

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 17, 1999

D. H. BLATTNER & SONS,	:	CONTEST PROCEEDING
INCORPORATED,	:	
Contestant	:	Docket No. CENT 95-121-RM
	:	Mine ID 29-00233
v.	:	
	:	Continental Pit
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
Respondent	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On February 17, 1995, the contestant filed a notice of contest alleging it was given a verbal order by an inspector of the Mine Safety and Health Administration (hereafter referred to as "MSHA"), to comply with 30 C.F.R. ' 41.20 or be shut down. The regulation requires operators to file a notification of legal identity with the appropriate MSHA district manager. The contestant argues that because it is an independent contractor, the regulation should not be applied to it. According to the contestant, it is a party in other cases now on appeal before the Commission which present the same issue. Those cases involve a different mine and operator.¹

On March 9, 1995, an order was issued directing the Solicitor to file a response to the notice of contest. On April 6, 1995, the Solicitor filed a motion to dismiss, denying that a verbal order had been issued for failure to file a legal identity report. The Solicitor further asserts that on January 10, 1995, MSHA issued a citation to the contestant under section 104(a), 30 U.S.C. ' 814(a), alleging a violation of 30 C.F.R. ' 41.20. The Solicitor states that the contestant did not seek review of the citation and that this contest is an attempt to confer jurisdiction upon the Commission with respect to it. The instant complaint however, makes no mention of the January 10 citation. After receiving the Solicitor's motion to dismiss, the contestant

¹ Docket Nos. WEST 93-123, WEST 93-286, and WEST 94-5-M.

filed a brief alleging that it had not been served with such a citation.

With respect to the alleged January 10 citation, it is noted that section 105(d) of the Mine Act, 30 U.S.C. ' 815(d), provides an operator with dual avenues of relief. An operator may within

30 days of the receipt thereof contest the issuance or modification of any order or citation. 29 C.F.R. ' 2700.20, 2700.21. In addition or as an alternative, the operator may wait until the Secretary notifies it of a proposed penalty assessment for the alleged violation and then file a notice of contest. 29 C.F.R. ' 2700.25, 2700.26. In this case if a penalty assessment is proposed with respect to the January 10 citation, the operator can challenge the citation and the assessment at that time and raise the issue of service.

The Commission has no jurisdiction to review the alleged verbal order issued on January 18, 1995, by an MSHA inspector requiring it to obtain a legal identity number or be shut down.

Section 104 of the Act, supra, sets forth the conditions under which the Secretary may issue citations to operators for violations of the Act and thereafter issue orders of withdrawal. Citations are expressly required to be in writing and it is clear the Act contemplates that orders issued after the citations also be in writing. The legislative history of the Act demonstrates that citations and orders are treated the same. S. Rep. No. 461, 95th Cong., 1st Sess. 47 (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, at 1325 (1978). Section 109 of the Act, 30 U.S.C. ' 819, provides, inter alia, that orders and citations be posted on a bulletin board at the mine. Also, Commission regulations require that a legible copy of the contested citation or order be attached to the operator's notice of contest and that if a legible copy is not available, the text of the citation or order be set forth in the notice of contest. 29 C.F.R. ' 2700.20(e). To comply with the posting and filing provisions, the citation or order must be in writing.

Accordingly, even assuming the operator received a verbal order as it alleges, such an order would be of no effect because it was not in writing. No penalty assessment can be based upon an oral communication. If the operator disagrees with an inspector's verbal communications, it may wait until the inspector completes and serves a written order. Then it can abate the order to avoid the effects of a withdrawal order and seek review before the Commission. If the operator decides not to abate, in which case the withdrawal order takes effect, it may seek expedited review before the Commission. Section 105(d), supra;

29 C.F.R. §§ 2700.20, 2700.52. An administrative agency is a creature of Congress and cannot exceed the jurisdiction given to it by Congress. Lyng v. Payne, 476 U.S. 926, 937 (1986); Killip v. Office of Personnel Management, 991 F.2d 1564, 1569 (Fed Cir. 1993). The Commission has followed this principle. Kaiser Coal Corp., 10 FMSHRC 1165, 1169 (September 1988). Under section 105(d), supra, the operator can seek review of an order or citation issued under section 104 and the Commission is directed to afford an opportunity for a hearing under 5 U.S.C. § 554. Since any order or citation issued under section 104 must be in writing, the Commission's jurisdiction extends only to such orders and citations.

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

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Michael S. Lattier, Esq., James B. Lippert, Esq., Gough, Shanahan, Johnson & Waterman, D. H. Blattner & Sons, Inc., 33 South Last Chance Gulch, Suite 1, P. O. Box 1715, Helena, MT 59624-1715

Robert A. Cohen, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Arlington, VA 22203

/gl