CCASE:
MSHA V. SALT LAKE COUNTY DEPARTMENT
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
July 28, 1981
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

v. Docket No. WEST 79-365-M

SALT LAKE COUNTY ROAD
DEPARTMENT

DECISION

This case involves a civil penalty proceeding under section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $801 et seq. (Supp. III 1979). The issue is whether a proposal for penalty should be dismissed because of its late filing under Commission Rule 27. For the reasons below, we conclude that dismissal is not warranted in this case.

On March 27, 1979, Salt Lake County Road Department was cited for a violation of 30 CFR $56.14-1. 1/ The Secretary proposed a penalty of $60 and Salt Lake timely filed a notice of contest on August 28, 1979. The Secretary filed a proposal for a civil penalty on December 10, 1979, which was accompanied by an instanter motion to accept late filing of the penalty proposal. Under Commission Rule 27, the Secretary should have filed the penalty proposal on or before October 12, 1979. 2/ In addition, under Commission Rule 9, if the Secretary desired an extension, such a motion should have been filed on or before October 7, 1979. 3/ The Secretary's instanter motion stated that lack of clerical personnel and a high volume of cases caused the delay in filing. 4/

1/ 56.14-1. Mandatory. Gears; sprockets; chains; drive, head, tail, and takeup pulleys; flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, shall be guarded.

2/ Rule 27, 29 CFR $2700.27, states in pertinent part:

(a) When to file. Within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty, the Secretary shall file a proposal for a penalty with the Commission.

3/ Rule 9, 29 CFR $2700.9, states:
Extension of Time. The time for filing or serving any document may be extended for good cause shown. A request for an extension of time shall be filed 5 days before the expiration of the time allowed for the filing or serving of the document.
4/ The proposal for penalty in this case is a simple two-page pleading consisting mainly of five short paragraphs.
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On January 11, 1980, Salt Lake filed an answer and a motion for a summary decision. Salt Lake predicated its summary decision motion, in part, on the argument that dismissal was required because the proposal for penalty was filed late. At the hearing held on July 23, 1980, the parties read into the record a settlement agreement stipulating to the violation and payment of the proposed $60 penalty subject to determination of the legal issues raised by the respondent in its motion for summary decision. Tr. 3 5. On November 25, 1980, the administrative law judge issued a decision in which he accepted the Secretary's late filing, found a violation, and assessed a $60 penalty. 2 FMSHRC 3409. 5/
Under section 105(a), an operator has 30 days from the receipt of the initial notification of a proposed penalty assessment in which to notify the Secretary that he plans to contest the assessment. Section 105(d) requires that if a timely notice of contest is filed, "the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing...." (Emphasis added.) In turn, Commission Rule 27 provides that "[w]ithin 45 days of receipt of a timely notice of contest ..., the Secretary shall file a proposal for a penalty with the Commission." In essence, Rule 27 implements the meaning of "immediately" in section 105(d).
We think that it is clear from the text of section 105(d) that the purpose of that section is to provide for prompt and efficient enforcement. The requirement of prompt penalty proposal puts teeth into the Mine Act's penalty structure. The section incidentally promotes "fair play" by protecting operators from stale claims. This focus on effective enforcement rather than on creating a period of limitations is reflected in relevant legislative history cited by the judge. Although that passage in the report of the Senate committee that largely drafted the Mine Act deals with the initial notification of an operator of a proposed penalty assessment, it bespeaks the overriding concern with enforcement:
To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the operator and miner representative promptly. The Committee notes, however, that

there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding. [6/]

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5/ Our grant of Salt Lake's petition for discretionary review limited review to the issue of whether the penalty proposal should be dismissed due to its late filing. There were two additional issues, originally raised in Salt Lake's summary decision motion, concerning which we did not grant review: 1) whether the pit in question is under the jurisdiction of the Mine Act; and 2) whether the inspection was conducted lawfully because the inspector did not have a warrant.

6/ S. Rep. No. 95 181, 95th Cong., 1st Sess. 34 (1977), reprinted !n Senate Subcommittee on Labor, Comm. on Human Resources, 95th Cong.. 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 622 (1978).

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Commission Rule 27 must be interpreted consistently with section 105(d), since Rule 27 implements that section. Accordingly, the Secretary is not free to ignore the time constraints in Rule 27 for any mere caprice, as that would frustrate the enforcement purposes of section 105(d) and, in some cases, deny fair play to operators.

In view of the foregoing, what consequences should ensue if the Secretary does not comply with Rule 27. Since the purpose of Rule 27 is to effectuate the Act's substantive penalty scheme, not to create a "statute" of limitations, as Salt Lake contends, we cannot view the term "immediately" in section 105(d), or the time limit set in Rule 27, as procedural "strait jackets." Situations will inevitably arise where strict compliance by the Secretary does not prove possible. Nonsuiting the Secretary in such situations presents quite a different situation from defaulting the tardy private litigant. The drastic course of dismissing a penalty proposal would short circuit the penalty assessment process and, hence, a major aspect of the Mine Act's enforcement scheme.

