

CCASE:
SOL (MSHA) v. CNB COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
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Falls Church, Virginia 22041

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

CIVIL PENALTY PROCEEDING
Master Docket No. 91-1
Docket No. KENT 91-1087
A.C. No. 15-16122-03532D

CNB COAL COMPANY, INC.,
RESPONDENT

No. 1 Mine

ORDER DENYING MOTION TO DISMISS

On February 10, 1992, Respondent CNB Coal Company, Inc., (CNB) filed a Motion to Dismiss this proceeding because the Secretary's Petition for Assessment of Civil Penalty was not timely filed. The Secretary filed an opposition to the motion on February 19, 1992.

I

The two citations involved in this proceeding were issued to CNB on April 4, 1991. After a proposed penalty assessment was issued, CNB returned its Notice of Contest and Request for Hearing which was received by MSHA on June 28, 1991. On August 19, 1991, the Secretary mailed her Petition for Assessment of Civil Penalty which was received by the Commission on August 21, 1991. The Secretary did not seek an extension of time for filing her penalty proposal, nor did she file an "instanter" (sic) motion to accept late filing. CNB filed its answer on September 16, 1991 (received by the Commission September 20, 1991).

II

Section 105(d) of the Act requires the Secretary, when a timely notice of contest is filed, to "immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing. . . ." Commission Rule 27, 29 C.F.R. 2700.27, requires the Secretary to file a proposal for a penalty "within 45 days of receipt of a timely notice of contest. . . ." The Commission has stated that "[i]n essence, Rule 27 implements the meaning of 'immediately' in section 105(d)." Salt Lake County Road Department, 3 FMSHRC 1714, 1715 (1981).

Salt Lake set out a two-fold test for deciding whether a late filed penalty case is subject to the "drastic remedy of dismissal": Has the Secretary shown adequate cause for the delay, and, if so, did the delay prejudice Respondent? Salt Lake at page 717; See also Medicine Bow Coal Company, 4 FMSHRC 882

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(1982). Salt Lake involved a 2-month delay; Medicine Bow, a 15 day delay. Dismissal was denied in both cases. The Commission held that adequate cause for the delay was established, but prejudice was not shown. See also Secretary v. M. Jamieson Company, 12 FMSHRC 901 (ALJ); Secretary v. Swindall, 13 FMSHRC 310 (ALJ) (1991). Cases in which motions to dismiss were granted include Secretary v. Washington Construction Company, 4 FMSHRC 1807 (ALJ) (1982) (delay of 1-1/2 years and 2 years), and Secretary v. Lawrence Ready Mix Concrete Corp., 6 FMSHRC 246 (ALJ) (1984) (delay of 1-1/2 years). In two cases involving River Cement Company, 8 FMSHRC 1599 and 1602 (ALJ) (1986), the Secretary's "justification" for late filing was "inadvertence" and "a change in policy" of the civil penalties processing unit. Neither was found to constitute adequate cause for delays of 7 days and 23 days respectively.

III

On April 4, 1991, the Secretary issued some 4,700 citations to 500 mine operators covering 850 mines alleging violations of 30 C.F.R. 70.209(b) and 71.209(b). Approximately 4,000 notices of contest were filed with the Commission between April and July, 1991. The Secretary states in her opposition that approximately 800 civil penalty assessments were filed in related cases during "a two month time period" when the late filing occurred in this case. I conclude that the extraordinary volume of cases processed by the Secretary in this short period of time constitutes adequate cause for her late filing in this case.

CNB asserts that it was prejudiced by being denied the opportunity to participate in the depositions held prior to October 21, 1991, and that the delay was inherently prejudicial to CNB's preparation of a proper defense. The Secretary's opposition states that no depositions were taken in these cases prior to October, 1991. She notes that CNB's counsel entered an appearance for a different operator in these cases on July 11, 1991. CNB has not stated how the delay hindered its preparation of a proper defense. I conclude that Respondent has failed to show that it was prejudiced by the Secretary's delay in filing her petition for the assessment of penalties with the Commission.

ORDER

Accordingly, the Motion to Dismiss this proceeding is DENIED.

James A. Broderick
Administrative Law Judge