

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

April 4, 1997

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
 :
v. : Docket Nos. LAKE 95-180-RM, etc.
 :
 :
DAANEN AND JANSSEN, INC. :

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners¹

ORDER

BY THE COMMISSION:

These consolidated contest and civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@). The Commission previously granted the petition for discretionary review filed by Daanen and Janssen, Inc. (AD&J@) challenging the conclusion of a Commission Administrative Law Judge that D&J violated 30 C.F.R. ' 56.9101 for failure to maintain control of a front-end loader, and 30 C.F.R. ' 56.14101(a)(3) for failure to maintain the loader's braking system in functional condition. 18 FMSHRC 1796, 1804-15 (October 1996) (ALJ). The citations were issued following investigation of an accident in which a miner died when his loader fell off a 40-foot-high embankment.

On January 30, 1997, counsel for the Secretary of Labor filed a motion for an extension of time, from January 30, 1997 to February 13, 1997, to file the Secretary's brief. S. Ext. Mot. at 1. She explained that the extension was necessary due to a heavy workload. *Id.* Counsel stated she had Acontacted the counsel for Daanen and Janssen to apprise him of the situation and he does not object to the granting of this extension.@ *Id.* On January 31, 1997, the Commission granted the motion.

On February 3, 1997, counsel for D&J filed an opposition to the motion alleging that the motion had been untimely filed, the Secretary had not shown good cause for the extension, and

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

counsel for the Secretary had misrepresented that the motion was unopposed. D&J Opp. to Mot. for Ext. at 1-2. Counsel stated that, while the Secretary's counsel had left a message at his office that she would be seeking a 2-week extension of time to file her response brief, she had never inquired whether he objected to the motion. *Id.* at 1. He asserted that he has never spoken with the Secretary's counsel and that he did not inform her that he had no objection. *Id.* On February 5, 1997, the Commission ordered the Secretary to reply to the allegation of misrepresentation, restating that the response brief was due to be filed by February 13, 1997. Unpublished Order at 2 (February 5, 1997).

On February 6, 1997, the Secretary's counsel filed her response to the allegation of misrepresentation. Counsel explained that, prior to filing the motion for an extension of time, she had telephoned counsel for D&J and asked the office secretary if she could speak with the attorneys of record in this case. S. Resp. at 1. Counsel stated that the office secretary informed her that both attorneys were not available. *Id.* Counsel then told the office secretary that she was requesting a 2-week extension that day and that "Apprising opposing counsel of what our intentions are . . . is done as a courtesy and is standard practice." *Id.* at 2. Counsel asserted that the office secretary told her that "she foresaw no problem from either attorney regarding the extension of time." *Id.* Counsel requested that the office secretary inform the attorneys of her telephone call. *Id.* Counsel asserted that the office secretary assured her that "this was not going to be a problem, and promised that if either attorney had a problem with [the] request for an extension of time, someone representing that office would call [her] before the end of that business day." *Id.* Counsel stated that, since no one called her, she represented in the motion that opposing counsel did not object to the granting of the extension. *Id.* Counsel stated that, had she received any indication that opposing counsel would object to the motion, she would not have made this representation. *Id.* Therefore, counsel asserted that the allegation of misrepresentation is unfounded. *Id.*

On February 11, 1997, counsel for D&J filed a reply in which it moved to strike the Secretary's response brief. Counsel asserts that, had the Secretary's counsel attempted to reach him again, he would have agreed to the extension. Mot. to Strike at 1. He requests that the Commission strike the Secretary's response brief because the Secretary's counsel "called at the last minute" to announce that she would be seeking a 2-week extension, never inquired whether he objected to the request nor consulted with either attorney of record regarding any such objection, explicitly told the office secretary that no return telephone call was necessary, and subsequently represented that she had consulted with opposing counsel and that he had no objection to the motion for extension. *Id.* at 2.

Attached to the motion to strike is the sworn affidavit of the office secretary. She states that the Secretary's counsel did not ask "if our firm's client would object" to the motion for extension. Aff. at 1. Rather, according to the office secretary, the Secretary's counsel said she would be filing the motion for extension because her office had gotten backed up due to a death in someone's family. *Id.* She states that the Secretary's counsel said the telephone call was a "courtesy call," that she was leaving the office in 45 minutes, and that it was not necessary to call

her back. *Id.* She denies telling the Secretary's counsel that she foresaw no problem from either attorney of record regarding the extension, and assuring her that the extension was not going to be a problem. *Id.* She further denies promising the Secretary's counsel that someone would call her before the end of that business day if either attorney had a problem with the request for extension. *Id.* She asserts that she is in no position to make such assurances and that she does not have authority on behalf of the firm's clients to respond to requests for extensions. *Id.* at 2. She further states that at no time did the Secretary's counsel request that she or the attorneys call her back regarding any objection the client might have to the motion for extension. *Id.*

On February 13, 1997, the Secretary's counsel filed an opposition to the motion to strike. Counsel states that her recollection of the events is as set forth in her reply to the allegation of misrepresentation and not as stated in the motion to strike and accompanying affidavit. S. Opp'n to Mot. to Strike at 1. Counsel requests that the Commission deny the motion to strike because mere differing recollections of events does not warrant the imposition of the extraordinary sanction of striking the Secretary's brief in a case which involves the interpretation of an important safety standard and the death of a miner.² *Id.* at 1-2. On the same date, the Secretary's counsel filed the response brief.

On March 7, 1997, counsel for D&J filed a reply to the Secretary's opposition to the motion to strike. Counsel argues that it remains uncontroverted that the Secretary's counsel represented that she had consulted with opposing counsel who had no objection to the motion for extension. D&J Reply at 1-2. Counsel argues that, by her own admission, the Secretary's counsel did not consult with anyone representing D&J and that she was not told that D&J had no objection to the motion for extension. *Id.* at 2. He argues that the representation by the Secretary's counsel is simply untrue. *Id.* On the same date, counsel filed D&J's reply brief.

The motion to strike is based on D&J's allegation that the Secretary's counsel misrepresented its contact with D&J's counsel in the motion for extension of time. The Commission is authorized to impose a sanction for misrepresentation under its inherent powers.² The imposition of such a sanction is committed to the Commission's sound discretion. *See Chambers*, 501 U.S. at 55 (citations omitted).

It is undisputed that the Secretary's counsel initiated a telephone call to opposing counsel, left a message informing him of the motion for extension, but never communicated directly with

² Inherent powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.² *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (quoting *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962)).

him. In light of this, counsel for the Secretary's statement that she had "contacted" opposing counsel and that he did not object to the motion is, at best, inaccurate.

We agree with the Secretary that striking the Secretary's response brief would be inappropriate. However the conduct of the Secretary's counsel is characterized, striking the response brief would punish the Secretary of Labor for his counsel's conduct. As the Secretary points out, the Commission needs to hear from the Secretary on the merits on an important question of regulatory interpretation involving the death of a miner. S. Opp'n to Mot. to Strike at 1-2. Moreover, we conclude that D&J has not suffered prejudice as a result of the Secretary's counsel's representation because counsel for D&J admitted that, had she spoken with him, he would have agreed to the extension. D&J Mot. to Strike at 1. Therefore, whatever was said by the parties to the conversation, we conclude that the requested sanction would be inappropriate. Accordingly, we deny the motion to strike the Secretary's response brief.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner