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SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. CENT 92-240-M
Petitioner : A. C. No. 39-01282-05528
:
v. : Annie Creek
WHARF RESOURCES USA :
INCORPORATED, :
:
Respondent :

ORDER ACCEPTING LATE FILING
ORDER DENYING MOTION TO DISMISS

Before: Judge Merlin

On August 18, 1992, the Solicitor filed the penalty petition in the above-captioned case and a motion to accept late filing of the penalty proposal. On September 21, 1992, the operator filed its answer to the penalty proposal together with a motion in opposition to the Solicitor's motion to accept late filing.

Commission Rule 27 requires that the Secretary file the penalty proposal within 45 days of the date she receives an operator's notice of contest for the proposed penalty. 29 C.F.R. 2700.27. An operator contests the proposed penalty by mailin in the so called "blue card" which has been provided to it for this purpose. The date of receipt by the Secretary is the date the operator mailed the blue card. J.P. Burroughs, 3 FMSHRC 854 (1981). Assuming that in this case the blue card was mailed the same day it was signed, June 18, 1992, the penalty proposal became due on August 3. The proposal was mailed on August 14, and received at the Commission on August 18. It was therefore, 15 days late.

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission has permitted late filing of the penalty proposal upon a showing of adequate cause by the Secretary where there has been no showing of prejudice by the operator. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981).

The Solicitor's motion to accept late filing represents that the delay occurred because the case was not sent to her office until August 3, 1992. In Salt Lake County Road Department, supra, decided early in the administration of the Act, the Commission held that the extraordinarily high caseload and lack of personnel confronting the Secretary at that time constituted adequate cause for late filing. At the present juncture, I take

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note of the precipitous rise in the volume of contested cases over the last few years, as indicated by the Commission's own records. I find these circumstances constitute adequate cause for the short delay in the filing of the penalty petition. Finally, the record does not indicate any prejudice to the operator from the two week delay.

More serious is the time span between the issuance of the citation on August 15, 1991, and the notification to the operator of the proposed penalty assessment on June 1, 1992. Section 105(a) of the Act, 30 U.S.C. 815(a), provides that after the Secretary issues a citation or order under section 104, she shall within a reasonable time notify the operator of the proposed civil penalty to be assessed for the cited violation.

The Mine Act does not define "reasonable time". However, the following statements of the Senate Committee are instructive:

To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and miner representative promptly. The Committee notes, however, 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. 34, reprinted in, Senate Subcommittee on Labor, Comm. on Human Resources, 95th Cong., 2 Sess., Legislative History of the Federal Mine Safety and Health Act, at 622 (1978).

It does not appear that the Commission has specifically considered whether a penalty petition must be dismissed because it was not issued until several months after the citation had been issued. However, I find relevant the principles adopted by the Commission in Salt Lake County Road Department, supra, and therefore, in the instant matter I will consider whether adequate cause existed for the delay and if the operator has demonstrated prejudice.

Note is taken of the few Commission judges' decisions where delays in the issuance of the proposed assessments have occurred. In Heldenfels Brothers, Inc., 2 FMSHRC 851 (April 1980), a judge denied a motion to dismiss where there was a 220-day delay on the ground that MSHA's assessment procedures required considerable time and that the operator had not shown that it suffered any actual harm. However, in Anaconda Company, 3 FMSHRC 1926 (August 1981), another judge dismissed a case where there had been a two year delay and the Secretary offered no reasons, but this same judge subsequently refused to dismiss a case for a 132 day delay

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because the operator had not claimed prejudice. Industrial Construction Corp., 6 FMSHRC 2181 (Sept. 1984). Delays of a year and a half and two years have not been countenanced. Washington Corporation, 4 FMSHRC 1807 (October 1982).

In this case the delay was considerable, but within the parameters previously allowed by judges in the cases cited above. In addition, the file in this case shows that the alleged violation was the subject of an investigation of a non-fatal haulage accident. In discussing the requirement of reasonable promptness for the issuance of citations, Congress made specific reference to the time taken by accident investigations. S. Rep. No. 94-181, supra, Legislative History supra, at p. 618. Just as accident investigations are to be taken into account in determining timeliness for the issuance of citations, so they are germane in deciding the analogous question of whether adequate cause exists to justify a lag in assessing a penalty.

The operator has alleged prejudice because it will have to reconstruct events as they were on August 15, 1991, and that it must have witnesses who are available and recall the specific facts. However, there is no specific proffer that such witnesses are in fact unavailable and that the operator is unable to present its position sufficiently.

Informative with respect to the foregoing is the decision of the Commission in Old Dominion Power, 5 FMSHRC 1886 (1984), refusing to dismiss a citation because it was not issued until one year after a violation occurred where in the interim there had been a fatality investigation. The Commission found that the operator had not been prejudiced and cited the legislative history for the proposition that the "reasonable promptness" requirement was not jurisdictional. Old Dominion Power at 1894. So too, allowing the instant case to proceed is consistent with the expressed Congressional mandate that a failure to propose a penalty with promptness shall not vitiate the penalty proceeding. MSHA is, however, forewarned that as a general matter tardiness in assessments is troublesome and may in other contexts irreparably hinder its enforcement of the Act.

In light of the foregoing, it is ORDERED that the Solicitor's motion to accept late filing be GRANTED and that the operator's motion to dismiss be DENIED.

Paul Merlin
Chief Administrative Law Judge

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