CCASE:
SOL (MSHA) V. CURTIS CRICK
SOL (MSHA) V. JAMES BO JONES
SOL (MSHA) V. CHARLEY WRIGHT
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 92-548
	:	A.C. No. 15-02706-03752-A
v.	:	
	:	Hamilton No. 2 Mine
CURTIS CRICK, employed by ISLAND CREEK COAL COMPANY, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 92-550
	:	A.C. No. 15-02706-03754-A
v.	:	
	:	Hamilton No. 2 Mine
JAMES BO JONES, employed by ISLAND CREEK COAL COMPANY, Respondent	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 92-551
	:	A.C. No. 15-02706-03755-A
v.	:	
	:	Hamilton No. 2 Mine
CHARLEY WRIGHT, employed by ISLAND CREEK COAL COMPANY, Respondent	:	

DECISION

Appearances: Gretchen M. Lucken, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Timothy M. Biddle, Esq. and J. Michael Clise, Esq., Crowell and Moring, for Respondents.

Before: Judge Melick

These cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq., the "Act," charging Curtis Crick, James Bo Jones and Charley Wright as agents of a corporate

mine operator, Island Creek Coal Company, with knowingly authorizing, ordering, or carrying out a violation by that mine operator of the mandatory standard at 30 C.F.R. 75.400 as alleged in Order No. 3549013.(Footnote 1

In pretrial motions to dismiss the Respondents objected to the untimely filing by the Secretary of the instant petitions.(Footnote 2) In this regard the undisputed facts show that:

1. On or about March 31, 1992, the Secretary issued to each of these Respondents a proposed civil penalty assessment for allegedly violating 30 C.F.R. 75.400 on January 15, 1991.

2. By certified mail on April 22, 1992, each Respondent filed with the MSHA Office of Assessments a notice of contest requesting a hearing on the alleged violation and proposed penalty.

3. On April 27, 1992, the Secretary received the Respondents' notices of contest.

4. The Secretary filed the instant petitions for civil penalty against Respondents Crick, Jones and Wright on July 6, 1992, 70 days after receiving Respondents' notices of contest.

5. Respondents Jones and Wright first learned that the Secretary intended to propose individual civil penalties when they received the March 31, 1992, notice of proposed penalty from the Secretary.

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1 Section 110(c) provides as follows:

"Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection 105(c), any director, officer, or agent of such corporation, who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b)."

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2 Rulings on the pretrial motions to dismiss were deferred to enable the parties to develop an evidentiary record to support their positions. Hearings on these motions, as well as hearings on the merits with Docket No. KENT 92-549, were thereafter held on November 18 and 19, 1992.

> 6. Respondent Crick first learned that the Secretary intended to propose an individual civil penalty against him when the proposed individual penalty was conferenced in October 1991.

More particularly, Respondents argue that the petitions herein are untimely under Commission Rule 27(a) and must be dismissed under the principles of Salt Lake County Road Department, 3 FMSHRC 1714 (1981). In that case the Commission held that "if the Secretary does seek permission to file late he must predicate his request upon adequate cause." The Commission further held that a Respondent could also object to a late-filed penalty proposal on grounds that it was prejudiced by the delay. The Respondents argue that the Secretary's late petitions fail on both counts and should therefore be dismissed.

Commission Rule 27(a), 29 C.F.R. 2700.27(a) provides that "within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission." In these cases the Secretary now admits that he failed to comply with Rule 27(a). In the Salt Lake decision, the Commission held that the Secretary is not free to ignore the time constraints in Rule 27 for any mere caprice, as that would frustrate the enforcement purposes of Section 105(d) and, in some cases, deny fair play to operators. Clearly these principles are applicable as well to individual respondents in Section 110(c) cases and, because such cases directly impact individual rights, the concepts of fair play and due process must be even more carefully protected.

The Commission also held in the Salt Lake decision that "absent extraordinary circumstances, the Secretary is . . . admonished to proceed by timely extension motion when extra time is legitimately needed." The Commission found unacceptable the procedures followed by the Secretary in that case in filing an instanter motion accompanying the late filed proposal for civil penalty noting that under Commission Rule 9, 29 C.F.R. 2700.9 a request for extension of time "shall be filed 5 days before the expiration of time allowed for the filing or serving of the document." In these cases the Secretary failed not only to comply with Commission Rule 9, but also failed to file any motion explaining the late filed petitions until, and only in response to, motions to dismiss filed by the Respondents. This cavalier disregard of the Commission Rules of Procedure and established Commission precedent in itself warrants dismissal of these proceedings.

In any event, the Secretary has failed to show "adequate cause" for the late filing in these cases. Salt Lake, supra at 1716. As reason for the late filing the Secretary alleges in her post hearing brief as follows:

> [T]he record reflects that the Office of Assessments was experiencing an unusual backlog of cases at the time the case materials were generated and forwarded to the Solicitor's Office. The record also reflects that the 45-day deadline had already expired before undersigned counsel even received the case materials, and that the petitions were filed within 6 days of receiving the case."

