

CCASE:
SOL (MSHA) V. ART BEAVERS CONSTRUCTION
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 4, 1994

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 93-615
Petitioner	:	A.C. No. 05-00294-03504 ZW5
	:	
v.	:	Somerset
	:	
ART BEAVERS CONSTRUCTION CO.,	:	
Respondent	:	

PARTIAL SUMMARY DECISION

Before: Judge Cetti

Pursuant to 29 C.F.R. 2700.67, the Secretary of Labor, Mine Safety and Health Administration (MSHA), through counsel, moves for a partial summary decision disposing of the issue as to whether the civil money penalty assessment was made within a reasonable time as required by 30 U.S.C. 815(a). Respondent, Art Beavers Construction Company, sought to have the citation at issue, Citation No. 4060718, dismissed, and has asserted that the Secretary has failed to comply with the provisions of 30 U.S.C. 815(a). (See, Respondent's Answer at paragraph 8). The Secretary asserts that the Secretary complied with the provisions of 30 U.S.C. 815(a) as a matter of law. The parties agree that no disputed material issues of fact remain with regard to that issue and that this issue can be appropriately resolved by summary decision based on the agreed Stipulations and exhibits, the subject citation, the Petition for Assessment of Penalty and the Respondent's answer.

I

STIPULATIONS

The parties jointly stipulate and agree to the following:

1. Citation No. 4060718 was issued for an alleged non-significant and substantial violation of 30 C.F.R. 48.29(a). A true and accurate copy of said citation is attached as Exhibit 1.

2. The cited standard requires that "[u]pon a miner's completion of each MSHA approved training program, the operator shall record and certify on MSHA Form 5000-23 that the miner has

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received the specified training... The training certificates for each miner shall be available at the mine site for inspection by MSHA ..."

3. MSHA Inspector Larry Ramey issued said citation following an inspection, and he alleged that the MSHA Form 5000-23 for one miner was not available for inspection.

4. MSHA Inspector Larry Ramey terminated said inspection on September 10, 1992, and the citation was issued on the same date.

5. On that same date, MSHA Inspector Larry Ramey also issued Order No. 4060714. A notice of proposed assessment of penalty was issued by MSHA on November 25, 1992, for that order.

6. On August 4, 1993, MSHA issued the notice of proposed assessment of penalty for Citation No. 4060718. A true and accurate copy of the notice of proposed assessment is attached as Exhibit 2.

7. The notice of proposed assessment of penalty was issued 330 days after the citation was issued. (September 10, 1992 to August 4, 1993).

8. Respondent received a copy of the notice of proposed assessment of penalty on or about August 19, 1993.

9. On or about September 1, 1993, the Respondent filed a timely notice of contest with MSHA. The notice of contest was received on September 10, 1993. A true and accurate copy of that notice of contest is attached as Exhibit 3.

10. On October 13, 1993, the Secretary filed a timely Petition for Assessment of Penalty within 45 days of receipt of the operator's timely notice of contest.

11. On November 3, 1993, the Respondent filed a timely answer to the Petition for Assessment of Penalty within 30 days from the date of receipt of the petition.

12. The Respondent has not alleged that it has suffered any actual harm as a result of the 330-day delay.

13. The delay in filing of the notice of proposed assessment arose out of the unusually high caseload at the time of the issuance of the citation and a lack of clerical help to process these cases. The Commission has agreed to take official notice of the unique events that transpired in 1992. This is a matter of public record as stated in Rhone-Poulenc of Wyoming Company, FMSHRC , (October 13, 1993), (15 FMSHRC 2089). A copy of this decision is attached as Exhibit 4.

This proceeding arises out of the Respondent's contest of Citation No. 4060718 issued on September 10, 1992, by MSHA Inspector Larry Ramey following an inspection of that same date. (Stipulation Nos. 3 and 4). The subject citation alleged that "A copy of the MSHA Form 5000-23, for the employee 'Fred English' was not available for inspection by the writer at the mine site." (See Citation No. 40608718, attached as Exhibit 1 to Stipulation). As such, the company's actions were alleged to be in violation of 30 C.F.R. 48.29(a). (Stipulation 1). The cited standard requires that

[u]pon a miner's completion of each MSHA approved training program, the operator shall record and certify on MSHA form 5000-23 that the miner has received the specified training... The training certificates for each miner shall be available at the mine site for inspection by MSHA ...

(Stipulation No. 2). Inspector Ramey terminated the inspection and issued the citation on September 10, 1992. (Stipulation No. 4). According to the citation, the condition was abated on September 10, 1992, when the employee in question left the mine property. (See Citation No. 4060718, attached as Exhibit 1 to Stipulation). It is noted that on the same date, MSHA Inspector Larry Ramey also issued Order No. 4060714. A notice of proposed assessment of Penalty was issued by MSHA on November 25, 1992, for that order. (Stipulation No. 5).

