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MSHA V. WALLACE BROTHERS  
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-372-M
Petitioner	:	A. C. No.
	:	
v.	:	Portable Crusher
WALLACE BROTHERS,	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On March 23, 1992, the Commission received a communication a petition dated March 17, 1992, from operator which was styled a for review of a proposed assessments.

The "petition" sets forth the following:

1. On May 29, 1991, Wallace Brothers portable crusher received Citation Nos. 3640554, 3640551 and 3640552.

2. On June 7, 1991, counsel wrote the MSHA District Manager requesting a safety and health conference and asking that all communications regarding these citations be sent to this office. (A copy of the June 7 letter was enclosed with the petition).

3. MSHA did not provide the requested conference and counsel was never notified or sent copies of any communications regarding the citations.

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4. In January, 1992, counsel was given copies of the Proposed Assessments by a representative of Wallace Brothers.

5. On February 3, 1992, counsel wrote the Civil Penalty Compliance Office requesting information and clarification about the citation and complaining that the requested conference had not been provided.

6. On February 13, 1992, the Director of Assessments advised counsel that the assessment was final because it was not contested within 30 days and that if he wanted to know why the request for a conference was not granted, he should write the District Manager.

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 terminations 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. 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 of any court or agency. \* \* \* \*

This provision is repeated in section 2700.25 of the Commission regulations, 29 C.F.R. 2700.25 and section 100.7(b)&(c) of the Secretary of Labor's regulations, 30 C.F.R. 100.7(b).

Section 105(d) of the Mine Act, 30 U.S.C. 815(d), sets forth the Commission jurisdiction and states in relevant 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 under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section \* \* \* the Secretary shall immediately advise the Commission of such notification and the Commission shall afford an opportunity for a hearing \* \* \* and thereafter

shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief. \* \* \* \*

As set forth above, the Act specifically states that if a penalty is not contested within the allotted time, the proposed assessment shall be deemed a final order of the Commission not subject to review by a court or agency. Therefore, the time requirements for contesting the penalty assessment must be viewed as jurisdictional. Energy Fuels Mining Company, 12 FMSHRC 1484, 1486 (July 1990), Northern Aggregates Inc., 2 FMSHRC 1062 (May 1980). Though jurisdiction has not raised, 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). Consequently, the Commission cannot provide a hearing for a contest which was not filed within the prescribed time because it lacks jurisdiction.

According to the February 13 letter by the Director of Assessments, the proposed assessments in this case were received by the operator on October 29, 1991. The operator took no action during the 30 days. Nothing in the file indicates that

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the operator has ever sent back the return mailing card (commonly called the "blue card") provided by MSHA with the proposed assessment to request a hearing. Not until sometime in January 1992 did the operator bring this matter to the attention of its counsel who then inquired about these citations on February 3, 1992. On February 13, 1992, the Director of Assessments responded to counsel's inquiry advising him about the status of this case. Finally, on March 23, 1992, counsel for the operator filed this action almost 150 days after the proposed penalty was received by the operator. Accordingly, I find that the operator failed to file its notice of contest of the proposed assessments within the prescribed statutory limits.

While the time requirements are jurisdictional, it is within the Commission's authority to determine whether a contest should be accepted as timely filed. J.P. Burroughs and Son, Inc., 3 FMSHRC 854 (April 1981).

In defense of its failure to contest the assessments, operator's counsel argues that he was not properly served the proposed assessment since he complied with 30 C.F.R. 41.30 and that the failure by MSHA to serve him with the proposed assessment denied the operator of the right to be represented by their attorney and was a denial of due process.

MSHA requires that all operator's file an legal identity report as set forth in 30 C.F.R. 41.20:

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Each operator of a coal or other mine shall file notification of legal identity and every change thereof with the appropriate district manager of the Mine Safety and Health Administration by properly completing, mailing or otherwise delivering form 2000-7  
\* \* \* \*

The Secretary does permit operators to designate other addresses for service as stated in 30 C.F.R. 41.30 which provides in relevant part:

The address of record and telephone number required under this part shall be considered the operator's official address and telephone number for purposes of the Act. \* \* \* However, operators may request service by delivery to another appropriate address provided by the operator.

One of the uses the Secretary has for the legal identity report is for service of proposed assessments which is provided in 30 C.F.R. 100.8 and states:

(a) All operators are required by 30 C.F.R. Part 41 (Notification of Legal Identity) to file with MSHA the name and address of record of the operator. \* \* \* Proposed penalty assessments delivered to those addresses shall constitute service

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Consistent with 40.31, the Secretary in 30 C.F.R. 100.8(b) also provides procedures for those operators who wish to designate another address other than the legal identity report for service of the proposed assessment which states:

(b) If any of the parties choose to have proposed penalty assessments mailed to a different address, the Office of Assessments must be notified in writing of the new address. Delivery to this address shall also constitute service.

Counsel in this instance provided only the District Manager with an address other than the one on the legal identity report and not the Office of Assessments. Therefore, since the MSHA complied with its regulations in serving the operator and the operator did not notify the Office of Assessment of the address of its counsel, I find that the operator was properly served.

Finally, the operator's counsel claims that it was denied due process because the Secretary did not provide a Health and Safety Conference according to section 100.6(a). As stated in section 105(d), supra, the Commission is empowered to provide a hearing when the operator has notified the Secretary within 30 days after receipt of the proposed assessment that it wishes to contest it. The Secretary's internal procedures prior to a case coming before the Commission are not within the Commission's jurisdiction.



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Since the operator failed to file within the statutorily prescribed time period and was properly served with the proposed assessment, I hold that the Commission lacks jurisdiction and that this case must be dismissed.

In light of the foregoing, it is ORDERED that this case be DISMISSED.

Paul Merlin  
Chief Administrative Law Judge

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