

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 19, 2016

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

GREENBRIER MINERALS, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2015-1002
A.C. No. 46-09217-499782

Mine: Powellton No. 1 Mine

**ORDER GRANTING MOTION FOR LEAVE TO FILE OUT OF TIME
AND DENYING MOTION TO DISMISS**

Before: Judge McCarthy

This case is before me upon a Motion for Leave to File Out of Time, wherein the Secretary requests permission to file its Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), beyond the 45 day-limit established by Commission Procedural Rule 28. See 30. C.F.R. § 2700.28.

This matter involves a single citation, Citation No. 9064978, issued to Respondent Greenbrier Minerals, Inc. on June 17, 2015. Respondent received the Mine Safety and Health Administration's (MSHA) Proposed Assessment on August 5, 2015, and timely contested the citation by marking the "check for contest box" on MSHA Form 1000-179 and returning the form to MSHA's Civil Compliance Office on or about August 21, 2015.

Pursuant to Commission Procedural Rule 28, the Secretary was required to file a Petition for the Assessment of Civil Penalty with the Commission by October 21, 2015. The Secretary represents that at the time Respondent's contest was received in MSHA'S Coal District 12 office, the employee responsible for processing penalty cases had been working in that capacity for less than a month, and Respondent's contest to Citation No. 9064978 was inadvertently overlooked. The Secretary became aware of the oversight on May 5, 2016, and contacted counsel for Respondent on May 11, 2016. The Secretary then filed his Motion for Leave to File Out of Time and the Petition for Assessment of Civil Penalty on May 17, 2016. Respondent filed a Response in Opposition and a Motion to Dismiss on May 27, 2016.

The Secretary argues that the "inadvertent oversight" of failing to process Respondent's contest is "understandable and excusable," and points out that the Commission has allowed late filing in cases where clerical errors have caused delays in the filing of penalty petitions.

Sec'y's Mot. for Leave to File Out of Time 2; see *Jim Walter Res.*, 22 FMSHRC 930 (July 2000) (ALJ); *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982); *Salt Lake Cty. Road Dep't*, 3 FMSHRC 1714 (July 1981).

Respondent points to Commission Procedural Rule 9(b), which allows extensions of filing deadlines in exigent circumstances, and contends that “the Secretary must meet the higher standard of demonstrating exigent circumstances to justify” the granting of its motion. Respondent argues that the replacement of the employee responsible for processing District 12’s proposed penalty petitions is not an exigent circumstance. Resp’t’s Mot. to Dismiss 3. Respondent also argues that the Secretary’s nine-month delay in filing its Petition for the Assessment of Civil Penalty prejudices its ability to defend itself. Respondent asserts generally that “as a substantial amount of time passes, as is the case here, memories fade, witnesses become unavailable, and evidence is lost.” *Id.* at 4.

Section 105(a) of the Mine Act states that the Secretary is to provide the operator notice of a proposed penalty “within a reasonable time” after the issuance of a citation or order. 30 U.S.C. § 815(a). Under section 105(d), the Secretary “shall immediately advise the Commission . . . and the Commission shall provide an opportunity for hearing” after an operator files a notice of contest for a proposed penalty. 30 U.S.C. § 815(d). Commission Procedural Rule 28 requires that the Secretary file a petition for the assessment of penalty with the Commission within 45 days of receiving a timely contest of a proposed penalty assessment. 30 C.F.R. § 2700.28. The Commission has explained that the “enforcement of the time limits is a secondary consideration to the primary purpose of section 105(d), i.e. ensuring prompt enforcement of the Act’s penalty scheme.” The 45-day time limit, then, should not be viewed as a “procedural straight jacket.” *Long Branch*, 34 FMSHRC 1984, 1990 (Aug. 2012).

