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SOL (MSHA) V. RHONE-POULENC OF WYOMING
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October 13, 1993

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. WEST 92-519-M |
| RHONE-POULENC OF WYOMING COMPANY | : | |

BEFORE: Holen, Chairman; Backley, Doyle and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988)("Mine Act" or "Act"). The issue is whether Commission Administrative Law Judge John J. Morris erred in denying the Secretary of Labor's motion to accept the late filing of his Proposal for Penalty. Judge Morris granted the motion filed by Rhone-Poulenc of Wyoming Company ("Rhone-Poulenc") to dismiss this proceeding on the ground that the Secretary had not demonstrated adequate cause for the late filing of his Penalty Proposal under the Commission's Procedural Rules ("Rules").(Footnote 1) 14 FMSHRC 2090 (December 1992)(ALJ) For the reasons set forth below, we reverse the judge's decision.

I.
Factual and Procedural Background

Rhone-Poulenc operates the Big Island Mine and Refinery in Sweetwater County, Wyoming. On October 2, 1991, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a citation to Rhone-Poulenc pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. 814(d)(1), alleging a violation of 30 C.F.R. 57.12016. On May 26, 1992, the

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1 This case involves the Commission's former Procedural Rules. The current rules became effective May 3, 1993. See 58 Fed. Reg. 12158-74 (March 3, 1993), to be codified at 29 C.F.R. Part 2700 (1993). All references in this decision to the Commission's Rules are to the former rules. The time limits at issue have not changed.

Secretary notified Rhone-Poulenc pursuant to Rule 25(Footnote 2) that MSHA was proposing a civil penalty assessment of $1,000 for the alleged violation. Included with the notice of proposed penalty assessment was a blue, pre-printed postcard ("blue card") advising Rhone-Poulenc to sign and return the postcard to MSHA if it wished to contest the proposed assessment. On June 16, 1992, Rhone-Poulenc sent the blue card to MSHA pursuant to Rule 26.(Footnote 3) MSHA apparently received Rhone-Poulenc's notice of contest on June 19, 1992.

On August 14, 1992, the Secretary filed his Proposal for Penalty, pursuant to Rule 27(a),(Footnote 4) along with a Motion to Accept Late Filing of Proposal for Penalty. Under Rule 27(a) the Secretary was required to file his Proposal for Penalty within 45 days of receipt of Rhone-Poulenc's notice of contest. The Secretary filed the Proposal for Penalty with the Commission approximately two weeks late. In the motion to accept late filing, the Secretary stated that the penalty proposal was delayed because the case file was "sent by [MSHA's] Arlington office to Denver but was not received by the Denver Office of the Solicitor until August 3, 1992."(Footnote 5)

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2 Former Rule 25, provided, in pertinent part:

> The Secretary, by certified mail, shall notify the operator or any other person against whom a penalty is proposed of: (a) The violation alleged; (b) the amount of the penalty proposed; and (c) that such person shall have 30 days to notify the Secretary that he wishes to contest the proposed penalty.

29 C.F.R. 2700.25 (1992).

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3 Former Rule 26, entitled "Notice of Contest," provided, in pertinent part:

> A person has 30 days after receipt of the notification of proposed assessment of penalty within which to notify the Secretary that he wishes to contest such proposed penalty.

29 C.F.R. 2700.26 (1992).

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4 Former Rule 27, entitled "Proposal for a Penalty," provided, 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.

29 C.F.R. 2700.27 (1992).

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5 The motion does not disclose the date on which the file was sent by MSHA's Arlington Office.

On August 24, 1992, Rhone-Poulenc filed a motion to dismiss the proceeding, contending that the Secretary had failed to show adequate cause to justify the late filing. In response, the Secretary stated that, due to an "unusual chain of events, the MSHA civil ... penalty office was faced with a tremendous and instantaneous influx of new and refiled cases" at the time this proceeding was pending. He stated that MSHA was "suffering from a lack of clerical personnel to process this dramatic increase in the caseload." The Secretary cited two reasons for this increase. First, MSHA was required to recalculate many proposed penalties and to serve amended proposed assessments on mine operators because of changes in the Secretary's civil penalty assessment regulations. Second, the Commission's decision in Drummond Co., Inc., 14 FMSHRC 661 (May 1992), required MSHA to reassess and refile cases involving hundreds of citations.

