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August 18, 2022

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. CENT 2022-0010-M A.C. No. 41-00009-542457
v.	Fairland Plant & Qys
CACTUS CANYON QUARRIES INC, Respondent	

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DECISION

Before: Judge Manning

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On May 6, 2022, Respondent, Cactus Canyon Quarries Inc. ("Cactus Canyon"), filed a Motion for Summary Decision ("CCQ Mot."). Subsequently, on August 15, 2022, the Secretary filed his Objection and Response to Respondent's Motion for Summary Decision ("Sec'y Resp."). [1] I find summary decision is inappropriate and **DENY** Respondent's motion.

Although the procedural posture of this case is long and complicated, for purposes of this order only certain events need be mentioned. On October 4, 2021, Respondent mailed its Notice of Contest to MSHA. Subsequently, on November 26, 2021, i.e., more than 45 days after receipt of the Notice of Contest, the Secretary filed a Motion for Extension of Time to File Initial Pleading citing the need for "additional time to allow the parties to thoroughly explore settlement in this matter." On December 1, 2021, the Commission's Chief Administrative Law Judge (the "Chief Judge") found that the Secretary had shown good cause and issued an order granting the Secretary's motion and affording the Secretary until January 18, 2022, to file the initial pleading (the "Chief Judge's Order"). After first asking for reconsideration of the Chief Judge's Order, which was not granted, Respondent filed a petition for discretionary review on December 23, 2021, challenging the validity of the Chief Judge's Order and asking that the case be dismissed. On January 4, 2022, the Commission issued a notice stating that "after consideration by the Commissioners, no two Commissioners voted to grant the petition [for discretionary review] or to otherwise order review." Finally, on January 18, 2022, the Secretary

[1] At the time Respondent filed its motion the case was stayed pending an appeal to the Fifth Circuit Court of Appeals. On July 18, 2022, the Fifth Circuit dismissed the appeal for lack of subject matter jurisdiction. Subsequently, I lifted the stay and ordered the Secretary to file his response to the motion by no later than August 15, 2022.

electronically filed the petition for assessment of penalty (the "penalty petition") with the Commission and served the same upon Respondent via email.

Cactus Canyon moves the court to vacate the citations at issue and dismiss the penalty petition with prejudice. CCQ Mot. 12. Respondent argues the Commission's decision in *Salt Lake County Road Dep't.*, 3 FMSHRC 1714 (July 1981), as well as other Commission case law, constitute "Black Letter Law" that "when the Secretary is late-filing a petition, the Secretary must file the petition to institute the proceeding and file a motion for forgiveness / excuse showing good cause to excuse the late filing." Respondent takes issue with the validity of the Chief Judge's Order and argues the Secretary failed to timely file and serve the penalty petition and/or properly show good cause for why the late filing should be excused.[2]

The Secretary, in his response, argues that the penalty petition was timely filed and served pursuant to the deadline set forth in the Chief Judge's Order. Sec'y Resp. 10-11. The Secretary asserts it was within the Chief Judge's discretion to set a new deadline, which the Secretary met by electronically filing the penalty petition with the Commission and serving the penalty petition on Respondent via email on January 18, 2022. Respondent is not entitled to summary decision as a matter of law because there is no issue of material fact that the Secretary filed the petition and served Respondent by the deadline set by the Chief Judge.

I will not revisit the validity of the Chief Judge's Order. The Chief Judge had jurisdiction and control over this case when Respondent filed its Notice of Contest on October 4, 2021, until February 14, 2022, when the case was assigned to me.[3] While the case was under his jurisdiction and control, the Chief Judge, citing "good cause having been shown," saw fit to grant the Secretary's motion for an extension of time to file the penalty petition. Although Respondent continues to dispute the validity of the Chief Judge's Order, the issue was appealed and, on January 4, 2022, the Commission declined to grant the petition for discretionary review and the Fifth Circuit subsequently dismissed Respondent's appeal. Unlike the Commissioners, I do not sit in a position of review. Accordingly, I decline to review the Chief Judge's order.

Moreover, principals of the "law of the case doctrine" dictate that, absent extraordinary circumstances, courts should be loathe to overturn prior decisions of their own or those of a coordinate court, i.e., the Chief Judge. *Christianson v. Colt Industries Operating Corp.*, 486

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[2] Although other issues, such as the appropriateness of the previous stay and my ability to rule on the motion during the pendency of the appeal, were raised in Respondent's motion, those issues are moot and not addressed in this order.

[3] The Secretary cites the Supreme Court's decision in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 209 (1994), for the proposition that "actions before the Commission are initiated not by the Secretary but by a mine operator who claims to be aggrieved." I previously found Commission jurisdiction began when the Notice of Contest was filed. Cactus Canyon Quarries Inc., 44 FMSHRC 353, 354 (April 2022) (ALJ). Accordingly, the Chief Judge properly had jurisdiction over this case at the time he issued his December 1, 2021 order.

