

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

November 2, 2007

ALEX ENERGY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEVA 2007-497-R
	:	Order No. 7267047; 05/02/2007
	:	
v.	:	Docket No. WEVA 2007-498-R
	:	Order No. 7267048; 05/02/2007
	:	
	:	Docket No. WEVA 2007-499-R
	:	Order No. 7267049; 05/02/2007
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEVA 2007-500-R
ADMINISTRATION, (MSHA)	:	Order No. 7267051; 05/03/2007
Respondent	:	
	:	Superior Surface Mine

ORDER GRANTING SECRETARY’S LEAVE TO FILE ANSWER
AND
STAY ORDER

The Contestant filed its Notices of Contest in the above captioned matters on May 31, 2007. Commission Rule 20(f), 29 C.F.R. 2700.20(f), specifies that the Secretary shall file an answer to a notice of contest within twenty days. The Secretary filed an Answer and Motion to Stay on August 2, 2007. The Secretary’s answer was filed thirty-eight days beyond the twenty day filing period contained in the Commission’s Rules.

Concurrently filed with its answer, the Secretary filed a Motion for Leave to File her untimely answer as well as a Motion to Stay these contests pending the docketing of the related civil penalty matter. The Secretary claims the untimely filing occurred as a result of routing delays in the Secretary’s mail delivery system.¹

¹ Also before me for consideration is the Secretary’s Motion to Dismiss the contest of Order No. 7267051 in Docket No. WEVA 2007-500-R, filed with the Commission on June 5, 2007, because the Secretary avers that she did not receive the contestant’s Notice of Contest. Obviously, the Secretary’s mail routing in these matters has been less than exemplary. Consequently, the Secretary’s Motion to Dismiss WEVA 2007-500-R is denied. However, the Secretary’s response to the Notice of Contest in WEVA 2007-500-R shall be held in abeyance pending the pertinent civil penalty case.

On August 14, 2007, the Contestant filed an opposition to the Secretary's Motion for Leave to File her untimely answer. The Contestant has not shown any cognizable prejudice by the Secretary's delay that is a prerequisite to any relief that the contestant is seeking. *Sec'y of Labor on behalf of Hale v. 4-A Coal Co.*, 6 FMSHRC 905, 908-09; (June 1984); *Sec'y of Labor on behalf of Hale v. 4-A Coal Co.*, 8 FMSHRC 905 (June 1986); *Sec'y of Labor on behalf of Nantz v. Nally & Hamilton Enters.*, 16 FMSHRC 2208, 2214-15 (Nov.1994); *Sec'y of Labor on behalf of Poddey v. Tanglewood Energy, Inc.*, 18 FMSHRC 1315, 1325 (Aug. 1996).

Processing guidelines generally are intended to "spur the Secretary to action," rather than to confer rights on litigants that limit the scope of the Secretary's authority. *Sec'y of Labor v. Twentymile Coal Company*, 411 F.3d 256, 261 (D.C.Cir. 2005). Moreover, filing periods under the Federal Mine Safety and Health Act of 1977 are not considered jurisdictional. *See, e.g., Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem.*, 750 F2d 1093 (D.C. Cir. 1984).

In view of the above, in the absence of a showing of identifiable prejudice, the late filing of the Secretary's answer does not exempt the contested cited violative conditions from Mine Act jurisdiction. Accordingly, the Secretary's Motion for Leave to File her untimely answer **IS GRANTED**. In the interest of judicial efficiency, the Secretary's Motion to Stay the captioned contests pending the assignment of the related civil penalty matter **IS ALSO GRANTED**.

Jerold Feldman
Administrative Law Judge

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