CCASE:
SOL (MSHA) V. DESKINS BRANCH COAL
DDATE:
19790514
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	Civil Penalty Proceedings Docket No. PIKE 78-329-P A.C. No. 15-07063-02006V
v.	Docket No. PIKE 78-343-P A.C. No. 15-07063-02007V
DESKINS BRANCH COAL COMPANY, RESPONDENT	Docket No. PIKE 78-351-P A.C. No. 15-07063-02008V
	No. 5 Mine

DECISION

Appearances: Thomas A. Mascolino, Lawrence W. Moon, Jr., Michael V. Durkin, Eddie Jenkins; Attorneys for Petitioner Wesley C. Marsh, William T. Watson, Lee F. Feinberg; Attorneys for Respondent

Before: Judge Littlefield

Procedural Background Before Assignment of Cases to the Judge

On April 27, 1978, the Mine Safety and Health Administration (MSHA), filed a petition for assessment of civil penalty in PIKE 78-329-P. On May 5, 1978, the same was filed in PIKE 78-343-P, and on May 8, 1978, a petition was filed in PIKE 78-351-P. All were submitted by MSHA attorney Lawrence W. Moon, Jr.

On May 26, 1978, Deskins Branch Coal Company, Respondent (Deskins), filed an answer in PIKE 78-329-P. Therein, Deskins moved to consolidated PIKE 78-329-P with PIKE 78-343-P and PIKE 78-351-P. The referenced answer was submitted by attorneys Wesley C. Marsh and William T. Watson.

On June 6, 1978,(FOOTNOTE 1) Deskins moved to extend the time to answer in PIKE 78-343-P and PIKE 78-351-P and supplement its answer in PIKE 78-329-P.

In an order of June 7, 1978, the acting chief administrative law judge granted the motion extending time to June 30, 1978, for the filing of answers in PIKE 78-343-P and PIKE 78-351-P.

On June 29, 1978, answers were filed by Messrs. Marsh and Watson on behalf of Deskins in PIKE 78-343-P and PIKE 78-351-P.

Procedural Background After Assignment of Cases to the Judge

On May 26, 1978, the Judge was assigned the file on PIKE 78-329-P.

On June 7, 1978, the Judge issued a notice of hearing in PIKE 78-329-P.

On June 26, 1978, Deskins, through Mr. Marsh, requested admissions of fact from the Secretary, through Mr. Moon.

On July 8, 1978, the files in the other two cases were assigned to the Judge.

On July 14, 1978, Messrs. Marsh and Watson moved to remand all three cases to the Secretary of Labor; said motion was certified to Mr. Moon, for MSHA. The motion was denied in a decision issued by the Judge on August 16, 1978. See, infra.

On July 17, 1978, Messrs. Marsh and Watson moved to postpone the hearing scheduled in PIKE 78-329-P. Further, the motion averred that counsel for MSHA orally advised that he joined in the motion.

On July 18, 1978, the Respondent's motion for a continuance was granted and the hearing scheduled in PIKE 78-329-P in Pikeville, Kentucky, on August 8, 1978, was vacated. Said continuance was distributed to Mr. Moon as MSHA trial attorney.

On August 7, 1978, MSHA, filed a response to request for admissions and an opposition to the motion to remand. Messrs. Michael V. Durkin and Thomas A. Mascolino signed the submissions. Said were certified only to Mr. Marsh.

On August 16, 1978, the Judge issued a denial of the motions to remand, distrubuting said order to Messrs. Durkin and Marsh. See, supra.

On December 15, 1978, the Judge issued a combined notice of hearing in all three cases setting hearing on the merits in Abingdon, Virginia, for March 28, 1979. Said notice was distributed to Attorneys Moon, Marsh, and Watson.

On December 22, 1978, a letter was received from Gail C. Blevins, secretary for Mr. Marsh, notifying the Judge that Mr. Marsh had died on November 9, 1978. Therein, the Judge was notified that the notice of hearing was forwarded to Mr. Paul S. Barbery of A. T. Massey Coal Company. The letter was copied to the Judge and Mr. Barbery.

On February 2, 1978, the Judge issued a supplemental notice of hearing. Said notice was distributed to attorneys Moon, Marsh, Watson, as well as Mr. Barbery, Mr. McPeer and Ms. Sowder of the Abingdon Clerk's Office.

