

Coal Talk: Second ALJ Dismisses Late-Filed Penalty Petition



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Administrative Law Judge Susan Biro joined Administrative Law Judge Thomas McCarthy in dismissing a penalty petition because the Secretary of Labor failed to file the petition within 45 days of a timely contest of a proposed penalty assessment.

In ***Dynamic Energy, Inc., Docket No. WEVA 2009-944*** (May 18, 2012), the Secretary of Labor issued three orders to the operator in December 2008 and January 2009. The orders were assessed and the operator timely contested the proposed assessments on March 3, 2009. The notice was received by the Secretary on March 11, 2009, making the petition for assessment of civil penalty due on April 27, 2009. The case, however, sat for almost three years until Chief Judge Robert J. Lesnick issued an Order to Show Cause on February 17, 2012 requiring the Secretary to file a proposal for penalty or show cause why the case should not be dismissed.

Following the Order to Show Cause the Secretary filed her petition for assessment of civil penalty along with a Response to the Order to Show Cause and a Motion for Leave to File Out-of-Time. On March 14, 2012, Chief Judge Lesnick issued an Order Accepting Late Filing and Order Directing Operator to Answer. This Order, however, did not take into account that the Operator filed its Response to the Show Cause Motion and Motion to File Out-of-Time on March 14, 2012.

After issuing the Order Accepting Late Filing the case was transferred to Judge Biro

who then reviewed the record and found it appropriate to reconsider Judge Lesnick's order and decision.

The Secretary argued that "Commission decisions indicate the 'preference toward resolving cases on the merits rather than based upon procedural defects'" and that **"the Commission has not viewed the 45-day requirement as jurisdictional or as a statute of limitation'" and "has permitted the late filing of the penalty petitions upon a showing of adequate cause by the Secretary where there has been no showing of prejudice by the operator."** The Secretary further explained her reasons for delay as follows:

[A] high rate of contests coupled with MSHA's and the Solicitor's Office's limited staff resulted in MSHA missing the filing date for the petitions in these cases. Due to the recognized increase in contested cases following the implementation of the Miner Act and staff shortages within MSHA and SOL, a backlog of cases developed which eventually led to Congress taking action in 2010 through the 2010 Supplemental Appropriations Act to address the backlog of cases. The case involved herein falls within that time period between the passage of the Miner Act and the Supplemental Appropriations Act. The same factors of a burgeoning caseload and staffing shortages apparently resulted in some cases not being properly processed and not being filed timely with the Commission.

The operator argued that four years elapsed since the violations were originally issued and that the Secretary, after receiving notice that the operator intended to contest the proposed penalty assessments on March 11, 2009, failed to do anything with the case. Moreover, the operator provided correspondence from the Secretary indicating that she did not oppose the dismissal of three other cases involving citations issued during the same period of time as the orders in the instant matter. Finally, the operator argued that the retention period for maintaining pre-shift and on-shift records is one year and that the foreman in charge at the mine was recently discharged due to alleged criminal activity - thus, even if he could be found his testimony would be hostile. For these reasons, the operator argued that it could not present an effective defense.

After considering the arguments of the parties, Judge Biro noted that Rule 28 of the Commission's Procedural Rules requires the Secretary to file a petition with 45 days of a timely contest of a proposed penalty assessment. Moreover, her decision is to be guided by *Salt Lake Cnty. Rd. Dep't*, 3 FMSHRC 1714 (July 1981), which sets forth the Commission's two-part test to determine if a penalty case should be dismissed.¹ Judge Biro also reviewed several other decisions of Administrative Law Judges on this very issue. Notably, she reviewed Judge McCarthy's decision in *Long Branch Energy*, 33 FMSHRC 1960 (ALJ McCarthy) (Aug. 2011) where he noted that the Secretary's claims of a backlog of contested penalties and lack of clerical personnel to process cases did not amount to adequate cause for the delay.

Judge Biro found that because of a delay of 1,087 days from the time the operator notified the Secretary of its intent to contest the proposed assessments to the time the petition was finally filed the Secretary had a "high hurdle" to overcome to establish adequate cause. In this case the Secretary only offered generalized

explanation for the delay of almost three years to file a relatively uncomplicated pleading. To accept such reasoning, according to Judge Biro, “would render the 45 day filing period meaningless in almost every case arising over the four year period from 2006 to 2010.” As a result, Judge Biro vacated the penalty petitions for this case and dismissed the proceedings.

In following the guidance from *Salt Lake* that the Secretary failed to establish adequate cause for the delay, Judge Biro noted that she need not reach the answer of whether the operator established prejudice because of the delay. Judge Biro, however, went on to find that the operator did establish prejudice as the passage of almost three years was a “substantial time period and quite significant in terms of the potential for degradation of evidence.” Moreover, Judge Biro aptly noted that the operator has to bear the burden of its defense and this delay prejudiced the operator’s ability to present its case.

This issue has been the subject of several motions to dismiss by operators in the past several years. Obviously, operators have been filing these types of motions in order to get cases dismissed because of the Secretary’s repeated failure to follow the procedural rules of the Commission. Judge McCarthy’s decision in *Long Branch Energy* was appealed by the Secretary and oral arguments were heard on April 17, 2012. Stay tuned for further Coal Talk issues to see how the Commission rules on this very important issue for the industry.

(1) The two-part test is as follows: (1) the Secretary must establish adequate cause for the delay; and (2) if the Secretary establishes adequate cause, for a case to be dismissed, the operator would have to establish prejudice because of the delay. See *Salt Lake Cnty. Rd. Dep’t*, 3 FMSHRC 1714 (July 1981).

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