CCASE:

RIVCO DREDGING V. SOL (MSHA)

DDATE: 19880712 TTEXT: Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)

Office of Administrative Law Judges

RIVCO DREDGING CORPORATION,
CONTESTANT

CONTEST PROCEEDINGS

v.

Docket No. KENT 88-23-R Citation No. 2985271; 9/17/87

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

Docket No. KENT 88-24-R Citation No. 2985272; 9/17/87

River Dredge Mine Mine ID 15Ä12672

ORDER OF DISMISSAL

Before: Judge Maurer

It is undisputed that the two citations at bar (Nos. 2985271 and 2985272) were issued on September 17, 1987, and that Contestant did not notify Respondent or the Commission of its intent to contest the citations until the MSHA office in Pikeville, Kentucky received a notice of contest on October 21, 1987. The Commission was not forwarded notification until November 16, 1987, when it received the correspondence via the Department of Labor.

Under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., the operator must notify the Secretary of its intent to contest a citation within 30 days of its receipt. Here, the Secretary was notified only after the 30 days had elapsed. The contests were accordingly filed untimely and are therefore DISMISSED. Alexander Bros., Inc., 1 MSHC 1760 (1979); Island Creek Coal Co., 1 MSHC 2143 (1979).

Because this dismissal is on jurisdictional grounds, and this Commission is without subject-matter jurisdiction over the citations at bar in these contest proceedings, I find Rivco's failure to contest the associated proposed civil penalty assessments because Mr. Wilson did not recognize or understand the need to also file such a contest to be a moot point herein, having no bearing on these two contest proceedings.

Regardless of Rivco's reasons for failing to contest the associated civil penalty proposals, the fact is that a long line of precedent going back to the Interior Department's former Board of Mine Operations Appeals holds that the 30Äday time limit prescribed in the statute for the filing of an application for review is a statutory limitation on the Commission's authority to review such an application and is jurisdictional. Freeman Coal Mining Corp., 1 MSHC 1001 (1970).

Therefore, even if I should find that Rivco's failure to contest the associated civil penalty proposals was due to the excusable neglect, mistake or inadvertence of the operator, it would not serve to create subject-matter jurisdiction where none heretofore existed, i.e., in these two contest proceedings.

Apropos that point, I also note for the record that unlike the M.M. Sundt Construction Co.,(Footnote 1) and Kelley Trucking Co.,(Footnote 2) cases referred to by the Commission in its Order of May 26, 1988, there are no civil penalty cases before me which could serve as the potential vehicle to give equitable relief to the operator herein should that be appropriate because the Secretary has never filed and presumably does not intend to file a Complaint Proposing Penalty concerning these two citations. Under those circumstances, there is not now nor will there ever be created a civil penalty case in which to litigate Rivco's objections to these citations.

Roy J. Maurer Administrative Law Judge

 ${\tt \sim Footnote_one}$

1 8 FMSHRC 1269 (1986).

~Footnote_two

2 8 FMSHRC 1867 (1986).