

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
7 PARKWAY CENTER, SUITE 290
875 GREENTREE ROAD
PITTSBURGH, PA 15220
TELEPHONE: 412-920-7240 / FAX: 412-928-8689

JUN 21 2017

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

CONSOL PENNSYLVANIA COAL
COMPANY, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2015-260
A.C. No. 36-10045-382289

Mine: Harvey Mine

ORDER GRANTING MOTION FOR LEAVE TO FILE LATE PETITION
ORDER DENYING MOTION TO DISMISS

This docket contains one 104(d)(1) Citation No. 7030582 issued on October 21, 2014, to Consol Pennsylvania Coal Company, LLC (“Consol”) at its Harvey mine. Consol checked the appropriate block on MSHA Form 1000-179 contesting the citation, and notice of the contest was received by MSHA on June 10, 2015. Under Commission Procedural Rule 28, the filing of a Petition for the Assessment of Civil Penalty (“Petition”) was due within 45 days, or by July 25, 2015. 29 C.F.R. § 2700.28.

The Secretary of Labor’s (“Secretary”) Motion for Leave to File a Late Petition was filed on March 23, 2016; attached was the Secretary’s Petition. Incorporated by reference was a Memorandum in Support of Secretary’s Motion for Leave to File a Late Petition.¹ This memorandum included the declarations of two MSHA Coal District 2 employees, set forth *infra*.²

On April 1, 2017, Respondent filed a Response in Opposition to the Secretary’s Motion to File a Late Petition.³ On April 14, 2017, the Secretary filed a Motion to Accept the Secretary’s Reply to Respondent’s Response in Opposition to the Secretary’s Motion to Permit Late Filing, and also the Secretary’s Reply to Respondent’s Response in Opposition.⁴ On April 20, 2017, Respondent filed a Motion to Dismiss, which included, in the alternative, an Answer to the Petition.⁵

¹ The Secretary’s memorandum will be abbreviated SMEM.

² The Declaration of Susan Sikora is marked GX-1; the Declaration of Rebecca L. Kollar is marked GX-2.

³ The Respondent’s opposition will be abbreviated ROPP.

⁴ The Secretary’s reply will be abbreviated SREP.

⁵ The Respondent’s Motion to Dismiss will be abbreviated RMD.

Contentions

The Respondent argues it timely contested the citation, but the Petition was submitted more than 7 months after the date required by Rule 28. ROPP 3; RMD 3. It argues that the Secretary's proffered reasons do not establish "adequate cause" for this delay, but instead demonstrate MSHA has failed to implement checks and balances necessary to protect the rights of operators. ROPP 3. In *PBS Coals, Inc.*, 35 FMSHRC 1501 (May 2013)(ALJ), the filing procedures of MSHA Coal District 2 were examined and found to be minimally adequate; however, there is no indication District 2 has altered its procedure with checks and balances or back-up systems to ensure compliance with the rules. RMD 2-4. It contends that the Secretary's justification is not "plausible" and the absence of system improvements is a "capricious" failure to comply with Rule 28 and grounds for default. ROPP 5; RMD 5. It concludes that the Secretary's superficial explanation that a new employee failed to enter the contest into a tracking spreadsheet does not meet the minimum requirements for adequate cause for the delay. ROPP 3,4.

In addition, Consol argues that it has suffered real prejudice since the mine is idled and the availability of records may be affected. Employees have been transferred to other mines, and the miner who worked on the system at issue in the citation is no longer employed. With time, memories fade and evidence becomes stale. Respondent suggests that like *PBS Coals*, a hearing should be required to obtain more information on the issue of "adequate cause". ROPP 4.

The Secretary argues a clerical error caused the inadvertent failure of the Secretary to file a Petition until March 23, 2016. SMEM 1,2. This was due to an unusual oversight related to a change in administrative personnel, during the final week of employment of a short-term assistant in the District office; the notice of contest was not entered into a case tracking spreadsheet and was not mailed to the Solicitor's office where the Petition would have been timely filed. SMEM 2, 3, 6; SREP 1, 2. The error was discovered by another assistant. When compared to the many matters transferred between District 2 and the offices of MSHA and the Solicitor since 2006, the oversight was a rare occurrence and not indicative of a systemic breakdown in filing procedures. SMEM 2, 3; SREP 2. There is no evidence to suggest this was anything but an inadvertent oversight exacerbated by the departure of an employee. SMEM 3.

In addition, the Secretary notes that it is well settled the filing time deadlines are not jurisdictional, and out-of-time Petitions may be filed if an adequate cause for the delay can be shown. SMEM 4. Further, Respondent has failed to show actual prejudice arising from the delay, claiming essentially that records and people may not be readily available; however, Respondent is responsible for the preservation of relevant notes and the preparation of a defense. SREP 2,3. Even if the mine operator can establish actual prejudice, the public interest in enforcement of the Mine Act is paramount to strict procedural regularity. SMEM 4,7; SREP 4.

