FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W., SUITE 600
WASHINGTON, D.C. 20006

September 20, 1995

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. CENT 95-185 A. C. No. 29-00224-03667 A
v.	:	Cimmarron Mine
JAMES LEE HANCOCK, EMPLOYED BY PITTSBURGH & MIDWAY COAL COMPANY, Respondent	:	

ORDER DENYING MOTION TO DISMISS
ORDER ACCEPTING FILING

Before: Judge Merlin

This case is a petition for the assessment of civil penalties filed by the Secretary of Labor against respondent, James Lee Hancock, under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 810(c), hereinafter referred to as the AAct@. Respondent seeks to have the petition dismissed on the ground that the Secretary has failed to act in a timely manner.

The case involves one citation and three orders issued to respondent=s employer, Pittsburgh and Midway Coal Company, under section 104(d) of the Act, 30 U.S.C. ' 814(d), for alleged violations of the Act and its mandatory standards. The citation and first order were issued on July 15, 1993, and the subsequent two orders were issued on June 16, 1994.

Petitions for the assessment of civil penalties for the same conditions also were filed by the Secretary against respondent=s employer, Pittsburgh and Midway Mining Company, under section 110(a) of the Act, 30 U.S.C. ' 820(a). The first two items were the subject of an ALJ decision after hearing which affirmed the citation and order. Pittsburgh and Midway Mining Company, 16 FMSHRC 2260 (Nov. 1994). The latter orders are presently on stay before an Administrative Law Judge pending assignment of this case (Docket No. CENT 95-13).

On April 3, 1995, a civil penalty assessment was issued by the Secretary against respondent under section 110(c), supra. Thereafter, on April 24, 1995, respondent timely requested a

hearing. 29 C.F.R. ' 2700.26. The Secretary is allowed 45 days after the hearing request to file his penalty petition. 29 C.F.R. ' 2700.28. The time for filing or serving any document may be extended for good cause shown and the request for extension must be filed before the expiration of the time allowed for filing. 29 C.F.R. ' 2700.9. The Solicitor filed a request for an extension of time within which to file the penalty petition on June 12, 1995, which was the 45th day. The request was served upon respondent, but not upon his counsel. An order dated June 19, 1995, granted the extension. On July 11, 1995, the Solicitor filed a second motion for a further extension of time. This motion was served upon respondent=s counsel who on July 21, 1995, filed a memorandum in opposition to the both the first and second requests for extensions. An order dated August 7, 1995, directed the Solicitor to respond to the matters raised in respondent=s memorandum.[1]

Respondent first seeks dismissal on the ground that the requests for extensions should not be granted. The Solicitor explains the basis for his requests as follows: Two petitions for the assessment of civil penalties were filed against respondent=s employer under section 110(a) regarding the same conditions for which respondent now has been cited. The Solicitor consulted with his colleagues who had been assigned the other cases. As already noted, one of those dockets had been heard and decided and the Solicitor acquired and read the hearing transcript which was 449 pages. He represents that he did not want to file the 110(c) petition unless and until he could reliably determine respondent was the responsible agent and that bringing suit was appropriate as in accordance with the statute's substantive requirements.

I accept the Solicitor's explanation. It was proper for him to review the entire record compiled before he was assigned the case. Indeed, it would have been irresponsible for him not to have done so. I have previously permitted the late filing of penalty petitions upon a showing of good cause where there has been no prejudice shown. And I have noted the large number of mine safety cases. Here the nature of the case and the overall caseload constitute good cause. Power Operating Company Incorporated, 15 FMSHRC 931, (May 1993), Wharf Resources USA Incorporated, 14 FMSHRC 1964 (November 1992); Salt Lake County Road Department, 3 FMSHRC 1714 (July 1981). See also the Commission=s decision in Rhone-Poulenc, 15 FMSHRC 2089 (October 1993) aff=d, 57 F.3rd 982 (10th Cir. 1995). In addition, although the operator has alleged prejudice, it has not demonstrated any injury

[1]**The penalty petition was filed on August 7, 1995, and the answer was filed on August 21, 1995.**

resulting from these extensions. In light of the foregoing, I grant the extensions sought by the Solicitor for the filing of the penalty petition.[2]

Respondent also seeks dismissal of this case because 17 months elapsed between the first two citations dated July 15, 1993, and the notice of proposed assessment dated December 22, 1994. Respondent states that the operator is in the midst of a reduction in force which significantly increases the risk that critical witnesses will no longer be available and that relevant documents will not be located. He also advises that his employment was terminated on July 14, 1995. Based upon these assertions, respondent alleges prejudice.

