

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

July 31, 1990

|                              |   |                                |
|------------------------------|---|--------------------------------|
| ENERGY FUELS MINING COMPANY, | : | CONTEST PROCEEDING             |
| Contestant                   | : |                                |
|                              | : | Docket No. WEST 90-211-R       |
| V.                           | : | Citation No. 3240559; 12/11/89 |
|                              | : |                                |
| SECRETARY OF LABOR,          | : | Raton Creek No. 2              |
| MINE SAFETY AND HEALTH       | : |                                |
| ADMINISTRATION (MSHA)        | : | Mine ID 05-3817                |
| Respondent                   | : |                                |

ORDER OF DISMISSAL

Before: Judge Merlin

On June 22, 1990, I issued an order stating that it was not clear from the pleadings then of record whether the operator was filing a notice of contest challenging the issuance of the subject withdrawal order or was contesting the penalty assessment. The parties were directed to submit further information and to set forth their positions with respect to the timeliness of the operator's filings.

From the statements now filed by the parties, it appears that the notice of contest filed on May 24, 1990, was directed to the penalty assessment.<sup>1</sup> The Solicitor advises that the penalty proposal was sent to the operator on March 7, 1990, and according to the return receipt card was received on March 15, 1990. The Solicitor claims the filing is untimely and must be dismissed. The operator argues the filing should be accepted.

Section 105(a) of the Mine Act, 30 U.S.C. § 815(a), 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

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<sup>1</sup> The notice of contest was filed with Commission's Office of Administrative Law Judges in Falls Church, Virginia. It should have been filed at Commission headquarters in Washington, D.C. 29 C.F.R. § 2700.5.

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. A copy of such notification shall be sent by mail to the representative of miners in such mine. 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, \* \* \* 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. \* \* \* \*

Section 2700.25 of Commission regulations, 29 C.F.R. § 2700.25, states as follows:

The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of: (a) The violation alleged; (b) the amount of the penalty proposed; and (c) that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty. If within 30 days from the receipt of the Secretary's notification of proposed assessment of penalty, the operator or other person fails to notify the Secretary that he intends to contest the proposed penalty, the Secretary's proposed penalty shall be deemed to be a final order of the Commission and shall not be subject to review by the Commission or a court.

And Section 100.7(b) of the Secretary of Labor's regulations, 30 C.F.R. § 100.7(b) reads in relevant portion:

Upon receipt of the notice of proposed penalty, the party charged shall have 30 days to: (1) Pay the proposed assessment (acceptance by MSHA of payment tendered by the party charged will close the case); or, (2) notify MSHA in writing of the intention to contest the proposed penalty. The Office of Assessments shall provide a return mailing card with each notice of proposed penalty to be used by the party charged to request a hearing before the Federal Mine Safety and Health Review Commission under Section 105 of the Act. Such a request must be sent to the address listed on such notification. When MSHA receives the notice of contest, it shall immediately advise the Commission of such notice, and shall promptly forward the case to the Office of the Solicitor. No proposed penalty which has been contested before the Commission, shall be compromised, mitigated or settled except with the approval of the Commission.

(c) The failure to pay or to contest the proposed penalty within 30 days of receipt of notice thereof shall result in the proposed penalty being deemed a final order of the Commission and not subject to review by any court or agency.

As set forth above, the operator received notice of the proposed penalty by March 15, 1990. It took no action within 30 days. Indeed, it has never sent back the return mailing card (commonly called the "blue card") provided by MSHA to request a hearing. The notice of contest which was not filed until May 24, 1990, was 40 days late.

Since the operator failed to file within the statutorily prescribed time period, this case must be dismissed. The Act specifically mandates that a penalty not contested within the allotted period the proposed assessment shall be deemed a final order of the Commission not subject to review by any court or agency. Northern Aggregates Inc., 2 FMSHRC 1062 (May 1980) (Administrative Law Judge Melick). Cf. J. P. Burroughs and Sons, Inc., 3 FMSHRC 854 (April 1981); Old Ben Coal Comoanv., 7 FMSHRC 205 (February 1985); Local Union 2333, District 29, UMWA v. Ranger Fuel Corporation, 10 FMSHRC 612, 618 (May 1988); Peabody Coal Comoanv., 11 FMSHRC 2068, 2092, 2093 (October 1989) (Administrative Law Judge Koutras).

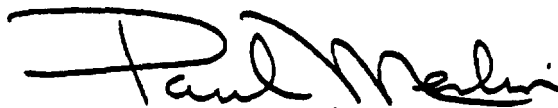
In this connection it must also be noted that a long line of cases going back to the Interior Board of Mine Operation Appeals have held that cases contesting the issuance of a citation must be brought within the statutory prescribed 30 days or be dismissed. Freeman Coal Mining Corporation, 1 MSHC 1001 (1970); Consolidation Coal Co., 1 MSHC 1029 (1972); Island Creek Coal Co. v. Mine Workers, 1 MSHC 2143 (1979), aff'd by the Commission, 1 FMSHRC 989 (August 1979); Amax Chemical Corn., 4 FMSHRC 1161 (June 1982) (Administrative Law Judge Steffey); Rivco Dredging Corp., 10 FMSHRC 889 (July 1988) (Administrative Law Judge Maurer); See Also, Peabody Coal Co., supra; and Big Horn Calcium, 12 FMSHRC 463 (March 1990) (Administrative Law Judge Cetti). Accordingly, the time requirements for contesting the issuance of a citation and for contesting the penalty assessment which appear together in section 105(a), must be viewed as jurisdictional. It is well settled that jurisdiction cannot be waived and can be raised by the court sua sponte at any stage of the proceedings. Insurance Corporation of Ireland, LTD, et al. v. Compagnie des Bauxites, 456 U.S. 694, 701-702 (1982); Athens Community Hospital, Inc. v. Schweiker, 686 F.2d 989 (D.C. Cir. 1982).

The only case cited by the operator, Humphrey v. Samples, 1 MSHC 1723 (1979), is distinguishable. It involved a complaint of discrimination filed under Section 105(c) of the Act. 30 U.S.C. § 815(c). The legislative history of 105(c) expressly

provides that the time allowed for filing a discrimination case should not be construed strictly where the filing of the complaint is delayed under justifiable circumstances. S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in Senate Subcommittee on Labor, committee on Human Resources, 95th Cong. 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, p. 624 (1978). Brvant v. Dinaess Mine Service, et al., 9 FMSHRC 336 (February 1987) (Administrative Law Judge Broderick); McIntosh v. Flaquet Fuels, 12 FMSHRC 1151 (May 1990) (Administrative Law Judge Koutras).

The foregoing is dispositive. But it is noted that this operator has appeared before the Commission in many other proceedings, is represented by counsel and offers no excuses for its tardiness.

In light of the foregoing, this case is DISMISSED.



Paul Merlin  
Chief Administrative Law Judge

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