

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 24, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2000-133
Petitioner	:	A. C. No. 01-01401-04327
	:	
v.	:	Docket No. SE 2000-134
JIM WALTER RESOURCES	:	A.C. No. 01-01401-04328
INCORPORATED,	:	
	:	
Respondent	:	Mine No. 7

ORDER ACCEPTING LATE FILING

Before: Judge Barbour

On July 3, 2000, this office received the Secretary's Petition for Assessment of Civil Penalty accompanied by a Motion to Permit Late Filings. In her motion, the Secretary states that the petition was due no later than June 26, 2000. She further states that her support staff consists of two legal assistants, one of whom was out of the office during the week of June 19, 2000. This meant that one legal technician assumed responsibility for all the administrative, clerical, and office management tasks, including the preparation of litigation case materials. According to the Secretary, during this week, the above captioned cases were inadvertently overlooked.

On July 10, 2000, Counsel for the Respondent filed a Statement in Opposition to Petitioner's Motion to Permit Late Filings. In the statement, Counsel disputes that MSHA received the Notice of Contest on May 10, 2000, claiming that an agent of the Secretary received the Contest on May 5, a reasonable delivery time from the alleged May 2, mailing date plus one additional day. Counsel for the Respondent argues that the Respondent's time to contest any citation elapsed on May 7, so if the Secretary did not receive the Contest until May 10, she should have moved the Commission to issue an order requiring the Respondent to pay the proposed penalties, pursuant to 29 C.F.R. § 2700.27. She did not do so. Therefore, Counsel states that the Secretary's failure to make such a request is either an admission that MSHA received the Contest earlier than May 10, or that the Secretary failed to handle the cases properly.

Counsel for the Respondent further argues that the Secretary does not have adequate cause for the late filing, as required by *Salt Lake County Road Department*, 7 FMSHRC 1714, 1716 (July 1981), because the Secretary has not alleged any heightened or unusual caseload. Counsel proffers that the Secretary has attempted to place the blame for the late filings on the legal technician, but Commission rules place the burden on the Secretary and the Secretary alone. Counsel charges that such displacement of blame constitutes “legal malpractice” on behalf of the Solicitor, that the reason given for the delay is not an excuse, that the delay was in the control of the Secretary, and that in filing the Motion to Permit Late Filings, the Secretary did not act in good faith.

Finally, Counsel for the Respondent argues that the delay presents a danger of unfair prejudice to Respondent and that “[r]ewarding the Solicitor’s malpractice and the Secretary’s negligence in these cases would be... improper, unfair, and unjust.”¹

Counsel for the Secretary filed a response to the Respondent’s Statement of Opposition, which included a signed affidavit from a supervisor from the Civil Penalty Compliance Office, swearing that MSHA received the Notice of Contest on May 10, 2000.

DISCUSSION

Date of Contest

I conclude that Respondent’s contentions regarding the date on which MSHA received the Contest are without merit. First, Counsel fails to provide any evidence that MSHA received the Contest before May 10, 2000. He seems to argue that because the Respondent mailed the Contest to MSHA on May 2, that the Contest should have arrived sooner than May 10. However, the Secretary has filed with the Commission a copy of the Notice of Contest with a May 10 stamp date. Moreover, a Civil Penalty Compliance Office supervisor has sworn that May 10 was in fact the date of receipt. Ordinary experience teaches that the postal service is not infallible, and it is conceivable that something mailed on May 2, could have been received on May 10. Further, I do not believe that MSHA fraudulently would date the Notice of Contest or that the supervisor would swear falsely. Therefore, I find that the Contest was received on May 10, and that the Secretary had until June 26, to file the penalty petition.

Second, the Secretary’s failure to move the Commission to issue an order requiring the Respondent to pay the proposed penalties is not evidence that the Contest was received earlier than May 10, or that the Secretary mishandled the cases. As Counsel for the Secretary points out, Commission Rule 7(c), 29 C.F.R. § 2700.7(c), states in pertinent part: “service by mail . . . is effective upon mailing.” Thus, whether the Notice of Contest was mailed on May 2, as Counsel for the Respondent argues, or on May 4, as the Counsel for the Secretary maintains, it was not

¹Counsel for the Respondent’s accusations of “legal malpractice” are surprising. His words express neither the realities of the record nor the civility the Commission demands of those who appear before it. In the future Counsel should not allow the inevitable irritations of litigation to impinge upon the courtesy he owes (and usually shows) his fellow litigators.

overdue regardless of when the Secretary received the Contest.

Adequate Cause

Respondent's Counsel next argues that the Secretary did not have adequate cause for the late filing. Section 105(d) of the Mine Act states in pertinent part: "[i]f, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104 . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing." Further, Commission Rule 28, 29 C.F.R. § 2700.28, states that, "within 45 days of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for section 105(d)." *Salt Lake*, 7 FMSHRC at 1715. Although the purpose of Section 105 (d) and Rule 28 are to effectuate swift enforcement, *Salt Lake* at 1715, the Commission has made clear that they should not be interpreted "to create a statute of limitations nor should the term immediately in Section 105(d) be construed as a procedural strait [jacket]." *Id.* at 1716. The Commission has held that the Secretary may request permission for late filing if the request is based upon "adequate cause." 7 FMSHRC at 1716.

Legal precedent dictates that clerical errors, including those committed by agents of the Secretary, are adequate cause for delay, especially where the delay is short. In *Apac Company*, Docket No. CENT 97-187, unpublished (Dec. 16, 1997) (attached to *Patterson Materials Corp.*, 21 FMSHRC 463, 466 (April 1999)), a petition that was filed 24 days late because of a filing error was accepted. In *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982), the Commission ruled that insufficient clerical help was adequate cause for the 15 day delay. Even in *Salt Lake*, the seminal case, the Commission deemed a lack of clerical personnel to be adequate cause for the approximate 2 month delay.

Although Counsel for the Respondent argues otherwise, the instant case is similar to *Jerry Hudgeons*, 22 FMSHRC 272 (Feb. 2000), in which I held that there was adequate cause for delay where a staff member inadvertently misfiled a case because in both situations the delay was caused by the mishandling of files by a staff member. I have stated that "adequate cause is based upon the reasons offered and the extent of the delay." *Id.* at 273. The Secretary's explanation for why the petition was delayed was not a shifting of blame but was the "[reason] offered." In addition, the delay in this case was a mere 6 days. Accordingly, I find that the Secretary did not file her motion in bad faith but had adequate cause for the delay.

Prejudice

Finally, Counsel for the Respondent argues that allowing the late filing "would work a manifest unfair and unduly prejudiced harm" upon the Respondent. In *Salt Lake*, the Commission stated that even if there is adequate cause for the delay "the operator has an opportunity to object to the late filing on the grounds of prejudice." 7 FMSHRC at 1716. Counsel, however, fails to offer any specific evidence of prejudice. Absent such a showing, I find that there is no prejudice.

ORDER

In light of the foregoing, it is **ORDERED** that the Solicitor's late filed penalty petition is **ACCEPTED**.

It is further **ORDERED** that the Respondent file its answer to the penalty petition within 30 days of the date of this order.

David F. Barbour
Chief Administrative Law Judge

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