The Commission’s decision in *Salt Lake* established two competing interests that must be weighed when determining whether to dismiss petitions for the assessment of penalties on the basis of untimely filing. First, “if the Secretary does seek permission to file late, he must predicate his request upon adequate cause.” *Salt Lake*, 3 FMSHRC at 1716. Adequate cause to support late filing “may be found to exist where the Secretary provides a non-frivolous explanation for the delay,” and the excuse “may not be facially implausible, and should be supported by evidence sufficient to establish that the delay did not result from “mere caprice” or through willful delay, intentional misconduct, or bad faith.” *Long Branch*, 34 FMSHRC at 1991.¹

Second, even where the Secretary shows adequate cause, “an operator may object to a late penalty proposal on the grounds of prejudice.” *Salt Lake*, 3 FMSHRC at 1716. “Mere

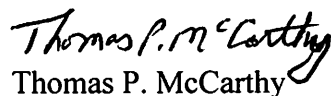
¹ While I find that, in this matter, the Secretary has provided a non-frivolous explanation for the delay and provided sufficient evidence to show that the delay did not result from willfulness, intentional misconduct, or bad faith, I note the difficulty in determining what delay may result from “mere caprice.” Merriam-Webster defines “caprice” as “a sudden, impulsive and seemingly unmotivated notion or action,” or “a sudden usually unpredictable condition, change, or series of changes.” This standard seems especially difficult to apply given that “the Commission presumes that the Secretary’s agents generally act in good faith to uphold the timely enforcement of penalties assessed under the Act.” *Long Branch*, 34 FMSHRC 1991, n.11.

allegations of potential prejudice or inherent prejudice should be rejected.” *Long Branch*, 34 FMSHRC at 1991; *see also Nealy v. Transportation Maritima Mexicana, S.A.*, 662 F.2d 1275 (9th Cir. 1980) (“Where a plaintiff has come forth with an excuse for his delay that is anything but frivolous, the burden of production shifts to the defendant to show at least some actual prejudice.”). The Commission has recognized that this analytic position is consistent with “allowing such an objection comports with the basic principle of administrative law that substantive agency proceedings, and effectuation of a statute’s purpose, are not to be overturned because of a procedural error, absent a showing of prejudice.” *Salt Lake*, 3 FMSHRC at 1716. Thus, the *Salt Lake* test as clarified in *Long Branch* “rests firmly on the principle that consideration of procedural fairness to operators must be balanced against the severe impact of dismissal of the penalty proposes upon the substantive scheme of the statute, and, hence, the public interest itself.” *Long Branch*, 34 FMSHRC at 1991 (citing *Salt Lake*, 3 FMSHRC at 1716).

Applying the *Salt Lake* standard as clarified in *Long Branch*, I find that the Secretary has shown adequate cause to support the late filing of the petition for assessment of civil penalty. The Commission has, in the past, accepted clerical errors as adequate cause to permit late filing. In *Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089 (Oct. 1993), the Commission permitted late filing after a three-month delay due to a transfer of files from the MSHA Arlington to the Denver Solicitor’s office. Similarly, the Commission allowed a two-week delay in *Medicine Bow Coal* due to “insufficient clerical help,” 4 FMSHRC at 885, and at least one Commission judge has allowed late filing when, as in this case, penalty petitions have been inadvertently overlooked by MSHA clerical staff. *See Jim Walter Res. Inc.*, 22 FMSHRC at 932.

Under the second part of the *Salt Lake* test, as clarified in *Long Branch*, dismissal may still be required if the operator makes a showing of actual prejudice. Here, however, Respondent has made only general allegations of potential and inherent prejudice, and has not made any real or substantial showing of specific instances of actual prejudice that will result should the Secretary be permitted to proceed with filing its Petition for Assessment of Civil Penalty. *See Long Branch*, 34 FMSHRC at 1993; *see, e.g., Webster Cty. Coal, LLC*, 34 FMSHRC 1946, 1952 (Aug. 2012) (upholding ALJ’s determination that prejudice must be pleaded with specificity).

WHEREFORE, the Secretary’s Motion for Leave to File Out of Time is **GRANTED**, and Respondent’s Motion to Dismiss is **DENIED**.


Thomas P. McCarthy
Administrative Law Judge

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