

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

February 5, 1998

LOCAL 1702, DISTRICT 31, UMWA	:	COMPENSATION PROCEEDING
on behalf of miners,	:	
Applicants	:	Docket No. WEVA 98-10-C
v.	:	
	:	
CONSOLIDATION COAL COMPANY,	:	Blacksville No. 2 Mine
Respondent	:	Mine ID No. 46-01968

ORDER DENYING MOTION TO DISMISS COMPLAINT

In a motion to dismiss filed by Consolidation Coal Company (Consol) it is represented that this Commission received what purports to be a complaint for compensation on July 2, 1997. Consol maintains that it was not served a copy of said complaint until December 2, 1997, 153 days later.

Commission Rule 7, 29 C.F.R. § 2700.7 governs service of complaints for compensation but is silent with respect to the time limits for the service of such a complaint. Where a procedural question is not governed by the Federal Mine Safety and Health Act of 1977, the Commission rules or the Administrative Procedure Act, the Commission is guided by the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. Commission Rule 1(b), 29 C.F.R. § 2700.1(b). Accordingly, the time for the service of a complaint following its filing is governed by Rule 4(m), Federal Rules of Civil Procedure. That rule provides as follows:

If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the Court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time; provided that if the plaintiff shows good cause for the failure, the Court shall extend the time for service for an appropriate period.

Courts have broad discretion on whether to dismiss an action because of inadequate service or require that service be made properly. *Montalbano v. Easco Hand Tools Inc.*, 766 F.2d 737 (2nd Circuit 1985), 2 A J. Moore and J. Lucas, Moore’s Federal Practice, ¶ 12.07 [2.-4] (2nd Ed. 1996). As a general matter the action will be preserved in those cases in which there is a reasonable prospect that the service can be accomplished properly. *Novak v. WorldBank*, 703 F.2d 1305 (D.C. Circuit 1983), Moore’s Federal Practice *supra*. In the instant case, Consol was served with a copy of the Complaint on December 2, 1997. It has not claimed prejudice by the untimely service and the non-lawyer representative of the applicants was apparently unfamiliar

with the service requirements. Under the circumstances, Consol's motion to dismiss is DENIED.

Gary Melick
Administrative Law Judge
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