The evidentiary record does not, however, contrary to the Secretary's representation, include any of the information now cited by the Secretary as justification for her late filing. As part of the Secretary's response in opposition to the Motions to Dismiss certain representations and allegations were made, however such representations made in pleadings are not evidence. In addition, attached to the Secretary's pleadings was a copy of an undated memorandum not on its face identified or associated in any way with the cases at bar purportedly issued by the Office of Assessments and directed to the Regional Solicitors' Offices stating the following:

> The subject case is being sent to your office for a hearing with an Administrative Law Judge at the Federal Mine Safety and Health Review Commission.
>
> However, due to the increased number of contested cases being received in this office, some cases may be late coming to your office.
>
> We apologize in advance for any inconvenience this may cause, and we intend to make every effort possible to get these cases to your office as soon as humanly possible.
>
> If you have any questions concerning this matter, please contact Edwina Pitts of my staff at FTS 235-8344.

Again, while this document was attached to the Secretary's pleadings, it was never introduced into evidence at the hearings. Even if it had been properly admitted at hearings and identified with these cases, the document needs further explanation.

In addition, as noted by the Respondents in their posthearing brief, the Secretary has apparently fallen into precisely the routine that the Commission condemned in the Salt Lake, 4 FMSHRC 882 (1982) decision, i.e., the practice of filing rather uncomplicated pleadings late. The use of a generic intra-agency memorandum warning the regional solicitors to expect late transmittal of cases from the Office of Assessments creates an inference that the untimely filing of pleadings had become the Secretary's practice, not the rare exception. The untimeliness in these cases is particularly egregious when considering that these cases had already been delayed by the Secretary for over 14 months before he issued a proposed civil penalty assessment. Obviously at that point the Secretary had already computed the proposed assessments and had prepared the related workup so his administrative tasks were minimal, i.e., the transferral of the case files from one office in the agency to another and the filing of a two-page "boiler plate" pleading. Under the circumstances, and for this additional reason, the late filing in these cases warrants dismissal.

However, even assuming, arguendo, that the Secretary had presented justifiable circumstances for his violation of Commission Rules 9 and 27 the Respondents have established that they have been prejudiced by the late penalty proposals. Salt Lake, supra. First, I find that the delay of 25 days is inherently prejudicial to the Respondents, particularly following a delay of 14 months before Jones and Wright (and 9 months in the case of Crick) were even notified that they would be charged under Section 110(c) of the Act. The inherent prejudice to the individuals charged in cases under Section 110(c) is greatly exacerbated by the fact that, unlike mine operators who generally receive immediate notice of violations with the receipt of an citation or order, these individual did not learn of the charges against them until well after the alleged violations had been abated, after evidence had been removed and after memories had faded.

There was no reason for these Respondents to have been aware when the underlying order was issued on January 15, 1991, that the Secretary would prosecute them months later and they did not therefore have any opportunity to preserve evidence or to effectively participate in the various stages of the proceedings. It was not until March 31, 1992, over 14 months later, that the Secretary first informed Respondents Jones and Wright that they were to be prosecuted under Section 110(c) and 9 months later before informing Respondent Crick.

In addition, at hearing Respondents Jones and Wright could not recall with any specificity the circumstances surrounding the alleged violation and Respondent Crick's recollection was only refreshed "a little bit" by reading reports in the belt examiner's book. Moreover, Crick was unable to recollect conditions on the cited belt with specific detail.

Other witnesses also had difficulty recalling conditions on the cited belt. Belt Examiner Grisham, who conducted the belt examination on the day shift preceding the date of the order, could not remember the condition of the cited belt or any other particular belt. Belt Examiner Hatfield, who completed the last belt examination report before the order was issued, also admitted having no specific recollection of the conditions at the time of that examination or on the day the order was issued. Hatfield also testified that he took notes of his observations but that he had long since thrown them away. Even Inspector Gamblin, who issued the order, admitted that he had no recollection of conditions on the cited belt independent of reading the order itself. Moreover, Gamblin candidly recognized that "what the conversation was two years ago there would be no way I could tell you that."

Under the circumstances and recognizing that it would be impossible to identify and isolate that precise quantum of memory loss and prejudice attributable to the delay at issue after a delay of more than a year and a half, it can nevertheless reasonably be inferred that the former delay contributed to the prejudice. Under the circumstances and for this additional reason, the petitions herein must be dismissed.

ORDER

Civil penalty proceedings Docket Nos. KENT 92-548, KENT 92-550 and KENT 92-551 are hereby dismissed.

Gary Melick
Administrative Law Judge

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