Relying on the Commission's decisions in Salt Lake County Rd. Dep't, 3 FMSHRC 1714 (July 1981), and Medicine Bow Coal Co., 4 FMSHRC 882 (May 1982), the judge concluded that this case should be dismissed. The judge held that the Secretary's explanations for the delayed filing did not meet the "adequate cause" test established in Salt Lake. 14 FMSHRC at 2091. He determined that the fact that the case was not received by the Solicitor's office in Denver until August 3 was not adequate cause for the delay. The judge also determined that the unusually high workload cited by the Secretary was caused by MSHA's "own policy changes and its mistake in trying to enforce its `excessive history program.'" 14 FMSHRC at 2092. The judge held that changes in administrative policy, an unusually high workload and shortage of clerical personnel do not constitute adequate cause under Salt Lake. He concluded that, even if the Secretary provides an adequate explanation for the delay, the proceeding may nevertheless be dismissed if the operator demonstrates that it was prejudiced by the delayed filing. 14 FMSHRC at 2091. Finally, the judge held that the Secretary should have filed a motion for an extension of time within the 45-day period set forth in the Rule. 14 FMSHRC at 2092.(Footnote 6)

The Commission granted the Secretary's Petition for Discretionary Review of the judge's order dismissing this case.

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6 The judge also rejected Rhone-Poulenc's argument that the Secretary violated section 105(a) of the Mine Act, 30 U.S.C. 815(a), by filing the notification of proposed penalty assessment 237 days after the citation was issued (October 2, 1991, to May 26, 1992). 14 FMSHRC at 2093. Because Rhone-Poulenc did not seek review of this ruling or otherwise raise the issue in its response brief, we do not address it.

II.
Disposition

The Secretary admits that he filed the Proposal for Penalty out of time, but contends that the judge misapplied the Commission's test for excusing late filed penalty proposals set forth in Salt Lake and Medicine Bow.(Footnote 7) He argues that the judge failed to consider the fact that the operator had actual knowledge of the Secretary's allegations in the Proposal for Penalty -- the violation charged and the proposed civil penalty -- and that Rhone-Poulenc was not prejudiced by the late filing. He contends that dismissal is an extreme sanction that should not be imposed absent bad faith or prejudice. The Secretary states that his practice is to file proposals for penalty on time and that he is aware of only five instances since 1982 when such proposals have been filed out of time. The Secretary requests that the Commission review the facts de novo, including the facts supporting his claim of a heavy workload set forth in his brief on review, conclude that this evidence demonstrates adequate cause for the late filing and reverse the judge's order dismissing this proceeding.

Rhone-Poulenc contends that the judge's findings of fact are supported by substantial evidence. It argues that the judge properly applied the facts of this case to the two-part test set forth in Salt Lake and Medicine Bow and properly concluded that the Secretary failed to demonstrate adequate cause for the late filing. It maintains that the judge was correct in not considering whether Rhone-Poulenc was prejudiced by the late filing because the Commission's two-part test contemplates the consideration of prejudice only after the Secretary has shown adequate cause. Rhone-Poulenc argues that the Commission should not conduct a de novo review of the facts of this case, consider the new justifications presented in the Secretary's brief on review, or substitute its judgment for that of the judge.

In Salt Lake, the Secretary filed his proposal for penalty approximately 60 days late because of an extraordinarily high caseload and the lack of clerical help. 3 FMSHRC at 1714, 1717. The Commission held that the 45-day period in Rule 27 is not a statute of limitations.(Footnote 8) 3 FMSHRC at 1716. The

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7 The parties and the judge state that the proposal for penalty should have been filed by July 31, 1992, 45 days after Rhone-Poulenc mailed its notice of contest of proposed penalty assessment. It would appear, however, that the proposal for penalty should have been filed by August 3, 1992, 45 days after the Secretary received the notice of contest, according to the certified mail return receipt card. See Ex. A to Rhone-Poulenc's Motion for Dismissal. Rule 27(a) provides that a proposal for penalty shall be filed by the Secretary "[w]ithin 45 days of receipt of a timely notice of contest...." See Medicine Bow, 4 FMSHRC at 882, 884 (emphasis added). This distinction does not affect our disposition of this proceeding.

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8 The Commission held that the 45-day period in Rule 27 implements the provision in section 105(d) of the Mine Act, 30 U.S.C. 815(d), which requires the Secretary to "immediately" advise the Commission when a timely contest of a

Commission recognized that "[s]ituations will inevitably arise where strict compliance by the Secretary [will] not prove possible." Id. 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." Id. In order to balance considerations of procedural fairness against the "severe impact of dismissal of the penalty proposal," the Commission concluded that "if the Secretary does seek permission to file late, he must predicate his request upon adequate cause." Id. The Commission further held that, in the event the Secretary demonstrates adequate cause, justice may require that the case nevertheless be dismissed if the operator can demonstrate that it was prejudiced in the preparation of its case by the stale penalty proposal. Id. The Commission determined that the Secretary was engaged in "voluminous national litigation and mistakes can happen" and held that the Secretary "minimally satisfied the adequate cause standard." 3 FMSHRC at 1717.

In Medicine Bow, the proposal for penalty was filed approximately 15 days late because of the lack of clerical help. 4 FMSHRC at 883, 885. The Commission reaffirmed the "two-part" test established in Salt Lake. 4 FMSHRC at 885. The Commission specifically rejected the Secretary's argument that, unless the delayed filing is caused by "significant malfeasance," a penalty proceeding should not be dismissed absent a showing of prejudice to the operator. 4 FMSHRC at 885 n.6. The Commission determined that the Secretary met the adequate cause test but warned the Secretary that the Commission could reach a different conclusion in future cases with similar facts.

We agree with the judge that, under Salt Lake and Medicine Bow, the Secretary must establish adequate cause for the delay in filing, apart from any consideration of whether the operator was prejudiced by the delay. In general, if the Secretary fails to demonstrate adequate cause, the case may be subject to dismissal. We disagree, however, with the judge's holding that "[s]ince at least 1981, an unusually high workload and a shortage of clerical personnel do not constitute adequate cause." 14 FMSHRC at 2092.

The reasons offered by the Secretary in the present case were the unusually high caseload at the time the penalty proposal was issued and a lack of clerical help to process those cases. The Commission may take official notice of the unique events that transpired in 1992, in which the Commission

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8...(continued)
proposed penalty assessment is filed by an operator. Salt Lake, 3 FMSHRC at 1715. The Commission noted that Congress, in discussing the filing of an initial notice of penalty assessment by the Secretary, indicated that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible." S. Rep. No. 181, 95th Cong., 1st Sess. 34, reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d. Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 622 (1978). The Senate Committee stated that it "does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." Id. In Salt Lake, the Commission held that this language "bespeaks the overriding concern with enforcement" and rejected the operator's argument that Rule 27 established a "statute of limitations." 3 FMSHRC at 1715-16.

played a part. On May 5, 1992, the Commission issued its decision in Drummond, holding that the Secretary's Program Policy Letter ("PPL") establishing his excessive history policy was an invalidly issued substantive rule that could not be accorded legal effect. 14 FMSHRC 661, 692. Accordingly, in Drummond and related cases, the Commission remanded the proposed penalties to the Secretary for recalculation without use of the PPL. Following that decision, about 2,780 pending cases were remanded to the Secretary for reproposal of penalties. See Jim Walter Resources, Inc., 15 FMSHRC 782, 785 (May 1993). The Commission has noted that the Secretary "recalculated thousands of penalties that had been proposed pursuant to the PPL...." Jim Walter, 15 FMSHRC at 792. The unusually heavy volume of penalty reassessments is a matter of Commission record.

The rapid increase in new civil penalty cases in 1992 is also a matter of Commission record. Relying on Salt Lake, Chief Administrative Law Judge Paul Merlin has excused several late filed penalty proposals based on "the precipitous rise in the volume of contested cases ... as indicated by the Commission's own records." Power Operating Co., Inc., 15 FMSHRC 931, 932 (February 1993)(ALJ)(published May 1993). The judge noted that the number of new cases received by the Commission escalated from 2,029 in Fiscal Year 1990 and 2,267 in Fiscal Year 1991 to 6,032 in Fiscal Year 1992. 15 FMSHRC at 932, n. 1.

We note that the Secretary's late filing of the Proposal for Penalty is apparently a rare event. We conclude that the Secretary established adequate cause for the delayed filing on the basis of MSHA's unusually heavy 1992 caseload and its shortage of personnel to process this caseload. For the same reason, we conclude that adequate cause exists to excuse the Secretary's failure to file a motion for extension of time within the 45-day period.

We agree with the judge that, even if the Secretary provides an adequate reason for the delay, dismissal may be warranted if the operator demonstrates that it was prejudiced. We conclude that Rhone-Poulenc has failed to demonstrate that it was prejudiced by the 11-day delay in filing. The judge found that Rhone-Poulenc was not prejudiced when the Secretary failed to notify it of the proposed penalty assessment until 237 days after the citation was issued. 14 FMSHRC at 2093. He noted that Rhone-Poulenc had asserted it was "inherently prejudiced" by the delay, but that it failed to allege "any factual basis to establish such prejudice." Id. While that finding does not resolve the issue before us, Rhone-Poulenc has similarly failed to show that it was prejudiced by the Secretary's 11-day delay under the Commission's Rules in filing the Proposal for Penalty.

III.
Conclusion

For the foregoing reasons, the judge's order dismissing this proceeding is vacated and the Secretary's Proposal for Penalty is accepted for filing this date. This case is remanded to the judge for further proceedings consistent with this opinion.

Arlene Holen, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner