

CCASE:
SOL (MSHA) v. MANALAPAN MINING
DDATE:
19920221
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

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

CIVIL PENALTY PROCEEDINGS
Master Docket No. 91-1
Docket No. KENT 91-1129
A.C. No. 15-05423-03664D

MANALAPAN MINING COMPANY, INC.,
RESPONDENT

No. 1 Mine
Docket No. KENT 91-1130
A.C. No. 15-14395-03591D
No. 4 Mine

ORDER DENYING MOTIONS TO DISMISS

On February 10, 1992, Respondent Manalapan Mining Company, Inc., (Manalapan) filed Motions to Dismiss in the above proceedings because the Secretary's Petitions for Assessment of Civil Penalty were not timely filed. The Secretary filed an opposition to the motions on February 19, 1992.

I

The three citations involved in these proceedings were issued to Manalapan on April 4, 1991. After proposed penalty assessments were issued, Manalapan returned its Notice of Contest and Request for Hearing which was received by MSHA on July 1, 1991. On October 18, 1991, the Secretary mailed her Petitions for Assessment of Civil Penalty which were received by the Commission on October 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. Manalapan filed its answers on October 24, 1991 (received by the Commission October 31, 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 (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.

Manalapan 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 Manalapan'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 Manalapan's counsel entered an appearance in these cases on July 11, 1991. Manalapan 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 petitions for the assessment of penalties with the Commission.

~409

ORDER

Accordingly, the Motions to Dismiss this proceeding are DENIED.

James A. Broderick
Administrative Law Judge