Legal Principles

Section 105(a) of the Mine Act provides:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator...of the civil penalty proposed to be assessed...

30 U.S.C. § 815(a).

If a timely notice of contest is filed, section 105(d) provides:

The Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing....

30 U.S.C. § 815(d).

Commission Procedural Rule 28 provides:

Within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty.

29 C.F.R. § 2700.28(a).

The legislative history of the Mine Act reveals the express intent of Congress that “there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding.” S. Rep. No. 95-181, 95th Cong., 1st Sess. at 34 (1977), *reprinted in* Senate Subcommittee on Labor, Comm. on Human Resources., 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978).

In *Twentymile Coal Company*, 411 F. 3d 256 (2005), the D.C. Circuit Court held that an 11-month delay between an investigation report and the issuance of a proposed penalty assessment was not unreasonable. Two Supreme Court cases were cited, *Brock v. Pierce County*, 476 U.S. 253 (1986) and *Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003). In *Brock*, the Supreme Court warned that it “would be most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake.” *Id.* at 260, and concluded that the statutory time provision in that case “was clearly intended to spur the Secretary to action, not to limit the scope of his authority. Congress intended that the Secretary should have maximum authority to protect the integrity of the program.” *Id.* at 265. In *Barnhart* the Supreme Court noted that not “since *Brock* have we ever construed a provision that the Government ‘shall’ act within a specified time, without more, as a jurisdictional limit precluding action later.” *Id.* at 158.

In 1981 the Commission considered a proposed penalty filed about 2 months after the date it was due. *Salt Lake County Road Department*, 3 FMSHRC 1714 (July 1981). Referring to the legislative history, it was determined that the overriding concern was with enforcement, and the Commission's Rule did not create a "statute" of limitations or procedural "strait jackets." *Id.* at 1715, 1716. The Commission held that upon seeking permission to file late, the request must be predicated upon adequate cause. However, the Commission also held that an operator may object to a late penalty proposal on the grounds of prejudice. *Id.* at 1716.

The Commission has clarified that "adequate cause" will not be found to exist unless a non-frivolous explanation for the delay is provided. The Secretary's excuse may not be facially implausible, and the delay must not result from "mere caprice" or through willful delay, intentional misconduct, or bad faith. Should the Secretary meet the burden of showing adequate cause, the Commission further explained:

[A]n operator must show at least some actual prejudice arising from the delay in order to secure a dismissal of a penalty proceeding due to a late-filed petition. Mere allegations of potential prejudice or inherent prejudice should be rejected. Of course, occasions may arise where a judge will find that the Secretary has demonstrated adequate cause and that the operator has brought forth evidence of actual prejudice. The judge in such instances must weigh the interest of fairness to the operator against the public interest in upholding the enforcement purpose inherent in section 105(d).

Long Branch Energy, 34 FMSHRC 1984, 1991 (Aug. 2012).

Therefore, the burden shifts to the operator to establish actual prejudice. The prejudice must be "real" or "substantial", and demonstrated by a specific showing by the operator. *Id.*, at 1993. There must be more than "inherent prejudice" or mere "danger of prejudice". *Webster County Coal, LLC*, 34 FMSHRC 1946, 1951 (Aug. 2012), citing *Long Branch*.

The Declarations

In pertinent part, the Declaration of Susan Sikora is as follows:

1. I am currently employed by the U.S. Department of Labor, Mine Safety and Health Administration ("MSHA"), as a Coal Mine Safety and Health Assistant ("CMS&H Assistant") a position I have held since September 22, 2015.
2. The Coal District 2 CMS&H Assistant is responsible for keeping track of and carrying out all of the administrative tasks executed by the Conference and Litigation Representatives ("CLR's") of Coal District 2. These tasks include processing new civil penalty contests and keeping track of important case filing deadlines, such as the due dates of civil penalty petitions and mailing cases to the Philadelphia Office of the Regional Solicitor ("Solicitor's Office").

