CCASE:
MSHA V. WALLACE BROTHERS
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TTEXT:

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.

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. [A copy of the February 13 letter was attached.]

For purposes of considering the petition at this stage the representations contained therein are accepted.

Section 105(a) of the Mine Act, 30 U.S.C. 815(a) provides that an operator has 30 days after receipt of the proposed assessment to notify the secretary that it wishes to contest the assessment. If a penalty is not contested within the allotted time, the proposed assessment is deemed to be a final order of the Commission not subject to review by any court or agency. This provision is repated in section 2700.25 of the Commission's regulatiions, 29 C.F.R. 2700.25 and section 100.7 (b) and (c) of the Secretary of Labor's regulations, 30 C.F.R. 100.7 (b) and (c). Pursuant to section 105 (d) of the Mine Act, 30 U.S.C. 815 (d), the Commission provides a hearing if the operator has notified the Secretary within the 30 days that it wishes to contest the proposed assessment.

According to the February 13 letter by the Director of Assessments, the proposed assessments in this case were receive by the operator on October 29, 1991. 1 The operator took no action during the following 30 days. Indeed, it does not apppear that the operator or its attorney has ever requested a hearing by sending back the return mailing card (commonly called the "blue card") which is provided by MSHA to operators along with the proposed assessment. Not until after the operator gave counsel the notice of delinquent civil penalty did counsel inquire about these citations in his letter of February 3, 1992.

The Act mandates that a penalty not contested within the allotted perion the proposed assessmentshall be deemed a final order ot the Commission not subject to review by any court or agency. Energy Fuels Mining Company, 12 FMSHRC 1484 (July 1990). Northern Aggregates Inc., 2 FMSHRC 1062 (May 1980). Cf. F.P Burroughs and Sons, Inc., 3 FMSHRC 854 (April 1981); Old Ben Coal Company, 7 FMSHRC 205 (Feburary 1985); Local Union 2333, District 29, UMWA v. Ranger Fuel Corporation, 10 FMSHRC 612, 618 (May 1988); Peabody Coal Company, 11 FMSHRC 2068, 2092, 2093 (October 1989.)

In connection it must also be noted that a long line of cases going back to the Interion Board of Mine Operation Appeals has held that cses contesting the issuance ot a citation must be Freeman Coal Mining Corporation, 1 MSHC 101 (1970); Consolida tion Coal Co., 1 MSHC 1029 (1972); Island Creek Coal Co. v. Mine Workers, 1 MSHC 1029 (1972); Island Creek Coal Co. v. Mine Workers, 1 MSHC 2143 (1979), aff'd by the Commission, 1 FMSHRC 1982); Rivco Dredging Corp., 10 FMSHRC 889 (July 1988); See Also, Peabody Coal Co., supra; and Big Horn Calcium, 12 FMSHRC 463 (March 1990). Accordingly, the time requirements for contesting the isssurance of a citation and for contesting the penalty assess- ment which appear together in section 105(a), must be viewed as

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1 The letter also shows that Citation No. 3640554 was not inclused in that assessment package. Therefore, this citation is not a part of this case.

jurisdictional. It is well settled that durisdiction cannot be waived and can be raised by the court 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).

Counsel did not contract MSHA until almost eight months after he had requested a conference. Under 30 CF.R. 100.6 (c) of the Secretary's regulations the decision whether or not to grant a conference is within the sole discretion of MSHA. The jurisdic-tionof the Commission is defined and limited by the Act. An administrative agency cannot exceed the jurisdictional authority granted to it by Congress. As the Commision has pointed out, several provisions of the Act grant subject matter jurisdiction by establishing specific enforecement and contest proceedings and other forms of actions over which the Commission presides. Kaiser Coal Company, 10 FMSHRC 1165, 1169 (September 1988). The Commission has been given no jurisdiction over MSHA's internal practices and procedures. Cf. Mid-Continent Resourses, 11 FMSHRC 1015 (June 1989). Under circumstances far more compelling than those presented here, I have held that the Act and regulations those persented here, I have that the Act and regulations afford no basis to excuse tardiness because the operator mistak-enly believed it could pursue avenues of relief with MSHA before coming to this separate and independent Commission to challenge a citation. Prestige Coal COmpany, 13 FMSHRC 93 (January 1991).

Finally, operator's counsel alleges a denial of due process because communications regarding the subject citations were not sent to him as his June 7, 1991 letter to the District Manager requested. Counsel cntends that his request compiled with 30 C.F.R. 41.30 which provides that operators may request service to another appropriate address. See also 30 C.F.R. 41.20. Counsel, however, overlooks 30 C.F.R. 100.8 (b) whcih requires that of an operator chooses to have proposed assessments mailed to a different address the Office of Assessments must be notified in writing of the new address. Counsel failed to comply with 100.8 (b) because he only wrote the District Manager rather than the Office of Assessments. Section 100.8 was designed to prevent just such a sitution as this. Counsel is chargeable with knowledge of all applicable regulations.2 Under the circum-stances, service was proper and there is no basis for any exten-sion.

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2 It is noted that in his argument regarding the denial of a conference, counsel demonstrates his awareness of other sections of Part 100.

In light of the foregoing, I conclude that this case must be dismissed due to the operator's failure to timely request a hearing.

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

Paul Merlin
Chief Administrative Law Judge

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