

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 20, 1996

JIM WALTER RESOURCES, : CONTEST PROCEEDINGS  
INCORPORATED, :  
Contestant : Docket No. SE 96-81-R  
: Safeguard No. 4476609; 12/20/95  
v. :  
: Docket No. SE 96-108-R  
SECRETARY OF LABOR, : Safeguard No. 4476467; 1/19/96  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : No. 4 Mine  
Respondent :  
: Mine ID 01-01247

ORDER OF DISMISSAL

Before: Judge Merlin

On January 16, 1996, the operator filed a notice of contest with respect to Safeguard No. 4476609. This matter was assigned Docket No. SE 96-81-R, captioned as above. On January 29, 1996, the Solicitor filed a motion to dismiss.

On January 23, 1996, the operator filed a notice of contest with respect to Safeguard No. 4476467. This matter was assigned Docket No. SE 96-108-R, captioned as above. On February 12, 1996, the Solicitor filed a motion to dismiss identical to the one previously filed in the first case.

In his motions to dismiss, the Solicitor argues that the Commission does not have jurisdiction to consider a contest of a notice to provide safeguard. On March 1, 1996, the operator orally advised my law clerk that it would not file a response.

Section 314(b) of the Federal Mine Safety and Health Act (hereafter referred to as the "Act"), 30 U.S.C. § 864(b), authorizes the Secretary to issue safeguards to minimize hazards with respect to the transportation of men and materials. Safeguards are issued on a mine to mine basis and have the effect of mandatory standards. Southern Ohio Coal Company, 7 FMSHRC 509, 512 (April 1985). No penalty is assessed for the violation of a safeguard. When the requirements of a safeguard are subsequently violated, a citation is issued for which a penalty is assessed. Southern Ohio Coal Company, 14 FMSHRC 1, 13 (January 1992).

Section 105(d), 30 U.S.C. § 815(d), grants the Commission jurisdiction to review citations, orders, and proposed penalty assessments of the Secretary. There is no statutory provision for review of safeguard notices and the Commission has never

reviewed one. Commission decisions regarding safeguards deal only with situations where a subsequent citation has been issued. Southern Ohio Coal Company, 14 FMSHRC 1; Beth Energy Mines Inc., 14 FMSHRC 17 (January 1992); Mettiki Coal Corp., 14 FMSHRC 29 (January 1992); Rochester and Pittsburgh Coal Co., 14 FMSHRC 37 (January 1992); Green River Coal Company, 14 FMSHRC 43 (January 1992); Southern Ohio Coal Company, 10 FMSHRC 963 (August 1988); Southern Ohio Coal Company, 7 FMSHRC 509; Jim Walter Resources, Inc., 7 FMSHRC 493 (April 1985); Commission judges have refused to review a safeguard where there is no subsequent citation. Beckley Coal Mining Co., 9 FMSHRC 1454 (August 1987); Colorado Westmoreland, Inc., 10 FMSHRC 1236 (September 1988). The Commission, as a creature of Congress, is bound by the limits created by Congress and cannot expand them. Lynn v. Payne, 476 U.S. 926, 937 (1986); Killip v. Office of Personnel Management, 991 F.2d 1564, 1569 (Fed Cir. 1993); Kaiser Coal Corp., 10 FMSHRC 1165, 1169 (September 1988).

In light of the foregoing, it is ORDERED that these cases be DISMISSED.

Paul Merlin  
Chief Administrative Law Judge

Distribution: (Certified Mail)

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