3. I am familiar with MSHA's civil penalty assessment process and the procedures of civil penalty proceedings before the Commission.
4. Coal District 2 typically receives an automated e-mail from MSHA's internal citation and case tracking software that a matter has been docketed at the Federal Mine Safety and Health Review Commission ("FMSHRC"). This e-mail alerts the CMS&H Assistant that a contest has been filed and whether a CLR or the Solicitor's Office will handle the matter. In either case, the CMS&H Assistant enters the docket number on an Excel spreadsheet.
5. As a CMS&H Assistant I am responsible for implementing a system to manage and track the various cases that came into the office. At Coal District 2 we use an Excel Spreadsheet to organize and maintain information about cases including petition deadlines. This Spreadsheet automatically calculates the petition's due date. If a case is to be transferred to the Solicitor's Office, then the matter is entered in the spreadsheet. The procedure is for the case to be removed from the spreadsheet once a return receipt is e-mailed from United Parcel Services ("UPS") indicating that the package transmitting the case has been delivered.
6. Ms. Neiderheiser was employed as a CMS&H Assistant from on or about March 23, 2015 to on or about July 23, 2015.
7. I was told by former CMS&H Rebecca Kollar that Docket PENN 2015-266, an unrelated which originated in Coal District 2, was not received or sent to the Solicitor's Office sometime in July 2015 during Ms. Neiderheiser's final week of employment as a CMS&H Assistant.
8. Since the Petition had not been filed timely for Docket No. PENN 2015-266, I decided to run a report for all cases transferred to the Solicitor's Office on or about the time Ms. Neiderheiser left her employment with MSHA to ensure that no other cases were similarly lost. During my search I discovered that Docket PENN 2015-260 had not been designated to the Solicitor's Office at that time.
9. On or about March 10, 2016, I contacted the Solicitor's Office regarding Docket No. PENN 2015-260. The Solicitor's Office stated that it had never received the case. Since Ms. Neiderheiser's last date of employment with MSHA was July 23, 2015, I could not get her input as to what may have happened with Docket No. PENN 2015-260.
10. I also reviewed the Excel spreadsheet and determined that Docket No. PENN 2015-260 was not included on this list. I searched through our e-mailed receipts and could not find an e-mail receipt from UPS showing that the case had been mailed to the Solicitor's Office. As a result of my review, I found no evidence that the case was ever sent to the Solicitor's Office or that a civil penalty petition was filed by Coal District 2.
11. Because the file for PENN 2015-260 could not be located, our office created a new case file for the docket. The new case file was mailed to the Philadelphia Solicitor's Office for litigation.

GX-1

In pertinent part, the Declaration of Rebecca L. Kollar is as follows:

1. I am currently employed by the U.S. Department of Labor, Mine Safety and Health Administration (“MSHA”), as Secretary to the Assistant District Manager at the MSHA Coal District 2 (“Coal District 2”). I joined MSHA on October 15, 2006, when I was hired as a Coal Mine Safety and Health Assistant (“CMS&H Assistant”).
2. On December 14, 2014, I was promoted to my current position. On or about March 23, 2015, April Neiderhiser was hired to replace me as a CMS&H Assistant. Ms. Neiderhiser was in this role until on or about July 23, 2015, when she resigned. I trained Ms. Neiderhiser as a CMS&H Assistant.
3. I am familiar with MSHA’s civil penalty assessment process and the procedures of civil penalty proceedings before the Commission.
4. Coal District 2 typically receives an automated e-mail from MSHA’s internal citation and case tracking software that a matter has been docketed at the Federal Mine Safety and Health Review Commission (“FMSHRC”). This e-mail alerts the CMS&H Assistant that a contest has been filed and whether a CLR or the Solicitor’s Office will handle the matter. In either case, the CMS&H Assistant enters the docket number on an Excel spreadsheet.
5. I developed an Excel Spreadsheet to organize and maintain information about cases including petition deadlines. This spreadsheet automatically calculates the petition’s due date. If a case is to be transferred to the Solicitor’s Office, then the matter is entered in the spreadsheet. The procedure is for the case to be removed from the spreadsheet once a return receipt is e-mailed from United Parcel Services (“UPS”) indicating that the package transmitting the case has been delivered.
6. I trained Ms. Neiderheiser how to populate the Excel spreadsheet, keep track of cases, file petitions, and mail cases to the Solicitor’s Office.
7. On or about March 10, 2016, CMS&H Susan Sikora told me that she spoke to Regional Counsel Gayle Green regarding the status of Docket PENN 2015-260. The Solicitor’s Office stated it never received the case. Ms. Sikora also informed me that she reviewed the Exel spreadsheet and could not locate the Petition for the Docket.

