

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 11, 2000

FLORIDA CANYON MINING,	:	CONTEST PROCEEDING
INCORPORATED,	:	
Contestant	:	Docket No. WEST 2000-24-M
	:	Order dated August 10, 1999
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Florida Canyon Mine
ADMINISTRATION (MSHA),	:	Mine ID No. 26-01947
Respondent	:	

ORDER DENYING MOTION TO STAY **ORDER TO SUBMIT INFORMATION**

On October 12, 1999, the Commission received the operator's notice of contest of MSHA's notices to terminate an Agreement to Abate Violative Health Conditions which was given the above-captioned docket number. The operator advised that it entered into an agreement with MSHA on October 17, 1997, which provided that the time for abatement of certain citations would be extended so that the operator could address the problem of exposure of miners to dust at the mine. On August 10, 1999, MSHA sent a letter to the operator stating that MSHA was terminating the agreement within 30 days. The operator asked for and was granted additional time until October 12, 1999, to comply with MSHA regulations in a letter dated September 8, 1999, from MSHA. On September 10, 1999, MSHA sent another letter confirming that the operator must be in full compliance by October 10. The operator is seeking to contest the August 10 and September 8 letters.

On October 18, Chief Administrative Law Judge Paul Merlin issued an order directing the Solicitor to file a response to the operator's notice of contest.

On November 17, 1999, the Solicitor filed his response stating that the abatement date was extended until November 29, 1999, and the parties were engaged in discussions in order to avoid litigating this matter. Because of these actions, the Solicitor asserted that the contest of the termination of the extension of abatement agreement was not ripe.

On December 16, 1999, Judge Merlin issued an order directing the parties to set forth in writing why this case should not be dismissed for lack of subject matter jurisdiction. Judge Merlin stated in his order that the parties should address what appeared to him the more fundamental question of whether the Commission has jurisdiction in this case. Judge Merlin

pointed out that it is well established the Commission as an administrative agency has only the jurisdiction which Congress gives it, Lyng v. Payne, 476 U.S. 926, 937 (1986); Killip v. Office of Personnel Management, 991 F.2d 1564, 1569 (Fed Cir. 1993); Samuel B. and Nancy Sanders, 18 FMSHRC 377, 378 (March 1996), and that the Commission has long recognized that it cannot exceed the limits of its authority as enacted by Congress. Kaiser Coal Corp., 10 FMSHRC 1165, 1169, (September 1988). Judge Merlin further observed that section 105(d) of the Act, 30 U.S.C. § 815(d), sets forth how and under what circumstances Commission review may be obtained of actions taken by MSHA, and that he had repeatedly held the jurisdictional restrictions on the Commission must be observed. Samuel B. and Nancy Sanders, *supra*; Jim Walter Resources, 18 FMSHRC 380, 381 (March 1996); D.H. Blattner & Sons, 17 FMSHRC 1073, 1074 (June 1995); Consolidation Coal Co., 16 FMSHRC 1403, 1404 (June 1994); Wallace Brothers, 14 FMSHRC 586, 588 (May 1992). Finally, Judge Merlin stated that it did not appear the termination of an abatement agreement is an action covered by the statute.

On January 11, 2000, the parties filed a joint motion to stay this proceeding. The parties advise the primary reason for this request is the repeated abatement extensions of related citations and agreements that present a time delay in any basis for contest in these matters. The parties state that they plan to meet within the next sixty days to explore resolution of pertinent issues concerning respirable dust standards at the mine and this may cause the parties to settle these matters without further litigation.

The parties' motion is not well taken. The question of subject matter jurisdiction has been raised by Judge Merlin. Once this issue has raised by either the judge or the parties, it must be adjudicated. Barnett v. Brown, 83 F.3d 1380, 1383 (Fed. Cir. 1996). Moreover, rule 12(h)(3) of the Federal Rules of Civil Procedure requires a judge to dismiss an action "whenever it appears by suggestion of the parties or otherwise that the court lacks subject matter jurisdiction." The parties are now requesting that I stay a proceeding regardless of whether subject matter jurisdiction exists. However, implicit in the power to stay a case is that the judge has jurisdiction over the matter. Since it is unclear whether jurisdiction is present, the stay request cannot be granted. Rather, the parties must set forth their position with respect this issue.

In light of the foregoing, it is **ORDERED** that the motion to stay is **DENIED**.

It is further **ORDERED** that within 30 days of the date of this order the parties set forth in writing why this case should not be dismissed for lack of subject matter jurisdiction.

David F. Barbour
Chief Administrative Law Judge

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