U.S. 800, 817 (1988).[4] Here, nothing in the record suggests extraordinary circumstances exist that would warrant revisiting the Chief Judge's determination that good cause existed for granting an extension of time to file beyond the 45-day limit set forth in Commission Procedural Rule 28(a).[5]

Commission case law makes clear that the 45-day time limit is not a statute of limitations. *Salt Lake* at 1715-1716; *Rhone-Poulenc of Wy. Co.*, 15 FMSHRC 2089, 2092-2093 (Oct. 1993). Further, when adequate cause is shown for a delay in filing a penalty, absent evidence of actual prejudice, procedural irregularities are subservient to the substantive purpose of the Mine Act to protect miners. *Long Branch Energy*, 34 FMSHRC 1984, 1990-1991 (Aug. 2012) ("The requirement in Rule 28(a) to file a penalty petition within 45 days cannot be viewed as an avenue for an operator to seek dismissal on a mere technicality.")

Here, the Chief Judge found good cause to grant the Secretary's motion for an extension of time to file the penalty petition. Moreover, Respondent alleged no actual prejudice. Given the absence of extraordinary circumstances or actual prejudice, I see no reason to revisit what was already decided by the Chief Judge and unsuccessfully appealed.

Given that the Chief Judge's order must stand, the only questions that remain are whether the Secretary timely filed the penalty petition and served Respondent by the date set forth in the Chief Judge's Order.

The Secretary timely filed the penalty petition with the Commission. Commission Procedural Rule 5 states that documents filed via electronic transmission are "effective upon successful receipt by the Commission." 29 C.F.R. § 2700.5(f). An email dated January 18, 2022, from FMSHRC's eCMS system confirms the penalty petition was timely received by the Commission. Sec'y Resp. Ex. I. I find that the Secretary timely filed the penalty petition in accordance with deadline set forth in the Chief Judge's Order.

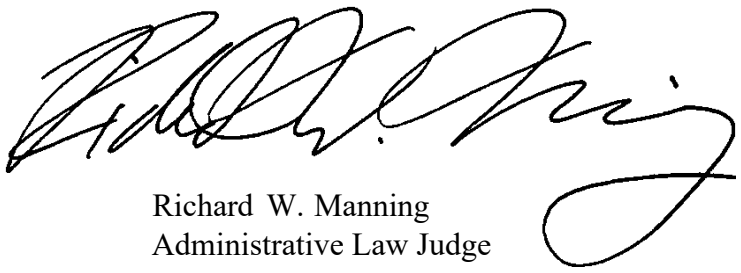
The Secretary timely served the penalty petition upon Respondent. Commission Procedural Rule 7 permits service via electronic mail and provides "service is effective upon

[4] The law of the case doctrine "expresses the practice of courts generally to refuse to reopen what has been decided[.]" *Christianson* at 817 (quoting *Messenger v. Anderson*, 225 U.S. 436, 444 (1912)). I note the Sixth Circuit Court of Appeals has held that "a transferee judge ought as a practical matter to accord considerable deference to the judgment of the transferor court[,]" *In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*, 664 F.2d 114, 120 (6th Cir. 1981), and as "[a]pplied to coordinate courts, the [law of the case] doctrine is a discretionary tool available to a court in order to promote judicial efficiency. As such, a decision to reconsider a previously decided issue will be deemed erroneous only if it is shown that the transferee court abused its discretion." *U.S. V. Todd*, 920 F.2d 399, 403 (6th Cir. 1990).

[5] Commission Procedural Rule 28(a) states that "[w]ithin 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." 29 C.F.R. § 2700.28(a).

successful receipt by the party intended to be served." 29 C.F.R. § 2700.7(c). The Certificate of Service included with the penalty petition indicates the Secretary emailed the penalty petition on January 18, 2022. Moreover, an email dated the same date confirms the Secretary sent a digital copy of the penalty petition to Respondent.[6] Sec'y Resp. Ex. J. I find that the Secretary timely served the penalty petition in accordance with deadline set forth in the Chief Judge's Order.

For the reasons stated above, Respondent's Motion for Summary Decision seeking dismissal of this case is **DENIED**.[7]



Richard W. Manning
Administrative Law Judge

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[6] The record demonstrates that on January 18, the Secretary emailed the penalty petition to the official email address for Respondent and also emailed a copy to Andy Carson, counsel for Respondent.

[7] Commission Procedural Rule 67(b) states that the Court may grant summary decision where the "entire record…shows: (1) [t]hat there is no genuine issue as to any material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. §2700.67(b).