On February 7, 1979, Mr. Barbery sent a letter to the Judge stating that he was not an attorney for Deskins and that Deskins would be represented by Attorney Lee F. Feinberg, as well as continuing to be represented by Mr. Watson. Said letter was copied to Mr. Watson and Mr. Feinberg.

On February 16, 1978, Mr. Feinberg filed a motion for a change of hearing site from Abingdon, Virginia, to Pikeville, Kentucky. Appended thereto, was a letter noting Mr. Barbery's letter and the fact that Mr. Watson would also continue to represent Deskins. The letter was copied to Messrs. Moon, Watson and Barbery. On the motion was appended a certificate of service to Mr. Moon signed by Mr. Feinberg.

On February 23, 1979, the Judge denied Mr. Feinberg's motion for a change of hearing site. Therein, the Judge noted his concern that rescheduling would engender new delay in these cases. The order was distributed to Mr. Moon, Mr. McPeer, Mr. Watson, and Mr. Feinberg.

On March 7, 1979, Mr. Feinberg made his prehearing filing pursuant to the December 15, 1978, notice of hearing. Thereto, a letter was attached. The letter was copied to Mr. Moon and Mr. Watson. Mr. Feinberg certified service of the filing on Mr. Moon.

On March 8, 1979, the Judge isused an order to show cause as to why the above-captioned should not be dismissed. The order was distributed to Messrs. Moon, Jenkins, McPeer, Watson, and Feinberg.

On March 8, 1979, Mr. Jenkins and Mr. Mascolino for MSHA, filed a motion for a 10-day extension of time to comply with the pretrial order. The certificate of service was addressed to Mr. Marsh, noting March 7 as the date of service.

On March 9, 1979, the Judge forwarded the March 8, 1979, MSHA motion for extension of time to Messrs. Feinberg and Watson.

On March 12, 1979, Messrs. Jenkins and Mascolino for MSHA, filed a response to the pretrial order. The certificate of service was addressed to "Mr. Feinbert" (sic).

On March 16, 1979, Mr. Feinberg filed a motion to dismiss the above-captioned. The accompanying cover letter was copied to Mr. Jenkins and Mr. Watson. The motion was certified as served on Mr. Jenkins by mail on March 15, 1979.

On March 19, 1979, the Judge issued an order denying the motion for an extension of time filed by MSHA. The Judge further continued the case and removed it from the trial docket in order that the issues raised might be fully studied and properly addressed.

On March 29, 1979, MHSA filed a response to Deskin's motion to dismiss. A cover letter attached, requested that the response be viewed as an answer to the show cause order of March 8, 1979. Mr. Jenkins and Mr. Mascolino submitted the response on behalf of MSHA. The appended letter, signed by Mr. Jenkins, was copied to Deskins Branch Coal Company, Mr. Watson and Mr. Feinberg. The certificate of service appended thereto, certified service on Mr. McPeer, Mr. Watson and Mr. Feinberg.

Proposed Penalties

MSHA seeks penalties for violations as follows:

Docket No. PIKE 78-329-P

Order or Notice No.	Date	Standard 30 CFR	Proposed Penalty
7-0032	07/26/77	77.506	$ 2,400
7-0037	07/27/77	75.517	2,800

Docket No. PIKE 78-343-P

7-0012	05/10/77	75.400	1,400

Docket No. PIKE 78-351-P

7-0015	06/15/77	75.200	1,200
7-0016	06/15/77	75.400	1,200
7-0017	06/15/77	75.202	1,200
7-0019	06/15/77	75.1306	600
		Total	$10,400

Issue Presented

Whether, taken as a whole, the conduct of Petitioner constitutes a failure to comply with the Judge's orders and mandates a dismissal of the above-captioned for want of prosecution. (See 29 CFR 2700.26(d)(1) and (2)(d).)

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Discussion

A. Legal Authority

The Commission rule 29 CFR 2700.26(d)(1) and (2), substantially controlling disposition of the above issue, states:

> If the Secretary fails to timely comply with any prehearing order, the Judge may issue an order to show cause why the proceeding should not be dismissed for want of prosecution.
>
> If the order to show cause is not satisified as provided therein, the proceedings shall be summarily dismissed for want of prosecution.