In reply, the Solicitor sets forth what transpired during the time it took MSHA to complete its investigation. On January 18, 1994, a special investigator was assigned to conduct a 110(c) investigation. Because of other 110(c) investigations to which the investigator was assigned, he did not commence work on this case until May 9, 1994. In the course of his activities the investigator determined that two additional unwarrantable failure violations existed and therefore, on June 16, 1994, issued two additional orders. The subsequent orders were added to the investigation on June 30, 1994. Two weeks later, on July 13, 1994, the special investigation report and supporting materials which consisted of more than 400 pages and contained interviews and signed statements, were sent to MSHA=s Office of Technical Compliance in Arlington, Virginia. That office completed its review in two weeks, finding agent liability, and forwarded the files to the MSHA Division of the Solicitor=s office, also located in Arlington. On December 12, 1994, the Solicitor in Arlington completed review and approved a finding of liability under section 110(c). The file was returned to Denver and on December 22, 1994, the District Manager mailed the notice of proposed assessment to respondent.

Without doubt, the seventeen months between the first

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[2]**Since the first request for extension was not served upon respondent=s counsel, both requests are before me and I have considered both of them. Accordingly, respondent has not been injured by the lack of service. I have previously declined to dismiss a penalty petition for lack of service. Power Operating, supra.**

citations and the proposed assessment notice constitute a considerable period of time. This is particularly so when this period is viewed together with the extensions of time for filing the penalty petitions. From the information furnished by the Solicitor it appears that much of the elapsed time was taken up with delays in handling the case rather by actual work. The special investigation took six weeks. But six months passed before an investigator was assigned to the case and an additional three months went by because the special investigator was working on other cases. Also the case was with the Solicitor in Arlington for five months.

Nevertheless, it must be borne in mind that both the investigation and the various levels of internal review were necessary for a proper evaluation of agent liability and a knowing violation. The time used to evaluate the case could reasonably be viewed as affording some assurance that resources of both the individual and the government would not be wasted by the bringing of an unworthy case.

Moreover, this case does not exist in a vacuum. I take note that data in the Commission=s docket office shows the following: In 1990 there were 147 completed investigations under section 110(c), 49 of which were contested for a contest rate of 33%. In 1991 there were 256 such investigations, 126 of which were contested for a contest rate of 49%. In 1992 there were 308 investigations, 142 of which were contested for a contest rate of 46%. In 1993 there were 293 investigations, of which 128 were contested for a contest rate of 44%. In 1994 **there were 251 investigations, 177 of which were contested for a contest rate of 70%. The number of investigations is rather high and the rate at which they are contested has risen sharply.**

Section 110(a) provides that a citation be issued to an operator within a reasonable time. The legislative history speaks in terms of reasonable promptness for the issuance of such citations. S. Rep. No. 181, 95th Cong., 1st Sess. 30 (1977), reprinted in, Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 618 (1978). No such requirement specifically applies under 110(c), but elemental fairness would seem to require application of this condition to 110(c) cases. Relevant to the meaning of this requirement is the legislative history which specifically recognizes that there may be instances where a citation will be delayed because of the complexity of the issued raised, a protracted accident investigation of other legitimate reason. S. Rep. No. 181, supra at 30. Legislative History, supra at 618.

In view of the considerations set forth above and after carefully weighing all the factors, I conclude that good cause existed for the delays. The Solicitor is, however, cautioned that the delays in processing which occurred here are troubling.

In addition and most importantly, respondent has not demonstrated that he has been prejudiced by the delays. He asserts that he runs the risk of witness and document unavailability. But he does not show that any such unavailability has occurred. In this case I will not infer prejudice from the passage of time alone.

Respondent cites the ALJ decision in Curtis Crick, 15 FMSHRC 735 (April 1993). In that case the Secretary did not timely request an extension within which to file the penalty petition. It is therefore, distinguishable from this matter. To the extent that Curtis Crick is contrary to anything herein, it is not binding upon me and I decline to follow it. 29 C.F.R. ' 2700.72. More to the point is the recent ALJ Order Denying Motions To Dismiss dated August 8, 1995, in Cedar Creek Quarries et al, 17 FMSHRC____, (Docket No. WEST 94-637 et al). In Cedar Creek the Administrative Law Judge refused to dismiss a 110(c) case where the investigation took fifteen months.

In light of the foregoing, I conclude that the time elapsed between the issuance of the first citations and the Notice of Proposed Assessment does not constitute a basis for dismissal in this case. In addition, I conclude that dismissal is not warranted when the 60 day extensions granted the Solicitor is added.

In light of the foregoing it is ORDERED that the motion to dismiss be DENIED.

It is further ORDERED that the filing of the penalty petition be ACCEPTED.

The case will be assigned by separate order.

Paul Merlin
Chief Administrative Law Judge

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