FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

September 23, 2013

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2013-68-M
Petitioner,	:	A.C. No. 01-01138-279202A
	:	
v.	:	
	:	
LEWIS JOHNSON, agent of ELMORE SAND	:	
& GRAVEL, INC.,	:	
Respondent.	:	Mine: Scott Pit

ORDER DENYING MOTIONS TO DISMISS
ORDER GRANTING LEAVE TO FILE AND ACCEPTING PENALTY PETITION
ORDER TO FILE ANSWER

This matter arises under the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815, and this case is before me upon the Federal Mine Safety and Health Review Commission's May 30, 2013, Order remanding this matter to Chief Administrative Law Judge Robert J. Lesnick for further proceedings under the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

This case's path has been circuitous. On January 31, 2012, the Mine Safety and Health Administration ("MSHA") mailed a proposed assessment to Lewis Johnson ("Johnson" or "Respondent") at Elmore Sand & Gravel, Inc. ("Elmore"), but the proposed assessment was returned unclaimed. *Lewis Johnson*, 35 FMSHRC 1259, 1259 (May 2013) *available at* http://www.fmshrc.gov/decisions/bluebook. On May 17, 2012, MSHA mailed a delinquency notice. *Id.* In his November 2, 2012, motion to reopen his section 110(c) penalty assessment, Johnson asserted "that he left his employment with Elmore . . . on January 27, 2012, and has no recollection of receiving the assessment." *Id*. The Commission concluded that the penalty assessment had not become a final order because Johnson never received it. *Id.* at 1260. After remanding the case to Chief Judge Lesnick, the Commission directed the Secretary of Labor ("Secretary") "to file a petition for assessment of civil penalty within 45 days of [May 30, 2013.]" *Id.*

Then things get interesting. On August 6, 2013, Respondent's counsel filed a Motion to Dismiss ("Mot. to Dismiss I") this proceeding because the Secretary had not filed his penalty petition within the 45-day window the Commission provided. (Mot. to Dismiss I at 2.) Notably, Johnson's August 6, 2013, Motion to Dismiss was not served on the Secretary. Then, on August 16, 2013, the Secretary filed Petitioner's Motion for Leave to File Petition for Assessment of Civil Penalty Instanter ("Mot. for Leave"), as well as the Secretary of Labor's Petition for the Assessment of Civil Penalty ("Petition"). Not to be outdone, on August 19 Johnson's counsel filled substantially the same Motion to Dismiss ("Mot. to Dismiss II") that he filed on August 6—this time serving the Secretary—and filed Respondent's Opposition to Petitioner's Motion

For Leave to File Petition Instanter ("Johnson Resp.") on August 23, 2013. Chief Judge Lesnick assigned this case to me on August 26, 2013, and the Secretary filed his Response in Opposition to Respondent's Motion to Dismiss ("Sec'y Resp.") on August 29, 2013.

The parties' gale of paperwork notwithstanding, these competing motions and responses each address essentially the same issue: whether the Secretary should be permitted to file his penalty petition despite missing the Commission's 45-day deadline. The Commission recently clarified its burden-shifting framework for evaluating late-filed petitions.[1] *Long Branch Energy*, 34 FMSHRC 1984, 1989–1991 (Aug. 2012). The Secretary satisfies his burden of production with a "non-frivolous explanation for delay," supported by "sufficient" evidence establishing the delay was not the result of mere caprice, willful delay, intentional conduct, or bad faith. *Id.* at 1991. Once the Secretary has satisfied his burden, an operator "must show at least some *actual* prejudice arising from the delay in order to secure a dismissal of a penalty proceeding due to a late-filed petition." *Id.* (emphasis added). Moreover, "[m]ere allegations of potential prejudice or inherent prejudice should be rejected." *Id.* Where both the Secretary and operator have satisfied their burdens of production, the Commission directs judges to "weigh the interests of fairness to the operator against the public interest in upholding the enforcement purpose inherent in section 105(d)." *Id.*

The Secretary admits that he did not file his petition by the Commission-ordered deadline, but contends that this delay "was not deliberate but rather the result of an administrative error by the Office of Assessment." (Mot. for Leave at 2.) The Secretary also avers that it "is the practice of the Atlanta Solicitor's Office to comply with all filing deadlines set out in the Commission Rules," but "in this case, the Solicitor was unaware of the matter and need to file a Petition until the Office of Assessment notified the Solicitor on August 14, 2013." (*Id.*) According to the Secretary, his request to file the penalty petition after the deadline is therefore based on adequate cause. (*Id.*) The Secretary also argues that Respondent is not prejudiced by the delay because Johnson "was notified of the penalty assessments as evidenced by his [November 2, 2012] Motion to Reopen, to which the Secretary did not object." (*Id.*) Finally, the Secretary supports his motion with an attached declaration by Melanie Garris, Chief

[1] Under section 105 of the Mine Act and Commission Procedural Rule 28(a), the Secretary must file a penalty petition within 45 days of receiving an operator's contest of a proposed penalty. 30 U.S.C. § 815(d); 29 C.F.R. § 2700.28(a). As Administrative Law Judge Zielinski has observed, "there are no comparable provisions directly governing the filing and processing of penalty cases against individual agents of operators pursuant to section 110(c) of the Act, [but] several Commission judges have determined that penalty cases against individuals must be processed expeditiously, and that delay in filing of a petition in a section 110(c) case should be analyzed using adequate cause and prejudice considerations similar to those addressed in *Long Branch*." *Dyno-Nobel East-Central Regio*n, 35 FMSHRC 265, 266 (Jan. 2013) (ALJ) *available at* http://www.fmshrc.gov/decisions/bluebook. The parties have each relied on the Commission's decision in *Long Branch Energy*, 34 FMSHRC 1984 (Aug. 2012), in their filings. Moreover, I note that the Commission specifically referenced Commission Rule 28 in its order. *Lewis Johnson*, 35 FMSHRC at 1260. Accordingly, I will employ the *Long Branch* framework to analyze the parties' claims.

of the MSHA Office of Assessments, Civil Penalty Compliance Office ("Garris declaration"), which outlines the clerical errors that occurred at the Office of Assessments.

