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MSHA V. RHONE-POULENC OF WYOMING
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 28, 1992

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 92-519-M A.C. No. 48-00154-05549
v.	:	Big Island Mine and Refinery
RHONE-POULENC OF WYOMING CO., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Morris

The issues presented here are: (1) whether Secretary's Motion for Late Filing of her Proposal for Penalty should be granted; and (2) whether the proceedings should be dismissed because of a delay of 237 days in notifying Respondent of the proposed penalty.

Factual Background:

1. On October 2, 1991, a Citation was issued by the Federal Mine Safety and Health Administration ("MSHA") to Respondent, pursuant to 104 of the Federal Mine safety and Health Act (30 U.S.C. 814). On May 26, 1992, Respondent was notified of a proposed penalty assessment of $1,000.

2. On August 14, 1992, the Secretary filed her motion to accept late filing of her Proposal for Penalty, pursuant to Commission Rule 10, 29 C.F.R. 2700.14.

3. Pursuant to Commission Rule 27(a), the Secretary's proposal for penalty should have been filed by July 31, 1992. The proposal for penalty was, in fact, filed on August 14, 1992, two weeks after the Commission's deadline.

4. Respondent moved to dismiss Secretary's proposal for penalty.

Discussion

I

The Commission case law is well established. The late filing of a penalty proposal has been permitted where the Secretary shows adequate cause for the delay. An equally important facet concerning late filing involves prejudice to the operator. Salt Lake County Road Department, 3 FMSHRC 1714 (July 1981). In a subsequent decision, Medicine Bow Coal Company, 4 FMSHRC 882 (May 1982) the Commission elaborated on the decision in Salt Lake stating "[t]he Judge [in Medicine Bow] correctly interpreted Salt Lake as creating a two-part test. Salt Lake first established that the Secretary must show adequate cause for any delayed filing." 4 FMSHRC at 885. Further, "[w]e also heed in Salt Lake that adequate cause notwithstanding dismissal could be required where an operator demonstrates prejudice caused by the delayed filing," 4 FMSHRC at 885.

In the instant case, the Secretary's justification for her late filing is that "[t]he case was sent by the Arlington office to Denver but not received by the Denver Office of the Solicitor until August 3, 1992." (See Penalty for Proposal 3).

I agree with Respondent that the above-stated bare assertion by the Secretary does not show adequate cause.

The Secretary's 45 days were up on July 31, 1992. The case was apparently not sent to the Solicitor until after the deadline. No explanation is advanced for the Secretary's failure to comply with the deadline. An unexplained excuse cannot arise to the level of adequate cause.

It is, however, appropriate to consider the issues raised in the Secretary's statement in opposition to Respondent's motion.

The Secretary states that Respondent did not demonstrate any prejudice and merely seized upon a procedural irregularity to justify the drastic remedy of dismissal. The Secretary's efforts to inject prejudice as an issue are rejected. As stated in Medicine Bow, the two-part test initially requires the Secretary to show prejudice.

The Secretary in her statement further elaborates on her reasons for missing the penalty proposal filing deadline by two weeks and asserts that these reasons amount to "adequate cause."

The Secretary explains the filing was two weeks late because: (1) changes in MSHA's civil penalty assessment process resulted in the need to recalculate many assessments and renotify many operators; (2) the invalidation of MSHA's "excessive history" program caused hundreds of citations to be dismissed and then refiled and reassessed; and (3) MSHA lacks sufficient clerical personnel.

Essentially, the Secretary argues that MSHA was unusually busy as a result of its own policy changes and its mistake in trying to enforce its "excessive history" program, with the problem compounded by a lack of clerical personnel.

All of Petitioner's excuses have been rejected previously by the Commission. Changes in administrative policy or practice do not constitute adequate cause. River Cement Co., 10 FMSHRC 1602 (Oct. 1986). Since at least 1981, an unusually high workload and a shortage of clerical personnel do not constitute adequate cause. Price River Coal Co., 4 FMSHRC 489 (Mar. 1982); Salt Lake County Road Department, supra.

Furthermore notably missing from the Secretary's argument is any explanation why, in light of the asserted work overload, the Secretary failed to make use of the pre-established procedure for handling such problems. The leading decision on this issue, Salt Lake County Road Department, supra, accepted the excuses now offered by Petitioner (high workload and lack of clerical personnel) as "minimally adequate in this case," but also expressly warned that these excuses would not suffice in the future. 3 FMSHRC at 1717. Moreover, the Commission clearly pointed out that if the Secretary needs additional time because of a high workload or lack of personnel, her remedy is to obtain an extension prior to the deadline as allowed by Commission Rule 9, 29 C.F.R. 2700.9. 3 FMSHRC at 1717 (fn. 8).

Inasmuch as the Secretary failed to establish adequate cause, the late filing of the Proposal for Penalty should be denied.

II

While Respondent only collaterally raises the issue (Brief, p. 5, fn. 4), the operator further asserts MSHA took 237 days to notify Respondent of the proposed penalty and thus did not comply with Section 105(a) of the Act.

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 expected that the failure to

> propose a penalty with promptness shall vitiate any proposed penalty proceeding.

S. Rep. No. 95-181, 95th Cong., 1st Sess. 24 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).

The Commission has apparently not addressed this issue but it has been considered by some Judges' decisions.

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 nearly a two-year delay and the Secretary offered no reasons for the delay, but this same judge subsequently refused to dismiss a case for a 132-day delay 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 the instant case, there was a delay of 237 days from when the Citation was issued to the issuance of the proposed penalty. However, the delay is within the parameters allowed in the above cited cases.

While Respondent asserts it was "inherently prejudiced" by the delay, it has failed to allege any factual basis to establish such prejudice.

Accordingly, I enter the following:

ORDER

1. Respondent's Motion to Dismiss under Section 105(a) of the Act is DENIED.

2. Secretary's motion to accept late filing of Proposal for Penalty is DENIED.

3. Respondent's Motion to Dismiss is GRANTED.

John J. Morris
Administrative Law Judge

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