On August 4, 1993, MSHA issued the notice of proposed assessment of penalty for Citation No. 4060718. (A copy of the notice of proposed assessment is attached as Exhibit 2 to the Stipulation). (Stipulation No. 6). The notice of proposed assessment of penalty was issued 330 days after the citation was issued. (September 10, 1992 to August 4, 1993). (Stipulation No. 7). Respondent received a copy of the notice of proposed assessment of penalty on or about August 19, 1993. (Stipulation No. 8). Respondent is contending that the 330 days between the issuance of the citation and the notice of proposed assessment is in contravention with 30 U.S.C. 815 (Respondent's Answer, paragraph 3). However, Respondent has not alleged that it has suffered any actual harm as a result of the 330-day time period. (Stipulation No. 12).

On or about September 1, 1993, Respondent filed a timely notice of contest with MSHA. The notice of contest was received on September 10, 1993. (Stipulation 9, Exhibit 3). On October 13, 1993, the Secretary filed a timely Petition for Assessment of Penalty, within 45 days of receipt of the operator's timely notice of contest. On November 3, 1993, Respondent filed

a timely answer to the Petition for Assessment of Penalty within 30 days from the date of receipt of the petition. (Stipulation No. 11). Thus, the parties are not contesting whether the Secretary filed his Proposal for Penalty in a timely manner within 45 days of receipt of the Respondent's timely contest of the proposed penalty assessment pursuant to 29 C.F.R. 2700.28. The only unresolved issue for partial summary decision is whether the Secretary complied with 30 U.S.C. 815(a) when the Secretary issued the proposed civil penalty 330 days after the issuance of the citation.

Section 105(a) of the Act, 30 U.S.C. 815(a) in relevant part provides that after the issuance of a citation, the Secretary shall:

within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited ... (emphasis added).

The Act does not define the term "within a reasonable time." In addition, in the new Procedural Rules of the Federal Mine Safety and Health Review Commission, 29 C.F.R. Part 2700, effective May 1, 1993, the Commission declined to set a specific time limit in which to require the Secretary to notify the operator of a proposed penalty assessment. See 29 C.F.R. 2700.25. In the comments to the new rules the Commission stated:

One commenter noted that neither the present nor the proposed rule sets forth a time limit within which the Secretary is to notify the operator of a proposed penalty assessment, and suggested that the Commission prescribe such a time limit. Section 105(a) of the Mine Act states that the Secretary shall provide such notice 'within a reasonable time.' Disputes over the meaning of that

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1. Section 2700.25 states: Proposed Penalty Assessment.

The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of the violation alleged, the amount of the proposed penalty assessment, and that person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty assessment.

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phrase will be resolved in the adjudicative process.

Section-by-Section Analysis 58 Fed. Reg. 12161 (1993).

The Secretary in his motion points out that the legislative history of 30 U.S.C. 815(a) indicates that Congress did not intend for the citation to be dismissed where a penalty is not proposed promptly. As stated by the Senate Subcommittee on Labor:

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. (emphasis added).

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).

In the instant case, admittedly there was a 330-day time period between the issuance of the penalty and the issuance of the citation. The parties have stipulated that the delay in filing of the notice of proposed assessment arose out of the unusually high caseload at the time of the issuance of the citation and a lack of clerical help to process these cases. The Commission has agreed to take official notice of the unique events that transpired in 1992. This is a matter of public record as stated in Rhone-Poulenc of Wyoming Company, 15 FMSHRC 2089, (October 13, 1993), at 2093-2094. (Stipulation No. 13; copy of decision attached as Exhibit 4). Given this course of events, this constitutes one of the circumstances, although rare, when the prompt proposal of a penalty was not possible. In addition, Respondent has not suffered any actual harm as a result of the 330-day delay. (Stipulation No. 12). Dismissal of the penalty proceeding in such circumstances would be in contravention of the legislative intent of Congress and would be a harsh result where no harm has come to the operator.

CONCLUSION

It satisfactorily appears from the record, including the stipulations, that the Secretary established an adequate cause

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for the delayed filing on the basis of MSHA's unusually heavy 1992 caseload and its shortage of personnel to process this caseload. The Commission has taken official notice of the unique events that occurred in 1992, in which the Commission played a part as more fully set forth in the Commission Decision Rhone-Poulenc of Wyoming Company, 15 FMSHRC 2089 (October 13, 1993).

It is also clear from the record that Respondent has not established, demonstrated nor even alleged that it was prejudiced or suffered any harm by the delay.

ORDER

The Secretary's motion is GRANTED. I find, under the facts and circumstances of this case, that the civil penalty assessment of \$50 was made within the reasonable time required by 30 U.S.C. 815(a)

Counsel for the parties having indicated to me that they would be able to resolve all other issues without need for formal hearing, Counsel are ORDERED to confer with each other during the next fifteen (15) days with respect to final resolution of this matter either by settlement or request for an order approving penalty.

In the event Counsel cannot agree, they are to notify me of this within the initial fifteen (15) day period. If there are any disagreements, Counsel ARE FURTHER ORDERED to state their respective positions on any remaining issues where they cannot agree, with supporting arguments and specific references to the record in this case, within thirty (30) days. If the parties believe that a further hearing is required on any aspects of this matter, they should so state.

I retain jurisdiction in this matter until all aspects of this case are resolved and finalized.

August F. Cetti
Administrative Law Judge

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