We do not mean to intimate that insuring procedural fairness is not an important concern under the Mine Act. However, effectuation of the Mine Act's substantive scheme, in furtherance of the public interest, is more crucial. Accordingly, considerations of procedural fairness to operators must be balanced against the severe impact of dismissal of the penalty proposed upon the substantive scheme of the statute and, hence, the public interest itself. See, e.g., Alumbaugh Coal Corp. v. NLRB, 635 F.2d 1380, 1384 (8th Cir. 1980). In order to help strike a proper balance and to insure that the Secretary does not ignore section 105(d)'s injunction to act "immediately," we hold that if the Secretary does seek permission to file late, he must predicate

his request upon adequate cause. Cf. Valley Camp Coal Co., 1 FMSHRC 791, 792 (1979) (excusing the late filing of an operator's answer for "adequate cause"). Such a requirement will guard against cases of abuse and also comports with analogous leeway extended to private litigants before the Commission. Valley Camp Coal Co., supra. Nevertheless, cases may arise where procedural justice dictates dismissal. While the requirement of showing adequate cause for a filing delay may guard against administrative abuse, a stale penalty proposal may substantially hinder the preparation and presentation of an operator's case. Therefore, we also hold that an operator may object to a late penalty proposal on the grounds of prejudice. We note that in his brief filed herein, the Secretary agrees with this general proposition. Br. 3 4. Allowing such an objection 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. See Alumbaugh Coal Corp. v. NLRB, 635 F.2d at 1383-1384 (and cases cited); Jensen Construction Co. v. OSHRC, 597 F.2d 246, 247-248 (lOth Cir. 1979); Todd Shipyard Corp. v. Secretary of Labor, 566 F.2d 1327, 1329-1330 (9th Cir. 1977); Ralph Foster & Sons, 3 FMSHRC 1181 (1981). 7/

7/ Salt Lake's objection (Br. 3) that we are not free to read a prejudice requirement into Rule 27 because the Rule is silent on prejudice lacks merit. As the authorities cited in the accompanying text

(footnote cont'd)

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In light of the foregoing general principles, we turn to the specific issues in this case: did the Secretary show adequate cause for the delay and did the delay prejudice Salt Lake?

The Secretary's reason for delay, an extraordinarily high caseload and lack of clerical personnel, might be deemed an improper excuse for filing a simple, two-page pleading two months late. As Salt Lake points out, almost any law office in the country can claim the same "cause" as an excuse to evade every time limit in the various rules of civil procedure. However, the Secretary is engaged in voluminous national litigation and mistakes can happen. We believe that the Secretary minimally satisfied the adequate cause standard in this case. This is not to say that we will tolerate a practice of filing relatively uncomplicated pleadings late. Therefore, we cannot too strongly urge the Secretary to comply with Commission Rule 27, to the end that the enforcement goals embodied in section 105(d) be realized. See Arch Mineral Corp., 2 FMSHRC 277 (1980). 8/

Furthermore, we agree with the judge (2 FMSHRC 3412) that Salt Lake has shown no prejudice. Indeed, in its brief filed herein, Salt Lake

makes no effort to demonstrate prejudice. Salt Lake certainly had notice of the citation and had filed its notice of contest. Salt Lake merely seizes upon a procedural irregularity to justify the drastic remedy of dismissal.

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fn. 7 continued
demonstrate, agencies have discretion to interpret their procedural rules in light of well established principles of administrative law, which, in effect, are read in pari materia with the rules. Salt Lake's attempt to treat Rule 27 as a statute of limitations or "statute of creation" (Br. 5-7) is also misplaced. As we have concluded, section 105(d) is not a statute of limitations and, therefore, the implementing 45-day time-limit in Rule 27 is not an administrative "statute" of limitations either; rather it is a procedural rule designed to give specific and concrete form to section 105(d)'s injunction for "immediate" action in order to effectuate the Mine Act's penalty system. For this reason, the numerous statute of limitations cases cited by Salt Lake are inapposite. These cases involved genuine statutes of limitations enacted by Congress expressly to protect parties from defending against stale claims.

8/ Complicating this case is the fact that the Secretary did not request an extension of time under Rule 9. Instead, the Secretary used an instanter motion, as the period for filing a request for an extension of time had lapsed. The use of an instanter motion could become temptation to abuse and, absent extraordinary circumstances, the Secretary is also admonished to proceed by timely extension motion when extra time is legitimately needed.

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In sum, for the reasons stated above, we affirm the judge's acceptance of the Secretary's late-filed penalty proposal and his refusal to dismiss the proceeding due to the late filing. Therefore, the judge's finding of violation and assessment of penalty are affirmed.

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