

CCASE:
SOL (MSHA) V. RIVER CEMENT
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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

CIVIL PENALTY PROCEEDINGS

Docket No. CENT 86-127-M
A.C. No. 23-00188-05520

v.

Docket No. CENT 86-128-M
A.C. No. 23-00188-05521

RIVER CEMENT COMPANY,
RESPONDENT

Selma Plant Quarry & Mill

ORDER OF DISMISSAL

Before: Judge Morris

Respondent has moved to dismiss the above cases for the reason that the Secretary's PETITION FOR ASSESSMENT OF CIVIL PENALTY was not timely filed.

In his memoranda filed in the case the Secretary does not concede the facts but he states that his petition "may" have been filed beyond the 45 day period as required by Commission Rule 27(a), 29 C.F.R. 2700.27(a). The Secretary also asserts that the respondent has failed to show any prejudice. The Secretary has not filed any affidavits nor has he denied certain relevant facts that appear as a matter of record.

These facts are that on June 27, 1986 respondent filed its notice of contest in each of these cases. (Notice of contest form in each file). The Secretary filed his petitions with the Commission on September 3, 1986. (Time/date stamp on petition in file).

In support of his position the Secretary states as follows:

Although his petition may have been beyond the 45 day limitation recited at 29 C.F.R. 2700.27, the Secretary asserts that this resulted from miscalculation of time periods in the normal processing of these cases in the office of the Secretary's counsel. This miscalculation resulted from two factors. First, a delay in processing was encountered at the Civil Penalties Processing Unit (CPPU) of the Mine Safety and Health Administration in Arlington, Virginia due to a change in policy being implemented in that office at the time the respondent's Notice of Contest and Request for Hearing in these matters was received.
Due

to this unusual delay in processing at the CPPU and the resultant delayed arrival of the case file to the office of the Secretary's counsel, the date stamp of July 11, 1986 on the Request for Hearing Form was inadvertently picked up as being the date the Request for Hearing was received in the CPPU (it being in line with the time factor usually involved in this type of case from the time of receipt of the Request for Hearing at the CPPU until the receipt of the file in the office of the Secretary's counsel). Based upon the date stamp of July 11, 1986 the Secretary calculated a due date of August 29, 1986, which is eighteen days beyond the due date alleged by respondent in its motion.

While it appears that the Secretary's petition may have been filed eighteen days beyond the 45 day period, it is also apparent that respondent has demonstrated no prejudice to itself as a result.

Discussion

The applicable case law is contained in Salt Lake County Road Department, 3 FMSHRC 1714 (1981), and Medicine Bow Coal Company, 4 FMSHRC 882 (1982). In these cases the Commission ruled that a two-tier test exists in a late filing situation. The initial test requires that the Secretary to show adequate cause to support his late filing. In Salt Lake and Medicine Bow the Secretary's excuse of insufficient clerical help was accepted as minimally adequate. The second test is that dismissal could be required, notwithstanding adequate cause, when an operator demonstrates prejudice caused by the delayed filing.

In view of the Commission's pronouncements it is necessary to examine the record to determine whether the Secretary has established adequate cause.

As a threshold matter it appears that the appeal process commenced with a notice of contest on June 27, 1986. Under Commission Rule 27(a) 29 C.F.R. 2700.27(a) the Secretary was obliged to file his petition within 45 days. The 45 day period expired on August 11, 1986. The petitions were in fact filed on September 3, 1986 which was 68 days after receipt of the notice of contest and 23 days late.

In justification of the late filing the Secretary basically states it was due to a "change in policy" at his office at the Civil Penalties Processing Unit and by a subsequent misreading of a date stamp.

The "change in policy" was not further explained and may have some meaning for the Secretary but it fails to present the judge with any facts to justify the late filing. In addition, I do not see how a "change in policy" could affect a long standing filing requirement.

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In addition, the Secretary also states that a date stamp of July 11, 1986 was inadvertently relied on to calculate a date of August 28, 1986.

In Medicine Bow the Commission specifically rejected the Secretary's reliance on such internal date stamps describing it as "internal bureaucratic processing" 4 FMSHRC at 884, footnote 5.

For the foregoing reasons, I conclude the Secretary has failed to show adequate cause to justify the late filing of his petitions.

Accordingly, I enter the following:

ORDER

1. CENT 86Ä127ÄM is dismissed.
2. CENT 86Ä128ÄM is dismissed.

John J. Morris
Administrative Law Judge