GX-2

Analysis

Adequate Cause

A short term employee, whose tenure at MSHA lasted only about 3 months, just before leaving the job apparently failed to respond to an automated e-mail from MSHA’s tracking software that this case had been docketed at the Commission. What is known is that this docket was not entered into the Excel spreadsheet at Coal District 2, and this case was not mailed to the Solicitor’s Office in order for a timely Petition to be filed. The Secretary contends this was a

clerical error, an unusual oversight that occurred at the time of a change in personnel. Initially, I note that the record does not suggest bad faith, intentional misconduct, or that the resulting delay was willful in nature. *Long Branch*, at 1991. Rather, the Secretary's characterization of the failure as inadvertent appears accurate. *Id.*

Respondent contends the Secretary's justification is not plausible and the explanation is superficial and does not meet the minimum requirements for "adequate cause". But the explanation provided is "non-frivolous." *Id.* Even if the employee had not been in the process of leaving the job, this was nothing more than simple error; either a missed e-mail resulting in no further processing, or if not missed, the inadvertent oversight of not entering the docket into the Excel spreadsheet and the further oversight of not mailing the case to the Solicitor's office. Under these circumstances the excuse is "facially plausible." *Id.*

Respondent makes much of the allegation that the failure of the Secretary to implement "checks and balances" amounts to "caprice". Referring to *PBS Coals* and *Long Branch*, the argument is essentially that the lack of improvements, safeguards and/or back-up systems is evidence of "mere caprice". However, neither case supports the allegation that such "checks and balances" must be implemented to protect operators. Nor does the record show that in designing and implementing the case tracking spreadsheet the District office personnel acted impulsively, on a whim or in dereliction of duties, but rather as discussed in *PBS Coals*, the system was intended to meet the need to handle a heavy caseload. *PBS Coals*, at 1516-17. That the system is not infallible is not controlling. As the Commission has observed, "dedicated public servants may stumble in the performance of their duties" *Long Branch*, at 1991. Further, that over about a ten year period with many transfers between entities a handful of cases might "slip through the cracks" or get "lost in the shuffle" hardly suggests a compelling reason for change, much less the dismissal of an enforcement proceeding. I would also observe it is not the function of the Commission to tell the Secretary how to administer his case tracking procedures.

I find there was adequate cause for the delay.

Actual Prejudice

Respondent argues it has suffered real prejudice. With the passage of time memories do fade, witnesses can become unavailable, and evidence may be lost or destroyed. But this is true in any long-delayed case and without information that the events have actually happened and will have a significant effect on the presentation of the case this presents only "inherent" prejudice. *Randy Howell*, 20 FMSHRC 556, 558-9 (May 1998) (ALJ). Where, as here, a mine has been idled, and employees have been transferred to other mines, there could be difficulties locating records and miner witnesses. However, there is no demonstration of an *unavailability* of witnesses or *loss* of records with supporting reasons given. *See, PBS Coals* at 1519.

Even where an important witness has left employment at the mine and will need to be found, the possible difficulty in contacting that person presents only potential prejudice. Indeed, just how this possible difficulty would prejudice Respondent is not explained. *Steve B. Rees*, 37 FMSHRC 1852, 1855 (Aug. 2015) (ALJ); *Randy Howell*, at 558, 559. Respondent must cite

specific instances and provide specific facts to support difficulties locating evidence or a witness. *Dino Trujillo*, 35 FMSHRC 1485, 1487 (May 2013) (ALJ).


I find actual prejudice has not been shown.

Only where both parties carry their respective burdens is there a requirement to balance the public and private interests at stake. *Long Branch*, at 1996. Assuming, *Arguendo*, that prejudice had been shown, resolving competing interests requires consideration of a number of factors, including the length of the delay, the type of alleged violation and whether designated S&S or UWF, whether an accident was involved, or injury or death, and the number of persons potentially affected. *See, PBS Coals*, at 1521. Here, the Inspector issued a citation when he found that a system used to track miners had failed to operate in a section of the mine for several days. The Inspector designated the gravity as S&S, and determined that injury was highly likely and could be expected to be fatal to 35 persons. The alleged violation was also found to be UWF. If proven as written, this would be a very serious matter, suggesting a compelling interest in enforcement of the Mine Act Provisions. The delay of almost 8 months is significant, but not protracted. The balancing of interests is in favor of allowing the out-of-time filing of the Petition. I find the public interest in enforcement of the health and safety standards under the Mine Act outweighs the harm to the parties caused by the delay.

The Secretary of Labor's Petition for the Assessment of Civil Penalty is of record.

The Respondent's Answer to Petition is also of record.

WHEREFORE, the Secretary's Motion for Leave to File Late Petition is **GRANTED**; Respondent's Motion to Dismiss is **DENIED**.


Kenneth R. Andrews
Administrative Law Judge

Distribution: (First Class Mail)

Jennifer L. Gold, Esq., Office of the Solicitor, U.S. Department of Labor, The Curtis Center, 170 S. Independence Mall West, Suite 630E, Philadelphia, PA 19106

James P. McHugh, Esq., Hardy Pence, PLLC, 500 Lee Street, East, Suite 701, Charleston, WV 25301