Neither counsel has drawn the Judge's attention to prior decisional law under the above rule. However, a Federal rule of civil procedure does provide a useful analogy to the Commission rule. The rule is 41(b) of the Federal Rules of Civil Procedure, which provides in relevant part: "(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." Rule 41(b) Fed. R. Civ. P.

One obvious difference between Rule 41(b) and the Commission rule is the Commission rule's requirement of a show cause order where the Secretary is addressed by potential dismissal.

Another difference is the analytical approach taken by the Commission rule. The Commission rule clearly prescribes that it is the failure to "timely comply" with the Judge's orders which provides the authority to dismiss. Rule 41(b) phrases the authority in the alternative. Therein, the rule provides for dismissal for a failure to prosecute or comply with rules or court orders. Where these distinctions have relevance, they will be addressed, infra. In the main, the Federal courts' judicial gloss on Rule 41(b) is and should be persuasive with this Judge.

B. Timely Compliance

The order initially at issue was contained in the December 15, 1978, notice of hearing. The notice provided in relevant part as follows:

* * * * * * *

> 3. In preparation for the hearing the parties are directed to complete the following prehearing requirements not later than March 1, 1979:

(a) Exchange lists of witnesses along with a synopsis of the testimony expected of each witness.

(b) Exchange lists of exhibits.

(c) File with the undersigned Judge before March 7, 1979:

(1) the parties' exhibit list and a list of witnesses with a synopsis of the testimony expected of the witness; and,

(2) any stipulation reached as to the facts, exhibits, issues, or settlement.

As noted, supra, it was addressed to Mr. Moon for MSHA. The initial point to be noted is that the order requires the exchange of lists of witnesses and exhibits, along with a testimonial synopsis to take place no later than March 1, 1979. Theoretically, such an exchange could take place without a discussion between counsel for Deskins and MSHA. MSHA's motion for an extension of time, "an additional 10 days," was not received by the Judge until 8 days after the date when the exchange was to have taken place, that was March 1, 1979. Even if the certificate of service is noted as the definitive date,(FOOTNOTE 2) MSHA has failed to even file for an extension of time until 7 days after the date of required exchange.(FOOTNOTE 3)

Though it may be argued that Deskins also violated the order in failing to make the required exchange until mailing on March 5, 1979, Mr. Feinberg's phone call of March 1, 1979, to MSHA, clearly demonstrates a good faith intent to comply with the order of the Judge.

As the March 1, 1979, exchange was intended to facilitate discussion between the parties;as well as to encourage just settlement, and as MSHA was not able to reciprocate in such discussion as it did not make the exchange, MSHA suffered no prejudice by Respondent's delay. Further, as the exchange was designed to assist the parties and MSHA has not argued any prejudice as a result of the delay; no such argument will be entertained. Finally, MSHA could not raise such an argument of Deskins' delay, as MSHA waived its right to demand compliance by not making the demand when the opportunity presented itself in the March 1, 1979, phone call of Mr. Feinberg.

C. Discussion of Deskins' Motion to Dismiss and MSHA's Response

Herein, Deskins' motion to dismiss of March 16, 1979, (Dismissal) and MSHA's reply to the motion of March 29, 1979 (Reply),(FOOTNOTE 4) will be examined.

In paragraph 1 of the motion to dismiss by Deskins (Dismissal, p. 1), counsel for Deskins states that by order of December 15, 1978, the Judge noticed hearings for March 28, 1979, and ordered exchanges by March 1, 1979, and filings with the judge on or before March 7, 1979, to include therein any stipulations reached. MSHA's counsel does not attack this point of the motion. I therefore conclude that MSHA concedes actual notice of the order of December 15, 1979, as distributed to Mr. Moon.

In paragraph 2 (Dismissal, p. 1), counsel states that as of March 15, 1979, it had never been contacted by counsel for MSHA regarding the information which the court ordered exchanged and filed. Counsel for the Secretary responds that Mr. Durkin and Mr. Moon had discussed those matters with "previous counsel" for Deskins (Reply, pp. 5, 6).

