or representative of miners under subsection (d) of this section within such time, the citation and the proposed assessment of penalty shall be deemed a final order of the Commission * * *. [Emphasis added.]

Section 105(d) of the 1977 Act also sets forth provisions for the assessment of penalties where the Secretary believes an operator has failed to correct a violation within the period permitted for its correction. Under this provision, the operator also has 30 days within which to contest the Secretary's "notification of the proposed assessment of penalty."

Section 105(d) of the 1977 Act provides in pertinent part:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104, * * * the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing * * *. [Emphasis added.]

A study of subsection 105(d) shows that Congress provided for review to be obtained as relates to three categories of actions taken by representatives of the Secretary of Labor. First, an operator is permitted to "contest the issuance or modification of an order issued under section 104." Second, an operator is permitted to obtain review of a "citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b)" of section 105. Third, an operator is permitted to obtain review of "the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104."

In view of subsection 105(a), the words of subsection 105(d) referring to review of "a citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) * * *" must be read to mean that the citation can be reviewed when the notification of proposed assessment is reviewed.

It is therefore clear that the time for the Applicant to file an application to review a citation will not begin to run until after a notice of proposed assessment of penalty has been received by the operator, except in the instance where the operator intends to contest the reasonableness of the length of abatement time fixed in the citation. The issue as to the validity of the citation will then be determined in the civil penalty proceeding.

The operator can then contest both the fact of violation (i. e., the citation) and the amount of the penalty, assuming there is a violation. If he fails to file such a notice within 30 days as provided, both the citation and the penalty become a final order of the Commission.

This interpretation is supported by the legislative history. An extensive discussion of this history is contained in decisions on similar motions by Judge Steffey in Itmann Coal Company v. MSHA (HOPE 78-356), dated May 26, 1978, and Judge Merlin in United States Steel Corporation v. MSHA (PITT 78-335), dated July 11, 1978.

The Procedural Rules of the Federal Mine Safety and Health Review Commission contain certain regulations relating to the processing of applications for review of citations and orders. Part of these rules are contained in 29 CFR 2700.18(a). If it were not for the fact that the intent of Congress is expressed in subsections 105(a) and (b) and subsection 105(d) of the 1977 Act, it would be possible to argue that 29 CFR 2700.18(a) allows review of citations generally rather than only as to the reasonableness of the length of abatement time. However, the word "citation" in the regulation cannot be construed to grant more than the type of review of a citation which the statute itself grants at that stage, and that is a review of the reasonableness of the time for abatement. Unlimited review of the citation will eventually be obtained, but that will take place during the course of the civil penalty proceeding.

In view of the statements of the Court of Appeals in Sink v. Morton, 529 F.2d 601 (4th Cir. 1975), it is clear that no due process problem arises in this instance.

The court therein noted that the District Court:

> [T]hough concluding that the obligation of the plaintiff to "exhaust his administrative remedies under the Act [was] entirely reasonable and in accord with accepted principles of administrative law," held that the plaintiff

> had made a showing of irreparable harm, without any countervailing interests of safety, by reason of the "failure of the Secretary of the Interior to utilize his discretion in order to provide a hearing before a mine closure order is issued" and had "had no opportunity to present his case to the appropriate authorities." For these reasons, it granted an injunction against the enforcement of the notice and withdrawal orders "pending a final administrative determination of the issues involved." [Footnote omitted.]

at 603.

The Court of Appeals ruled that the District Court erred in this finding. It went on to state:

> Nor is it of any moment that the inspector's withdrawal orders were issued without a hearing. By appeal, the plaintiff can obtain a hearing, which, by the terms of the Act, is to be held as soon as practicable, and he is accorded the right to apply, as an incident to that appeal, for a temporary stay of the orders. Such procedure accords the plaintiff due process. Due process does not command that the right to a hearing be held at any particular point during the administrative proceedings; it is satisfied if that right is given at some point during those proceedings. Reed v. Franke (4th Cir. 1961) 297 F.2d 17, 27.

at 604.

Accordingly, MSHA's motion to dismiss is GRANTED. IT IS THEREFORE ORDERED that the above-captioned proceedings be, and they hereby are, DISMISSED.

John F. Cook
Administrative Law Judge