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SOL (MSHA) v. ROBERT V. SWINDALL
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Federal Mine Safety and Health Review Commission
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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. VA 90-54 A.C. No. 44-00271-03571-A
v.	
ROBERT V. SWINDALL, EMPLOYED BY CLINCHFIELD COAL COMPANY, RESPONDENT	Moss No. 1 Prep Plant

ORDER DENYING MOTION FOR SUMMARY DECISION
PREHEARING ORDER

On January 7, 1991, Respondent filed a motion for summary decision pursuant to 29 C.F.R. 2700.64. Essentially, Respondent contends that the Secretary did not file a proposal for a penalty with the Commission within 45 days of the receipt by the Secretary of Respondent's notice of contest. The notice of contest was received by the Secretary on August 31, 1990.

On February 8, 1989, the Secretary issued a section 104(d)(2) order to Clinchfield Coal Company alleging a violation of 30 C.F.R. 75.200. In August 1990 (the letter is not dated), MSHA notified Respondent by mail that it determined that a civil penalty was warranted under Section 110(c) of the Act against Respondent on the ground that as an agent of Clinchfield Coal Company, he knowingly authorized, ordered, or carried out the violation cited against Clinchfield. On August 18, 1990, Respondent signed a notice of contest and request for hearing with the Review Commission. This was received the Secretary on August 31, 1990.

On October 3, 1990, the Secretary filed a Petition for Assessment of Civil Penalty entitled Secretary of Labor, Mine Safety and Health Administration v. Clinchfield Coal Company, Docket No. VA 90-54. Enclosed with the Petition was a notice of proposed assessment indicating a proposed penalty against Mr. Robert Vernon Sindell, employed by Clinchfield Coal Company. His address is given as P.O. Box 4100, Lebanon, Virginia 24266, which counsel for Respondent states is the Clinchfield corporate office address. A letter dated September 28, 1990 was also addressed to Mr. Robert Vernon Swindell at the Clinchfield corporate office informing him that a petition for a penalty has been filed and serving two copies on Mr. Swindell.

On November 5, 1990, Respondent filed a "conditional response" to the Petition. On November 5, 1990, Clinchfield Coal Company filed an Answer to the Petition in which it asserted that it was previously assessed a penalty for the alleged violation under section 110(a) of the Act, and that the proposed penalty was paid on April 21, 1989. On November 16, 1990, the case entitled Secretary of Labor, Mine Safety and Health Administration (MSHA) v. Robert Vernon Swindell, Employed by Clinchfield Coal Company, Docket No. VA 90-54 was assigned to me. A copy of the order of assignment was sent to Mr. Robert Swindell and to his attorney on the same date.

On November 20, 1990, the Secretary filed a motion to amend her petition for assessment of civil penalty. In the motion, she stated that the petition "was sought in error against Clinchfield . . . (and) the Secretary intended to file against an individual pursuant to section 110(c) of the . . . Act." The Secretary sought an amendment to the caption of the case to reflect that the Respondent is Robert V. Swindell, employed by Clinchfield Coal Company. The Secretary's amended petition seeks a civil penalty against Mr. Swindell because as an agent for the corporate mine operator (Clinchfield) he knowingly authorized, ordered, or carried out the violation for which Clinchfield was cited.

On November 29, 1990, I granted the Secretary's motion to amend and granted Respondent 30 days from the date of service of the amended petition to file an answer.

On December 2, 1990, Respondent filed a conditional Response to the motion to amend. On December 17, 1990, he filed copies of interrogatories which had been served by mail on the Solicitor December 14, 1990. On December 19, 1990, Respondent filed an answer to the amended Petition. On December 19, 1990, I issued a Prehearing Order, compliance with which was extended without date by order issued January 15, 1991.

On January 7, 1991, Respondent (the correct spelling of whose name is Robert Vernon Swindall) filed his motion for summary decision, together with an affidavit of Robert Vernon Swindall and a memorandum in support of the motion. The Secretary filed a response to the motion on February 1, 1991.

The motion for Summary Decision includes an affidavit from Mr. Swindall in which he contends that the delay in filing the petition prejudiced him in that (1) his attorney has been required to devote additional time to the legal issues involved; (2) the proceeding has been delayed, causing Swindall additional worry and concern; (3) bringing Clinchfield in the case heightened Swindall's anxiety and concern; (4) Swindall has been having serious back trouble and has been off work on disability.

Respondent's memorandum states that the plant in which Swindall was employed (and in which the alleged violation occurred) has been shut down since April 5, 1989. It states that the plant's work force was disbursed and "few, if any, of the plant's former workers are now employed by Clinchfield . . . " It states that the steps involved in the citation have been physically deteriorating for approximately two years since the citation. These assertions were not controverted by the Secretary.

