

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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January 10, 2001

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2000-411-M
Petitioner	:	A.C. No. 45-03224-05515
	:	
v.	:	
	:	Champion Pit
WASHINGTON ROCK QUARRIES, INC.,	:	
Respondent	:	

**ORDER DENYING MOTION FOR SUMMARY DECISION**

Counsel for the Secretary filed a motion for summary decision in this case. The motion was mailed on January 3, 2001. The hearing in the case is scheduled for January 17, 2001. The Secretary sets forth two grounds for the motion. First, she states that she should be granted summary decision as a matter of law because Respondent exceeded the time required “to contest the citations.” Second, she contends that there are no genuine issues of material fact with respect to the merits of the case. Respondent opposes the Secretary’s motion or, in the alternative, asks that it be granted an opportunity to respond in full.

The Commission’s Procedural Rules provide that a “motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any materials facts; and (2) that the moving party is entitled to summary decision as a matter of law.” 29 C.F.R. § 2700.67(b). The Commission’s procedural rule further states that a motion for summary decision must be supported. The Secretary attached affidavits of MSHA Inspectors Randy W. Horn and Rick Dance.

With respect to the Secretary’s first ground for the motion, I note that the Secretary, on or about August 14, 2000, filed a motion with the Commission’s chief administrative law judge requesting a “summary order assessing the proposed penalties as final and directing that such penalties be paid.” She based this motion on the fact that an answer to her petition for penalty had not yet been filed. By order dated August 24, 2000, the chief judge denied the motion. In addition, on August 10, 2000, the chief judge issued an order to show cause granting Respondent 30 days from that date to file its answer. Counsel for the Respondent filed his appearance and answer on September 6, 2000, within this 30-day period.

It is clear that Respondent intended to contest the citations and penalties when it filed its notice of contest under 29 C.F.R. § 2700.26. It failed to file an answer to the Secretary's petition for penalty within the time required by 29 C.F.R. § 2700.29. This 30-day requirement is not jurisdictional and the Commission's chief judge, in effect, granted Respondent a 30-day extension of time. The cases cited by the Secretary on page 11 of its motion are not applicable. Those cases concern late-filed *pre-penalty* contests of citations and orders under 29 C.F.R. § 2700.20. This case is a penalty proceeding and concerns a late-filed answer to the Secretary's petition for penalty. Commission law with respect to these distinct issues is not the same. Consequently, I deny this portion of the Secretary's motion.

The Secretary also contends that there is no genuine issue of material fact and that she is entitled to summary decision as a matter of law on the merits of the case. She attached affidavits of the two MSHA inspectors that issued the citations at issue in these cases. These affidavits, which total about seven pages, set forth the observations and conclusions of the inspectors. The affidavits are a summary of what they would testify to at a hearing. Under the Commission's procedural rules, "when a motion for summary decision is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for a hearing." 29 C.F.R. § 2700.67(c). Under rule 2700.10, a party has ten days to respond to a motion. Five days are automatically added to the response time when service is by mail, as it was in this case. 29 C.F.R. § 2700.8. Thus, Respondent has 15 days to file its response to the Secretary's motion for summary decision.

On November 1, 2000, I issued an order setting this case for hearing on January 17, 2001. Because the Secretary did not file and serve her motion for summary decision until January 3, 2001, Respondent's reply is not due until January 18, 2001. Thus, by filing this motion, the Secretary is indirectly asking that I cancel the hearing. Under 29 C.F.R. § 2700.67(a), motions for summary decision must be filed at least 10 days prior to the start of the hearing. Although the Secretary complied with this minimum requirement, I do not believe that she complied with the spirit of the Commission's procedural rules. A party should not be permitted to file a motion for summary decision 14 days before a scheduled hearing so as to require the cancellation of the hearing, at least where the motion simply sets forth the party's evidence to be presented at the hearing. The Secretary's motion does not attempt to narrow or focus the issues. It does not raise issues that are particularly amenable to resolution through summary proceedings.

Granting the Secretary's motion would not "secure the just, speedy and inexpensive determination" of the issues in this case. 29 C.F.R. § 2700.1(c). If I canceled the hearing to allow Respondent the opportunity to reply to the Secretary's motion, it is foreseeable that Respondent will respond with an affidavit that challenges some of the material facts set forth by the Secretary. I would then have to deny the motion and reschedule the hearing for a later date. Consequently, I deny this portion of the Secretary's motion as well.

For the reasons set forth above, the Secretary's motion for summary decision is **DENIED** and Respondent's motion to strike the Secretary's motion is **GRANTED**. Unless the parties settle this case, the hearing will proceed as scheduled on January 17, 2001. The exact courtroom in which the hearing will be held has been changed. The hearing will be in Courtroom 815 on the 8<sup>th</sup> Floor of the United States Courthouse, 1010 Fifth Avenue, Seattle. The hearing will commence at 9:00 a.m.

Richard W. Manning  
Administrative Law Judge

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