Johnson, meanwhile, claims that the Secretary has not established an adequate cause for the delay in filing the penalty petition because his "clerical mistakes" demonstrate "obvious indifference" to the Commission's deadline and the Respondent's Motion to Dismiss "triggered" the "Secretary's discovery of the clerical error." (Johnson Resp. at 3.) In addition, Johnson claims he would be unfairly prejudiced by the delay because of unavailable witnesses and personnel transitions at Elmore Sand. (*Id.* at 3–4; Mot. to Dismiss II at. 2.) According to Johnson "the Secretary's initial failure to properly serve . . . Johnson, and the Secretary's failure to subsequently timely file the petition" has prejudiced his "ability to prepare for this litigation." (Johnson Resp. at 4.)

Commission Procedural Rules are not suggestions, and I take seriously the deadlines outlined in the Mine Act and the Commission's procedural rules. Nevertheless, the Commission has recognized that dismissal on "mere procedural grounds . . . would frustrate section 105(d)'s overriding purpose of ensuring prompt and efficient enforcement." *Long Branch*, 34 FMSHRC at 1990. Here, the Secretary's explanation is non-frivolous, and the Garris declaration sufficiently establishes the delay did not result from caprice, willful delay, intentional conduct, or bad faith. I conclude, therefore, that the Secretary has satisfied his production burden showing adequate cause.

Conversely, Johnson has not established any actual prejudice from the Secretary's month-long delay in filing the penalty petition. As I explained, the Commission has specifically rejected assertions of potential prejudice. Johnson, however, provides only unsubstantiated claims that Respondent will not have "ready access to the company's records and personnel who would be of assistance in preparing his defense." (Johnson Resp. at 4.) Specifically, he indicates that Elmore's safety director at the time of the alleged violation left the operator in May 2013. (*Id.*) Conceptually, an inability to locate witnesses or access company records *might* have been the basis for claiming prejudice if they were substantiated or thoroughly explained. In this case, however, Johnson provides nothing beyond supposition to support his inability to track down witnesses or collect pertinent material. In fact, Johnson's knowledge that Elmore Sand's former safety director no longer works at Elmore suggests he has some knowledge about the safety director's identity and whereabouts. I also note that the Commission's procedural rules allow the parties liberal discovery and broad discretion to seek subpoenas. *See* 29 C.F.R. §§ 2700.56–.60 (providing discovery and subpoena rules). Based on the Respondent's filings, it is unclear why Johnson cannot use discovery and subpoenas to gather the information he requires to for his defense. Accordingly, I conclude that Johnson has not satisfied his production burden showing actual prejudice.[2]

[2] Johnson seems to suggest that I should reach back to the Secretary's service of the proposed penalty assessment in late-January 2012 to measure his prejudice rather than the month-long delay in filing the penalty petition. (Johnson Resp. at 4. ("Respondent's ability to prepare for this litigation has been prejudiced by the Secretary's initial failure to properly serve Mr. Johnson . . .").) I am not convinced that service of the proposed penalty is the proper reference point for measuring Johnson's actual prejudice from the Secretary's late-filed *petition*.

WHEREFORE, it is **ORDERED** that Respondent's motions to dismiss are hereby **DENIED**. It is also **ORDERED** that the Secretary's motion for leave to file is hereby **GRANTED** and the Secretary's Petition for the Assessment of Civil Penalty is **ACCEPTED**.

Furthermore, Commission Procedural Rule 29 requires "a party against whom a petition for assessment is filed" to "file an answer within 30 days after service of the petition for assessment of penalty." 29 C.F.R § 2700.29. Accordingly, it is **ORDERED** that Johnson file an answer within 30 days of the date of this order.

/s/ Alan G. Paez
Alan G. Paez
Administrative Law Judge

Distribution: (Via Electronic Mail & U.S. Certified Mail – Return Receipt Requested)

Carmen L. Alexander, Esq., U.S. Department of Labor, Office of the Solicitor, 61 Forsyth Street, SW, Suite 7T10, Atlanta, GA 30303
(Alexander.Carmen@dol.gov)

Justin M. Winter, Esq., Law Office of Adele L. Abrams, PC, 4740 Corridor Place, Suite D, Beltsville, MD 20705
(jmwinter28@gmail.com)

/pjv

Cf. Long Branch, 34 FMSHRC at 1985 (discussing late-filed petitions). Yet it is unclear how Johnson would have a winning argument even if I were to accept his position that January 2012 is the proper measuring point. As Johnson acknowledges, he left Elmore on January 27, 2012, four days before MSHA issued its citation and proposed penalty to him. (Johnson Resp. at 2.) Had the Secretary served the citation to Johnson directly at the time, he would be in substantially the same position he is in now—relying on the Commission's liberal discovery and subpoena rules to collect the information he needs to mount a defense. Though more time has elapsed, Johnson *did* have knowledge of the charges against him when he filed his motion to reopen this case in November 2012. Mere passage of time does not, itself, establish actual prejudice. *Cf. Christopher Brinson*, 35 FMSHRC 1463, 1472 (May 2013) (ALJ) ("None of the Respondents here have alleged anything other than a hypothetical fading of memory, and I will not infer prejudice from the passage of time.") *available at* http://www.fmshrc.gov/decisions/bluebook. Nevertheless, I do not need to address this issue because I conclude that Johnson has provided no indication of actual prejudice.