

CCASE:
SOL (MSHA) V. ERNIE BROCK
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

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

v.

ERNIE BROCK,
RESPONDENT

Civil Penalty Proceeding

Docket No. KENT 81-192
A.O. No. 15-05120-03027A

Ken No. 4 North Mine

ORDER DISMISSING PROCEEDING

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent on September 22, 1981, pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(c). The proposal seeks a civil penalty assessment in the amount of \$300 against the respondent for an alleged violation of mandatory safety standard 30 CFR 75.200.(FOOTNOTE 1) The alleged violation is based on certain conditions and practices detailed in an imminent danger order no. 0795972 issued pursuant to section 107(a) - 104(a) of the Act on May 21, 1979. The order was issued to Peabody Coal Company for the alleged violation which petitioner asserts took place at the above captioned mine, and petitioner asserts that the named respondent in this case was employed at the mine as a foreman. Petitioner further alleges that on or about May 21, 1979, and for a period of approximately one week prior thereto, respondent, acting as an agent of Peabody Coal Company, knowingly authorized, ordered, or carried out Peabody's violation of the cited section(s).

Respondent filed his answer to the proposal on October 7, 1981, denying any violation of section 110(c) on his part. He does admit to the fact that the mine is subject to the Act, that he was employed

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as a mine foreman at the time the citation issued, and does not dispute the fact that the citation was issued and served on Peabody Coal Company.

Motion to dismiss

By motion filed January 20, 1982, respondent's counsel moves for a dismissal of this case on the grounds that the respondent has been prejudiced by the extreme delay between the time the citation was issued on May 21, 1979, and the service of MSHA's proposed civil penalty assessment on the respondent on July 20, 1981. In support of the motion to dismiss, counsel states that after the citation was issued, Peabody Coal Company filed an application for review of the citation and an expedited hearing was held on this application on June 13-14, 1979. Counsel further states that respondent Brock testified in Peabody's behalf at the hearing, and while Peabody was represented by counsel, respondent Brock was not as he had not been charged with any violation. Since Mr. Brock testified to the events surrounding the issuance of the citation, counsel maintains that his participation in those events has been well-known to MSHA since at least June 13-14, 1979.

In further support of his motion, respondent's counsel points to the fact that when MSHA served its proposed assessment on the respondent July 20, 1981, more than two years had passed since the citation was issued and since the hearing where all the facts surrounding the event in question were laid open to MSHA. Since it is now January, 1982, some three years after the citation issued, counsel asserts that MSHA's delay in bringing this case is completely inexcusable and inherently prejudicial to the respondent.

In support of the claim of prejudice, respondent's counsel states that the Ken No. 4 North Mine last produced coal on October 12, 1979. Its entrance has been sealed since November 19, 1979. All reclamation activities associated with this mine, including covering the mine entrance with earthen material, has been concluded since January, 1980, and not until a year and a half following closure and sealing of this mine had passed did MSHA propose to assess a penalty against respondent Brock. The sealing of the mine is supported by an affidavit by Peabody's Vice-President of Underground Operations, Eastern Division, Henderson, Kentucky.

With regard to the instant case filed against the respondent Brock, counsel states that the condition of the roof in the mine in question would be the central issue to be resolved in this penalty proceeding. Since the mine is available to no one, and since the evidence "has long been literally covered up", counsel maintains that a proper defense cannot be prepared on respondent Brock's behalf, and he attributes this to MSHA's excessive delay in bringing this case. Counsel maintains that the prejudice test established by the Commission in *Secretary of Labor v. Salt Lake County Road Department*, Docket No. WEST 79-365-M (July 28, 1981) and reiterated in *Secretary of Labor v. The Anaconda Company*,

Docket No. WEST 81-94-M (August 13, 1981), is well met in the instant case, and that MSHA's delay is in blatant disregard of the "reasonable notice" provisions of the Act and respondent Brock has been prejudiced thereby.