The issues raised by the motion are multiple and complex:

1. When was the section 110(c) proceeding before the Review Commission instituted against Respondent Swindall?

2. When did Swindall receive notice that a section 110(c) case was being filed against him?

3. Was the case filed in time under Commission Rule 20 C.F.R. 2700.27(a).

4. If the case was not timely filed, did the Secretary show adequate cause for the late filing?

5. If the case was not timely filed, was Swindall prejudiced by the date filing?

I

Obviously, when the Secretary commenced the proceeding entitled Secretary of Labor, Mine Safety and Health Administration v. Clinchfield Coal Company with a form petition not referring to Swindall or section 110(c), she did not institute a proceeding against Swindall, whatever her secret intention. I conclude that the case against Swindall was commenced when the Secretary filed her Motion to Amend on November 20, 1990.

II

Respondent was notified in August 1990, that the Secretary intended to file a Petition for penalty against him under section 110(c). He signed and submitted a notice of contest and request for hearing on August 18, 1990. Therefore, he was on notice of the Secretary's intention as of August 1990.

III

Section 105 of the Act covers the enforcement procedure for mine operator violations. It gives the operator 30 days from the date of notification of a proposed penalty assessment to notify the Secretary that he wishes to contest the assessment. When

such a notice of contest is filed, the Secretary is required to "immediately advise the Commission of such notification. . . " Section 110(c) which provides for penalties against agents of corporate operators does not set out any procedures for its enforcement, but provides that an agent who knowingly authorized, ordered or carried out the violation of the corporate operator is subject to the same penalties as the operator. 29 C.F.R. 2700.27 requires that "within 45 days of receipt of a timely notice of contest [or] a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission." This procedural rule applies to "the operator or any other person against whom a penalty is proposed . . . " 2700.25.

The Secretary did not file a proposal for a penalty against Swindall within 45 days of the receipt of a timely notice of contest. In fact, it was not filed until more than 30 days after the expiration of the 45 day period.

The Commission addressed the question of the Secretary's late filing of a penalty petition in Salt Lake County Road Department, 3 FMSHRC 1714 (1981). The Commission held, inter alia, that if the Secretary seeks permission to file late (under Rule 9), [she] must predicate [her] request upon adequate cause." Id., 1716. In this case the Secretary did not seek permission to file late, nor did she establish adequate cause: she merely states that the original petition was filed in error and that she "moved to correct the error as soon as she became aware of the problem." Sloppiness in preparing pleadings hardly qualifies as adequate cause.

In the Salt Lake County Road Department decision, supra, the Commission also held that "an operator may object to a late penalty proposal on the grounds of prejudice." This was said to be based on the administrative law principle that "substantive agency proceedings, and effectuation of a statute's purpose, are not to be overturned because of a procedural error, absent a showing of prejudice." Has Respondent Swindall shown prejudice in this case?

The facts that the delay caused emotional distress to Respondent, and required additional legal work to address the legal issues related to the filing delay do not constitute prejudice in a legal sense. The assertions that the delay resulted in witnesses being "disbursed", memories fading and the deterioration of the physical condition of the area of the alleged violation, raise more substantial questions. The alleged violation occurred on February 8, 1989. In August 1990, more than one and a half years later, the Secretary notified Swindall that she intended to proceed against him under section 110(c). No explanation has been advanced by the Secretary for such an extraordinary delay. The Secretary's argument that the lapse of

time prejudices the Secretary as much as it prejudices Respondent is disingenuous. The delay is the Secretary's, and one should not have to defend stale claims. However, the delay from February 1989 to August 1990 is not the delay for which the instant motion is filed, but rather the delay in filing a penalty petition with the Commission after the notice of contest was received by the Secretary. There is no evidence or any serious assertion that the delay from October 15, 1990 to November 20, 1990, in itself, caused prejudice to Respondent which would handicap him in presenting his defense. I conclude that the delay in filing the action before the Commission, i.e., more than 45 days after Respondent served his notice of contest is not shown to have prejudiced Respondent and does not "justify the drastic remedy of dismissal." Salt Lake County, supra, at p. 1717.

ORDER

Accordingly, the Motion Summary Decision is DENIED.

The parties are FURTHER ORDERED to comply with the prehearing order of December 19, 1990: Paragraph 1 on or before February 25, 1991; paragraph 2 on or before March 15, 1991, and inform me of inappropriate hearing dates in April or May 1991.

James A. Broderick
Administrative Law Judge