I conclude that previous counsel would appear to have been Mr. Marsh. As the notice of December 15, 1978, required a filing of stipulation of facts, exhibits, issues, or settlement where they were reached; and as Mr. Marsh had been deceased since November 9, 1978, it is obvious that Mr. Marsh could not have been expected to participate in arriving at a pretrial stipulation. Further, had counsel for MSHA attempted to arrive at a stipulation with Mr. Marsh through the 4-month period of November 9, 1978, to March 7, 1979, it would have been abundantly clear that it was not possible. Finally, if counsel for MSHA had made an effort to contact a representative of Deskins and had counsel for MSHA found that Mr. Marsh was unavailable as such representative, he would have been obliged to turn to Mr. Watson, who has been a counsel of record for Deskins in these cases since they were filed. Therefore, MSHA has failed to show that it contacted any relevant counsel for Deskins to comply with the December 15, 1978, pretrial order.

In paragraph 3 (Dismissal, p. 1), Deskins' counsel avers that it contacted Petitioner by March 1, 1979, speaking with Mr. Moon, who had always been counsel of record for MSHA. Deskins further states that Mr. Moon informed counsel that he no longer represented MSHA, but would immediately inform the trial attorney for MSHA whom to contact (Dismissal, pp. 1, 2). MSHA counsel replies that Mr. Moon was not always counsel for MSHA and that the record reflects the appearance of Mr. Durkin. Further, Mr. Moon did pass along the call (Reply, p. 6).

I conclude that counsel for MSHA is correct in that the opposition to the motion to remand and response to request for admissions received on August 7, 1978, were filed by Mr. Durkin and Mr. Mascolino. The fact that Mr. Moon passed along the phone call of Mr. Feinberg, means that as of March 1, 1979, Mr. Jenkins, counsel for MSHA, was specifically on notice as to who was the active counsel for Deskins. As Mr. Jenkins concedes, record notice on December 15, 1978 (reference to paragraph 1, Dismissal, supra), he further effectively concedes actual notice of whom he was to contact to comply with the order.

Paragraph 4 (Dismissal, p. 2) of the motion relates to the pre-hearing filing of Deskins received on March 7, 1979, and certified on March 5, 1979. As it is not rebutted, it is deemed admitted.

Paragraph 5 (Dismissal, p. 2) asserts what was stated in the show cause order of March 8, 1979, and notes that no exchange had been received by Mr. Feinberg as of March 15, 1979. The reply of MSHA asserts that Mr. Feinberg's filing was not timely under a strict construction of the order (Reply, p. 6).

Though it is not clear with which aspect of the order Mr. Jenkins believes that Mr. Feinberg has failed to comply, I find that it is clear that Mr. Feinberg's filing, received on March 7, 1979, and certified March 5, 1979, meets the March 7, 1979 deadline. See 29 CFR 2700.12(b). Therefore, Mr. Jenkins' response is incorrect. (See Legal Authority, for March 1, 1979, discussion, supra.)

Paragraph 6 (Dismissal, p. 2) states that Mr. Jenkins did not serve his motion for an extension of time on Mr. Feinberg, though he has appeared on all filings in recent months, and directly contacted Mr. Moon. Nor did he serve Mr. Watson, whose name has appeared on all pleadings. Further, Deskins' counsel states that he would still be waiting to receive this pleading if the Judge had not noticed the failure to serve Mr. Watson and himself. Mr. Jenkins responds (Reply, p. 6) that Mr. Feinberg had not appeared on all pleadings during the last several months.

Further, Mr. Jenkins states that failure of service was based on uncertainty of representation by Mr. Feinberg and clerical error.

I conclude that after and including the filing of February 16, 1979, motion to change hearing site, all pleadings filed by Deskins

