

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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June 5, 2001

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. WEVA 2001-30
Petitioner : A. C. No. 46-01318-04447
 :
v. : Docket No. WEVA 2001-31
 : A.C. No. 46-01318-04448
CONSOLIDATION COAL COMPANY :
Respondent : Robinson Run No. 95

**ORDER GRANTING MOTIONS FOR LEAVE TO FILE OUT-OF-TIME
AND DENYING MOTIONS TO DISMISS**

These cases are before me on petitions for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815(d). The Secretary has moved for leave to file the petitions beyond the time allowed under Commission Procedural Rules. Respondent has opposed the motions and moved that the petitions be dismissed. For the reasons set forth below, the Secretary's motions are granted and Respondent's motions are denied.

Facts

Civil penalties were assessed by the Secretary's Mine Safety and Health Administration (MSHA) for alleged violations of mandatory health and safety standards and Respondent timely served notices of contest on the Secretary. The notice of contest for A.C. No. 46-01318-0447 (Docket No. WEVA 2001-30) was received on January 3, 2001. The notice of contest for A.C. No. 46-01318-04448 (Docket No. WEVA 2001-31) was received on January 2, 2001. Commission Procedural Rule 28(a), 29 C.F.R. § 2700.28(a), specifies that a petition for assessment of civil penalties shall be filed within 45 days of receipt of a timely contest. The petitions for the foregoing penalty assessments should have been filed by February 20, 2001 and February 16, 2001, respectively. They were filed on May 3, 2001, approximately two and one half months beyond the deadline.

The Secretary filed motions for leave to file the petitions out-of-time. Respondent opposed the motions and moved that the petitions be dismissed. Respondent does not claim that it has suffered prejudice as a result of the untimely filings. The Secretary asserts that there was adequate cause for the untimely filings, relying upon a sworn statement by the Assistant District Manager for Inspection Programs. In essence, the Secretary asserts that the untimely filings were the result of inadvertent delay in the transmittal of these cases to the Office of the Solicitor. The

delay resulted from a temporary reduction in secretarial staffing due to the retirement of a secretary in MSHA's Morgantown, West Virginia, field office. The experienced secretary in the Fairmont, West Virginia field office, who normally is responsible for timely forwarding of cases to the Office of the Solicitor, was detailed to perform the retired secretary's duties and was attempting to perform both jobs, devoting most of her time to the detailed position's responsibilities. Apparently, there was also a misunderstanding that led to a failure of one office to retain a copy of a packing list which resulted in an unnecessary delay while that office awaited a copy of the packing list, a problem that is claimed to have been corrected. The materials were transmitted to the Solicitor's Office on May 1, 2001, where it was recognized that the time for filing had expired. Petitions for assessment of civil penalties and motions for leave to late file were promptly filed with the Commission on May 3, 2001.

Applicable Law

The Commission has made clear that the time limits for filing a penalty petition are not to be lightly regarded by the Secretary and that adequate cause must be shown to justify a late filing. Even if adequate cause is shown, a motion to dismiss may be granted if the delay has resulted in prejudice to Respondent. *Rhone-Polenc of Wyoming Co.*, 15 FMSHRC 2089 (October 1993); *Salt Lake Co. Road Dept.*, 3 FMSHRC 1714 (July 1981). In *Salt Lake*, the Commission was critical of the Secretary's reliance on high case loads and limited clerical help as a justification for untimely filing and also admonished the Secretary to proceed with a timely motion to extend time when extra time is legitimately needed.

Nevertheless, the Commission reversed the dismissal that had been entered in that case, holding that "effectuation of the Mine Act's substantive scheme, in furtherance of the public interest" precluded automatic dismissal of an untimely filed petition. *Id.* at 1716. It established the "adequate cause" test for justifying a late filing and recognized that "procedural fairness" could dictate dismissal where an operator could establish that it had suffered prejudice as a result of any delay. The Commission concluded its analysis with the following language: "Allowing * * * an objection [based on prejudice] comports with the basic principle of administrative law that substantive agency proceedings, and effectuation of a statute's purpose, are not to be overturned because of a procedural error, absent a showing of prejudice." (citations omitted). *Id.*

Analysis

The delays in filing here were neither insubstantial nor excessive. While the statement relied upon by the Secretary to explain and justify the delay is not a model of clarity, it does appear to a reasonable degree of certainty that the delays were attributable to a temporary staffing shortage and an error in processing by MSHA field offices. The processing error has been corrected. The materials to support the petitions for assessment of civil penalties were forwarded to the Solicitor's Office after the due dates for filing had passed. The Solicitor's Office immediately noted the error and promptly filed the petitions and motions for leave to file out-of-time.

On the facts of these cases, I find that the Secretary has fulfilled her burden of showing adequate cause for the delay. Because Respondent claims no prejudice attributable to the delay, the motions for leave to late file will be granted.

ORDER

The Secretary's motions for leave to file out-of-time are granted. The Respondent's motions to dismiss are denied.

Michael E. Zielinski
Administrative Law Judge

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