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SOL (MSHA) V. RIVER CEMENT
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

CIVIL PENALTY PROCEEDING

Docket No. CENT 86-91-M
A.C. No. 23-00188-05518

v.

Selma Plant Quarry & Mill

RIVER CEMENT COMPANY,
RESPONDENT

ORDER OF DISMISSAL

Before: Judge Morris

Respondent has moved to dismiss the above case for the reason that the Secretary's PETITION FOR ASSESSMENT OF CIVIL PENALTY was not timely filed.

In his memoranda filed in the case the Secretary does not concede the facts but he states that his petition "may" have been filed beyond the 45 day period as required by Commission Rule 27(a), 29 C.F.R. 2700.27(a). The Secretary also asserts that the respondent has failed to show any prejudice. The Secretary has not filed any affidavits nor has he denied certain relevant facts that appear as a matter of record.

These facts are that the appeal process was initiated on April 24, 1986 with a notice of contest (notice of contest form). The Secretary filed his petition on June 16, 1986 (time/date stamp on petition in file).

In support of his position the Secretary states as follows:

Although his petition may have been beyond the 45 day limitation recited at 29 C.F.R. 2700.27, the Secretary asserts that this resulted from miscalculation of time periods in the normal processing of this type of case in the office of the Secretary's counsel. This miscalculation occurred due in part to inadvertence by the Secretary's representative and in part due to the fact that the respondent sent at least three separate responses to the notice of proposed penalties. Based on the date stamp of May 5, 1986, on the last of the three letters from respondent, the Secretary's calculated a due date of June 19, 1986. The Petition was actually filed on June 11, 1986, a mere two days beyond the due date alleged by respondent in his motion.

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While it appears that the Secretary's petition may have been filed two days beyond the 45 day period, it is also apparent that respondent has demonstrated no prejudice to himself as a result.

Discussion

The applicable case law is contained in Salt Lake County Road Department (1981) and Medicine Bow Coal Company, 4 FMSHRC 882 (1982).

In these cases the Commission ruled that a two tier test exists in a late filing situation. The initial test requires the Secretary to show adequate cause to support his late filing. In Salt Lake and Medicine Bow the Secretary's excuse of insufficient clerical help was accepted as minimally adequate. The second test is that dismissal could be required, notwithstanding adequate cause, when an operator demonstrates prejudice caused by the delayed filing.

In view of the Commission's pronouncements it is necessary to examine the record to determine whether the Secretary has established adequate cause.

As a threshold matter it appears that the appeal process commenced with a notice of contest dated April 24, 1986.

Under Commission Rule 27(a), 29 C.F.R. 2700.27(a), the Secretary was obliged to file his petition within 45 days. The 45 day period expired on June 9, 1986. The Secretary filed his petition on June 16, 1986 which was 53 days after receiving the notice of contest and 7 days late.

In justification of the late filing the Secretary basically states it was due to "inadvertence by the Secretary's representative" and due to the fact that "respondent sent three separate responses to the notice of the contest".

Inadvertence does not constitute justification for the late filing of a complaint.

The letters relied on by the Secretary all post-date the notice of contest of April 24. The 45 day period began to run after receipt of the April 24 notice.

In Medicine Bow an issue was presented as to whether the filing time for penalty proposals should be augmented by the 5

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days that Commission Rule 8(b), 29 C.F.R. 2700.8(b) allows for filing documents in response to those served by mail. The Commission ruled "[t]he 45-day period in Rule 27 is a sufficient amount of time to allow for the processing of mail" . . . further . . . Rule 8(b) does not apply to the Secretary's filing of penalty proposals" 4 FMSHRC at 884.

For the foregoing reasons I conclude that the Secretary failed to show adequate cause to justify the late filing of his petition.

Accordingly, I enter the following:

ORDER

CENT 86-91 is dismissed.

John J. Morris
Administrative Law Judge