

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

March 28, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. CENT 2001-379-M
	:	
CACTUS CANYON QUARRIES	:	
OF TEXAS, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER AND DECISION

BY: THE COMMISSION

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). Cactus Canyon Quarries of Texas, Inc. (“Cactus Canyon”) has filed a document styled “Petition for Discretionary Review” challenging an order by Chief Administrative Law Judge David F. Barbour, denying Cactus Canyon’s motion to certify for interlocutory review an earlier order by the judge. 24 FMSHRC 133 (Jan. 2002) (ALJ). In his earlier order, Judge Barbour permitted the Secretary of Labor to file the petition for penalty assessment late. The Secretary filed an opposition to Cactus Canyon’s petition. For the reasons set forth below, we grant the petition, suspend briefing, and remand the proceeding to the judge.

I. Background

On August 14, 2000, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued one citation and one order to Cactus Canyon. Nearly one year later, on August 13, 2001, MSHA issued a proposed assessment of penalty for the citation and order. On August 29, 2001, MSHA received Cactus Canyon’s notice contesting the citation, order and their related penalties. On October 30, 2001, the Secretary filed a petition for assessment of penalty and an accompanying motion to file petition out of time because she was 15 days late.¹ On November 7, 2001, Cactus Canyon filed an opposition to the late filing.

¹ Commission Procedural Rule 28(a), 29 C.F.R. § 2700.28(a), provides: “Within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty.”

On December 13, 2001, the judge accepted the Secretary's late-filed penalty petition, reasoning that the Commission permitted late filing of petitions where the Secretary's request is "(1) based upon adequate cause, and (2) the operator has an opportunity to object to the late filing on the grounds of prejudice." Unpublished Order at 2 (citing *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714, 1716 (July 1981)). He determined that "clerical mishaps" have been considered adequate cause in the past when Secretarial delays have not been of significant length. *Id.* The judge found that the petition was "days not months late" and, as soon as the delay was discovered, the Secretary acted to immediately rectify the matter. *Id.* He also was not persuaded by the operator's assertion of prejudice "given the short extent of the delay." *Id.*

Cactus Canyon filed a motion to reconsider. Without waiting for the judge to rule, Cactus Canyon filed a motion requesting certification for interlocutory review, which the Secretary opposed. On January 30, 2002, the judge issued an order denying Cactus Canyon's reconsideration and certification motions. 24 FMSHRC 133. The judge reiterated his determination that the Secretary's misplacement of the file sufficed as adequate cause in light of the short duration of the delay. *Id.* at 135. Again, he found Cactus Canyon's prejudice claim unconvincing due to the shortness of the delay. *Id.* The judge noted, however, that "had the delay been lengthy, [his] disposition might have been different." *Id.*

II. Analysis

As a preliminary matter, although Cactus Canyon has styled its document as a "Petition for Discretionary Review," the petition meets the requirements for filing a petition for interlocutory review under Commission Rule 76(a)(1), 29 C.F.R. § 2700.76(a), and we therefore construe the petition accordingly. *Southmountain Coal Inc.*, 16 FMSHRC 28 (Jan. 1994) (construing a filing styled as a petition for discretionary review as a petition for interlocutory review).

The Commission has held that the 45-day period for filing petitions for assessment of penalty in Rule 28 is not a statute of limitations. *Rhone-Poulenc of Wyo. Co.*, 15 FMSHRC 2089, 2092-93 & n.8 (Oct. 1993), *aff'd*, 57 F.3d 982 (10th Cir. 1995); *Salt Lake*, 3 FMSHRC at 1716. The Commission recognized that "[s]ituations will inevitably arise where strict compliance by the Secretary [will] not prove possible." *Rhone-Poulenc*, 15 FMSHRC at 2093; *Salt Lake*, 3 FMSHRC at 1716. In order to balance considerations of procedural fairness against the "severe impact of dismissal of the penalty proposal," the Commission has adopted a two-part test with respect to late-filed petitions for assessment of penalty. *Rhone-Poulenc*, 15 FMSHRC at 2093; *Salt Lake*, 3 FMSHRC at 1716. The Commission permits late filing where (1) the Secretary demonstrates "adequate cause" for the delay and (2) the operator fails to demonstrate prejudice resulting from the delay. *Rhone-Poulenc*, 15 FMSHRC at 2093; *Salt Lake*, 3 FMSHRC at 1716. In explaining the test, the Commission reasoned that the requirement of a showing of adequate cause by the Secretary would likely guard against administrative abuse. *Salt Lake*, 3 FMSHRC at 1716. 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.*; *Rhone-Poulenc*, 15 FMSHRC at 2093.

The Commission's two-part test requires a judge to weigh all of the relevant circumstances in determining whether a late filing should be permitted. *Rhone-Poulenc*, 57 F.3d at 985. In the instant case, the record reveals a significant circumstance that the judge did not consider. Not only did the Secretary delay 15 days in the filing of her petition for assessment of penalty, but 364 days passed before she issued the initial proposed assessment of penalty for the citation and order. *See* 30 U.S.C. § 815(a) (directing that the Secretary notify the operator "within a reasonable time" after the termination of the inspection or investigation of the civil penalty proposed to be assessed). This initial delay in the penalty proposal compounds the delay in the assessment of the penalty petition. Although the judge acknowledges that the inspection occurred in August 2000, well over a year before the penalty petition was filed in this case, he did not include the impact of this delay in his evaluation of whether Cactus Canyon was prejudiced in its case preparation. 24 FMSHRC at 135. Therefore, to the extent that the judge did not consider the Secretary's 364-day delay as well as her 15-day delay in his prejudice analysis, he erred.

Accordingly, we remand this matter to the judge to consider all of the Secretary's delays in proposing and assessing a penalty when reaching a determination of prejudice.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Robert H. Beatty, Jr., Commissioner

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