

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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September 8, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2000-38-M
Petitioner	:	A.C. No. 37-00002-05516
v.	:	
	:	Cranston Quarry
TILCON CAPALDI INC.	:	
Respondent	:	

ORDER DENYING MOTION TO DISMISS

This case is before me on a petition 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). Respondent has moved to dismiss the petition because it was not filed timely. For the reasons set forth below, the motion is denied.

Facts

MSHA conducted inspections of Respondent's mine in August and October, 1999. Eleven citations were issued in August and an additional six citations were issued in October. On September 9, 1999, Respondent initiated Contest Proceedings as to each of the August citations. Commission Docket No.'s YORK 99-69 through 99-79. On October 15, 1999, the Secretary, with Respondent's consent, moved to late file answers to the contest proceedings and to stay proceedings pending the assessment of civil penalties for the eleven citations. By Order dated, October 19, 1999, the motion to stay was granted. On October 15, 1999, MSHA assessed civil penalties for eight of those citations, and a petition to assess civil penalties was filed on December 23, 1999, Docket No. YORK 2000-12-M. By Order dated February 15, 2000, proceedings in that case were stayed pending the filing of a petition for civil penalties in the remaining three August 1999 citations.

Penalties were assessed by MSHA for the remaining three August citations on January 27, 2000. However, included in the assessment were the six citations issued during the October, 1999, inspection. Respondent contested that assessment on February 25, 2000, and requested that the three August citations be consolidated with the other pending cases and that the six October citations be referred to the Alternative Case Resolution Initiative (ACRI). The Solicitor attempted to accommodate that request.

Meanwhile, in the absence of any definitive commitment by the Secretary as to when penalty proceedings would be filed with respect to the remaining three August citations, the undersigned, by Order dated May 3, 2000, lifted the stay of proceedings on the eleven contest cases and the related

penalty docket, and scheduled a hearing in those cases for September 27, 2000.¹ The notice indicated an intention to also hear the penalty proceedings for the remaining three citations in the event that they were filed prior to the hearing date.

In response, the Secretary initiated penalty proceedings for the citations included in the January 27, 2000 assessment. The Secretary attempted to split those citations into two groups, the August and October citations, by filing a petition for only the six October 1999 citations in this assigned docket number, intending to file a separate petition for the three August 1999 citations under the pending penalty proceeding docket number. When informed by Commission staff that that could not be done, a petition as to all nine of the citations concluded in the January 27, 2000 assessment was filed. The filings occurred on May 15 and 17, 2000, respectively.

Respondent moved to dismiss the petition asserting that its filing was untimely by over a month and that it had suffered prejudice as a result.² Petitioner opposed the motion arguing that there was adequate cause for the untimely filing and that no prejudice was demonstrated by Respondent. Petitioner relies upon an affidavit by counsel describing the circumstances under which the petition was filed late.

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.³

¹ The Order stated, in pertinent part: "Three citations at issue in the contest proceedings apparently have yet to be made the subject of a petition for civil penalties. Six months should have been adequate time to allow the filing of civil penalty proceedings with respect to all of the citations at issue and there is no compelling justification for extending the stay further. If civil penalty proceedings are filed with respect to those three citations, they will be consolidated for purposes of the hearing."

² Respondent's contest of the proposed assessments was hand delivered on February 25, 2000. Commission 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, i.e., here, by April 10, 2000.

³ There, as here, the Secretary had not filed a motion for extension of time prior to the expiration of the time limit, as required by Commission Rule 9(a). 29 C.F.R. § 2700.9(a).

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.*

On the facts of this case, I find that the Secretary has fulfilled, but just barely, her burden of showing adequate cause for the delay. Because Respondent makes no showing of prejudice attributable to the delay, merely noting that more time will have elapsed between issuance of the citations and resolution of the penalty cases, the motion to dismiss will be denied.

For reasons unknown to at least Respondent and the undersigned, MSHA determined to split the assessment of penalties for the eleven citations issued during the August 1999 inspection. Eight were done in due course and a petition for assessment of penalties was timely filed, Docket No. YORK 2000-12-M. Assessment of the remaining three citations did not occur until January 27, 2000, which probably would not have had any detrimental consequences, except that MSHA also included in that assessment the six, essentially unrelated, citations issued during the October 1999 inspection. In contesting the proposed assessments, Respondent requested, quite reasonably, that the three August citations be consolidated with the remaining August citations and that the October citations be diverted into the ACRI program. The Secretary agreed with that proposal and attempted to effectuate it, ultimately finding that it was difficult to do.

The Secretary’s explanation of the difficulty, however, is somewhat “thin”. While the opposition and affidavit list numerous questions that needed to be answered, there is precious little detail as to particular actions required to obtain answers and when (or even if) those actions were taken. The delay as to the August citations ended, for all practical purposes, on May 3, 2000, when the stay on the contest proceedings and the penalty proceedings on the other eight August citations was lifted and a hearing date was set. It is somewhat ironic that the Secretary should benefit from this action because it was born partially out of frustration with the delay in assessment of penalties for the three outstanding citations and the inability to obtain meaningful information about the processing of the assessments despite a requirement for periodic status reports incorporated into the stay order.

On the whole, however, the complication of the combined assessments and what appear to be good faith efforts to accommodate the reasonable request of Respondent for diversion of the October citations to the ACRI program rise, but just barely, to the level of adequate cause even though Respondent bears no responsibility for that initial assessment processing anomaly. It is also relevant that Respondent assented to the initial stay of the contest proceedings, and noted no objection to the extension of the stay to Docket No. YORK 2000-12. If Respondent had a strong

interest in more expeditions litigation of the August citations, it could have taken steps to achieve that objective. The finding of adequate cause does not excuse the conduct of the Solicitor's office. While the attempts to deal with the complications resulted in delay, there is no excuse for failing to monitor the approach of the filing deadline or for disregarding the admonition of the Commission in *Salt Lake*, to "proceed by timely extension motion when extra time is legitimately needed."

The October citations stand on a slightly different footing. There were no previous cases filed with the Commission as to those citations and the lifting of the stay in the other cases did not end the delay as to them. Considered alone, the motion as to those citations presents a more straightforward argument for dismissal based upon delay in filing. However, the original complicating factor that prompted the delay as to the August citations had the same impact on the October citations. On the whole, I also find adequate cause for the delay in filing as to the October citations. If the parties still desire to attempt to resolve those citations through the ACRI program, a stay of proceedings as to those citations could be requested.

Michael E. Zielinski
Administrative Law Judge

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