

CCASE:
SOL (MSHA) SOUTHMOUNTAIN COAL
DDATE:
19931119
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 93-165
Petitioner	:	A.C. No. 44-06594-03522
v.	:	
	:	Docket No. VA 93-166
SOUTHMOUNTAIN COAL COMPANY,	:	A.C. No. 44-06594-03523
INCORPORATED,	:	
Respondent	:	No. 3 Mine

DECISION DENYING MOTION TO DISMISS

Respondent Southmountain Coal Company, Incorporated (Southmountain) has moved for dismissal of the captioned cases on the grounds that the petitions for assessment of penalties were filed four days late. It is undisputed that Respondent hand delivered its notices of contest ("blue card") of the Secretary's notification of proposed assessments of penalty to the Secretary on September 10, 1993. It is further undisputed that the "blue card" was stamped "received" by an agent of the Secretary on September 10, 1993.

Commission Rule 28(a) provides, in relevant part, as follows:

Time to File. Within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty.

Within the framework of this rule the petitions for penalties herein were due to be filed with this Commission by October 25, 1993. It is not disputed that the Secretary filed such petitions on October 29, 1993, four days beyond the 45-day deadline in Commission Rule 28(a). Southmountain argues that, accordingly, under applicable Commission decisions, these cases must be dismissed.

More particularly, Southmountain cites the Commission's two-tier test for determining whether a late filing requires dismissal -- the initial test requiring the Secretary to show adequate cause to support his late filing and the second test, applicable despite an adequate showing of cause by the Secretary, when an operator demonstrates prejudice caused by the filing delay. Salt Lake County Road Department, 3 FMSHRC 1714 (1981);

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Medicine Bow Coal Company, 4 FMSHRC 882 (1982); Rhone-Poulenc of Wyoming Company, 15 FMSHRC _____, WEST 92-519-M (October 13, 1993).

In his Response in Opposition to the Motion to Dismiss the Secretary states, as reasons for the late filing, the following:

1. On September 10, 1993, Southmountain filed its 'blue card' with MSHA's Civil Penalty Assessment Office contesting penalties proposed by the Secretary in docket numbers VA 93-165 and VA 93-166.

2. All 20 violations being assessed by the Secretary in this case are the subject of earlier filed notices of contest filed by Southmountain and William Ridley Elkins. The contest proceeding is presently pending before Administrative Law Judge Gary Melick. Southmountain Coal, Inc. and William Ridley Elkins v. Secretary, VA 93-108-R through VA 93-140-R.

3. The civil penalties proposed by the Secretary in these two docket numbers total \$436,372. (Attachment A.) Eight of the involved citations were assessed by the Secretary at \$50,000 each. The Secretary intends to prove at trial that each of these eight violations contributed to a fatal explosion at Southmountain's No. 3 Mine on December 7, 1992, in which 8 miners were killed and 1 miner was injured seriously.

4. After Southmountain filed its blue card with MSHA, the undersigned counsel received separate civil penalty packets from MSHA's Civil Penalty Office for VA 93-165 and VA 93-166. These penalty packets are used by the Solicitor's Office to prepare the Petitions for Civil Penalty Assessment that are filed with the Commission. Each of the penalty packets received from MSHA in this case was bound together so that the Civil Penalty Office date stamp of 'September 17, 1993' appeared at the bottom of each of the two blue cards. (Attachments B & C. The undersigned counsel has circled this date with blue marker on each of the blue cards.) The undersigned counsel calculated the 45-day civil penalty filing period provided for in Commission Rule 28 from the September 17, 1993, date stamp. As a result, the undersigned counsel was under the good faith belief that the deadline for filing a civil penalty in docket numbers VA 93-165 and VA 93-166 was November 1, 1993.

5. Unknown to the undersigned counsel was the fact that there was a second MSHA Civil Penalty Office date stamp on each of the two blue cards and that this second stamp bore the date 'September 10, 1993.' The undersigned counsel certifies that given the position of this second date stamp, at the opposite end of each of the September 17 date stamp, and at the uppermost portion of the blue cards, it was not observed by him during his review of MSHA's penalty packets for both VA 93-165 and VA 93-166. (In addition, this second date stamp of September 17 was concealed from the undersigned counsel's view as the documents were reviewed in their bound condition.) The undersigned counsel also certifies that he expected to find only one date stamp from MSHA's Civil Penalty Office on the blue cards. As a result, the 45-day filing period was calculated from September 17, 1993, and not from September 10, 1993. The undersigned subsequently has learned that the September 17, 1993, date mistakenly relied upon by him was actually the date that MSHA's Civil Penalty Office received the blue card from the Commission.

6. The Secretary submits that the undersigned counsel's good faith reliance upon the wrong MSHA Civil Penalty Office stamp date, and counsel's explanation as to how this mistake occurred, constitute adequate cause under Rhone-Poulenc, supra., for his filing a civil penalty petition 4-days out of time.

The above representations are not disputed by Southmountain and I find that they do in fact set forth legally sufficient adequate cause for excusing the brief four-day delay in the filing of the Secretary's civil penalty petitions in these cases. However, while I have found the excuses acceptable in the instant cases there is indeed concern with the increasing number of late filings. For the Commission judges to maintain their dockets in manageable order, it is essential that the parties adhere strictly to filing deadlines.

While Southmountain also alleges in these cases that it has been prejudiced by the four-day filing delay, it has failed to cite a particularized factual basis to support the allegation. Under the circumstances, the motion to dismiss filed by Southmountain is DENIED.

Gary Melick
Administrative Law Judge

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Distribution:

Carl C. Charneski, Esq., Office of the Solicitor,
U.S. Department of Labor, 4015 Wilson Blvd., Suite 400,
Arlington, VA 22203 (Certified Mail)

Henry Chajet, Esq., James Zissler, Esq., Jackson and Kelly,
2401 Pennsylvania Ave., N.W., Suite 400, Washington, D.C.
20037 (Certified Mail)

lh