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SOL (MSHA) V. NORTHERN AGGREGATES
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, Civil Penalty Proceeding
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), Docket No. YORK 79-79-M
PETITIONER A.C. No. 30-01267-05005

v. Fulton Plant

NORTHERN AGGREGATES, INC.,
RESPONDENT

DECISION AND ORDER OF DISMISSAL

Appearances: Jithender Rao, Esq., Office of the Solicitor,
U.S. Department of Labor, Rm, 3555, 1515
Broadway, New York, New York, for Petitioner
Paul A. Germain, Esq., Germain & Germain,
Syracuse, New York, for Respondent

Before: Administrative Law Judge Melick

This case is before me upon a petition for assessment of civil penalty under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., hereinafter referred to as the "Act." At hearings commencing February 20, 1980, in Syracuse, New York, Petitioner moved to dismiss this proceeding on the grounds that the operator, Northern Aggregates, Inc. (Northern), did not file its notice of contest to the proposed assessment of penalty within 30 days of its receipt. Petitioner asserts that under section 105(a) of the Act, such failure to timely contest the proposed assessment caused the citation and proposed assessment to become a final order of the Commission not subject to review by any court or agency. Section 105(a) provides in relevant part, as follows:

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

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or the proposed assessment of penalty, * * * the citation and the proposed assessment of penalty shall be deemed a final order of the Commission and not subject to review by any court or agency * * *.

The parties have stipulated, and therefore there is no dispute, that Northern received the proposed assessment of penalty in this case on May 19, 1979, and that it filed its notice of contest on August 9, 1979, more than 2-1/2 months later. Northern contends, however that under the Commission's Rules of Procedure, 29 C.F.R. 2700.63 and 29 C.F.R. 2700.9, the administrative law judge has the discretionary authority to permit late filing for good cause. Rule 2700.9 does provide for good cause extensions of time but it also requires that a request for an extension of time be filed 5 days before the expiration of the time allowed for its filing. Since no such request was made in this case Rule 2700.9 would in any event be inapplicable. Rule 2700.63 requires that before the entry of any order of default or dismissal for failure of a party to comply with an order of a judge or the rules, an order to show cause must first be directed to the party. Northern has in this case however failed to comply with a statutory filing requirement as distinguished from a requirement in the rules or under a judge's order. Rule 2700.63 (as well as Rule 2700.9) is therefore inapplicable to this proceeding.

Since there are no provisions for consideration of good cause for late filing under section 105(a), but only a precise statutory directive that upon failure to timely file a notice of contest the citation and the proposed assessment of penalty "shall be deemed a final order of the Commission and not subject to review by any court or agency," it is apparent that the Petitioner's motion to dismiss must be granted as a matter of law. I have no jurisdiction to consider the merits of the case or to even consider whether good cause existed for the late filing. Similar provisions under section 10(a) of the Occupational Safety and Health Act 29 U. S. C. 659(a), have been interpreted similarly. * Secretary v. American Airlines, Inc., BNA 2 OSHC 1326 (1974), CCH/OSHD 18,908 (1974-1975).

Under the circumstances, the citation and proposed assessment dated May 14, 1979, and received by the operator on May 19, 1979, became the final order of the Commission 30 days after its receipt by the operator. Since a jurisdictional defect cannot be waived it is immaterial that the Secretary erroneously initiated these proceedings before the Commission. Consolidation Coal Co., 1 IBMA 131 at 137 (1972). This case is therefore dismissed for lack of jurisdiction.

Gary Melick
Administrative Law Judge

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29 U. S. C. 659(a) provides as here relevant:

"If, within fifteen working days from the receipt of the notice * * * the employer fails to notify the Secretary that he intends to contest * * * the citation and the assessment * * * shall be deemed a final order of the Commission and not subject to review by any court or agency."