

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
601 NEW JERSEY AVENUE N. W., SUITE 9500
WASHINGTON, D.C. 20001

September 21, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	
Petitioner	:	Docket No. KENT 2009-444
	:	A.C. No. 15-18911-170135-01
v.	:	
	:	Docket No. KENT 2009-445
	:	A.C. No. 15-18911-170135-02
CAM MINING, LLC	:	
Respondent	:	Docket No. KENT 2010-446
	:	A.C. No. 15-18911-170135-03

SUMMARY DECISION

On August 26, 2011 Respondent filed, *inter alia*, a motion for summary decision in these proceedings for the Secretary’s failure to establish adequate cause for her late filing of the petitions for civil penalties herein. To date the Secretary has not responded to the motion and the Respondent’s proffered statement of facts is therefore accepted as undisputed.

Commission Rule 67(b), 29 C.F.R. § 2700.76(b) provides that “a motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law”.

It is now undisputed that on December 3, 2008, the Department of Labor’s Mine Safety Health Administration (MSHA) Office of Assessments issued Assessment No. 000170135. On December 5, 2008, the assessment was sent to CAM Mining, LLC (CAM) by Federal Express and was delivered to CAM on December 9, 2008.

After reviewing and then deciding to contest the majority of the assessment, counsel for Respondent returned the assessment form on December 12, 2008 and asked for a hearing. That assessment form was received by MSHA on December 16, 2008. MSHA’s Data Retrieval System then showed the citations and orders were in contest.

As agreed to by MSHA, the Petitions for Assessment should have been filed by January 29, 2009. No petition was filed. On March 24 and April 23, 2009, counsel for Respondent contacted MSHA Solicitor, John Mulvey, about the missing petition and provided mailing information and delivery information on the assessment. Mr. Mulvey informed said counsel that the matter was being looked into. On April 27, 2009, Mr. Burke, the District 6 Conference and Litigation Representative (CLR), filled three Motions to Allow Late Filing, all listing the same reason. The original motion claimed the Petitions for Assessment were not filed because the litigation packet was mis-delivered to an S. Iverson, who does not work for MSHA.

However, all the documents that MSHA based its Motion to Allow Late Filing on were the original assessment forms – not a litigation packet. In fact, the dates relied upon all predate the time Respondent actually asked for a hearing. All of the documents focus on a December 9, 2008 delivery, three days before Respondent even contested the assessment and asked for a hearing. The Secretary could not have generated a Hearings Package, as no hearing had been requested on December 5, 2008. The Secretary has provided no reason why she failed to generate Petitions for Assessment and why they were not filed until April 27, 2009, some four months after it was due. It appears that, but for the questions of Respondent’s counsel, Petitions would not have been filed.

This Commission permits the late filing of penalty petitions beyond the 45 days provided in Commission Rule 28, 29 C.F.R. § 2700.28, where the Secretary demonstrates adequate cause for the delay and where the respondent fails to show prejudice from the delay.” *Lesueur-Richmond Slate Co.*, 21 FMSHRC 98, 99 (Jan. 1999) (citing *Salt Lake County Road Dept.*, 3 FMSHRC 1714, 1716 (July 1981)). 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.” *Cactus Canyon Quarries of Texas, Inc.*, 25 FMSHRC 262, 265 (March 2002).

In this case, the Secretary has shown no factually supportable reason for the late filing. As noted in the undisputed statement of facts, the Secretary bases her entire argument for late filing on the representation that a litigation packet was mis-delivered. However, it is now also undisputed that the Secretary’s argument relates to the original assessment, dated December 3 and overnighted to Respondent on December 5. The December 9 signature, “S. Iverson”, cited by the Secretary is in fact the date Respondent received the assessment. Within three days of receiving the assessment, on Dec. 12, 2008, Respondent asked for a hearing.

Under the circumstances, I find that there has been no factually supported reason shown for why the petitions were not filed by January 29, 2009 as required by Commission Rule 28. Accordingly, without a showing of any cause, no less adequate cause, these petitions must be dismissed.

Order

Docket Nos. Kent 2009-444, Kent 2009-445 and Kent 2009-446 are hereby dismissed.

Gary Melick
Administrative Law Judge
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