and orders and notices issued by the Judge, do have Mr. Feinberg's name. There is no reason for confusion on the part of Mr. Jenkins as to whether Mr. Feinberg represented Deskins. Mr. Feinberg's filing of the February 16, 1979, hearing site motion and the distribution to him of the order denying change of February 23, 1979, should have satisfied Mr. Jenkins that Mr. Feinberg was a lawyer in the case. Further, the phone call of Mr. Feinberg on March 1, 1979, to Mr. Moon, relayed to Mr. Jenkins, should clearly have told Mr. Jenkins who was the chief lawyer for Deskins. Further, Mr. Marsh did not appear on the distribution list of the February 23, 1979, order. As to the issue of a clerical error, Mr. Jenkins' signature appears both on the face of the motion and on the certificate of service. Clerical errors could explain a misdating, such as the March 6-7 error in the certificate. A "clerical error" cannot be considered an explanation for a mailing to a single lawyer, whom Mr. Jenkins had every reason to know was no longer in the case, especially considering the presence of other attorneys and previous pleadings. Such a failure to give notice properly calculated to inform Deskins would work to deprive Deskins of its due process opportunity to be heard. Such a deprivation would result in an ex parte decision to the fundamental derrogation of the rights contained in the Administrative Procedure Act of 1946 (APA), 5 U.S.C. 554 et seq. (1946).

Paragraph 7 (Dismissal, p. 2), alleges that the Secretary has not prepared these matters for hearing or reviewed the files. Mr. Feinberg argues this conclusion based on Mr. Jenkins' failure to properly certify service of process and on Petitioner's failure to respond to Deskins' motion for admission. MSHA responds by stating that that which passed from Mr. Marsh and Mr. Watson to Mr. Feinberg is unknown (Reply, p. 6). Further, MSHA avers that there was a discussion between Mr. Moon and Mr. Durkin with Mr. Marsh. Finally, MSHA states that it is prepared and does desire to prosecute these cases.

I conclude that Deskins' statement that MSHA has failed to answer requests for admissions is not correct as MSHA filed objections thereto which were not ruled upon. MSHA's statements, with respect to interchanges with Mr. Marsh and other lawyers in the case, have no relevance. Mr. Marsh was replaced because he is deceased. Therefore, Mr. Feinberg did not speak with him about the case. Because Mr. Marsh has been deceased for 4 months, his conversations with Mr. Moon and Mr. Durkin certainly cannot be used to show a recent interest on the part of MSHA. MSHA's desire to prosecute the cases on March 29, 1979, is not the proper focus for purposes of this dismissal motion. The question as to preparation made to prosecute must be objectively analyzed and is not conclusively established by MSHA counsel's assertions or actions to date.

D. The Law of Failure to Prosecute and the Requirement of Reasonable Obedience to a Judge's Order

As noted, supra, the failure of the Secretary to timely comply with a judge's prehearing order allows the judge to issue a show cause as to why the proceeding should not be dismissed for want of prosecution. 29 CFR 2700.26(d)(1) and (2).

No exact rule can be laid down to determine in all cases where there has been a failure of prosecution. See Sandee Manufacturing Company v. Rohm & Haas Company, 298 F.2d 41, 43 (7th Cir. 1962). It is also clear that dismissal is a drastic sanction which should be used sparingly. Welsh v. Automatic Poultry Feeder Company, 439 F.2d 95, 96 (8th Cir. 1971). However, the application of such a sanction is committed to the sound discretion of the judge. See Link v. Wabash Railroad Company, 370 U.S. 626, 630 (1962); Van Bronkhorst v. Safeco Company, 529 F.2d 943, 951 (9th Cir. 1976); see also States Steamship Company v. Philippine Airlines, 426 F.2d 803, 804 (9th Cir. 1970) (must be firm and definite conviction that court below committed a clear error of judgment in the conclusion it reached upon weighing relevant factors).

Three fundamental policies must be weighed in the disposition of a motion to dismiss for failure to prosecute. On one side is the policy in favor of prompt disposition of litigation and the duty of the petitioner to proceed with diligence. On the other side is the policy in favor of deciding cases on the merits. See Pearson v. Dennison, 353 F.2d 24 (9th Cir. 1965). Added to these points, is the policy supporting a judge's authority to control litigation before him. See Van Bronkhorst v. Safeco Company, 529 F.2d 943, 947, 951 (9th Cir. 1976); accord, Stanley v. Continental Oil Company, 536 F.2d 914, 917 (10th Cir. 1976) (sua sponte dismissal of charge of employment discrimination).

The Commission rule prohibits, sua sponte, dismissal of the Secretary, absent a show cause order, which contrasts with Rule 41(b) of the Federal Rules of Civil Procedure. Thus, the generalized constitutionally permissible authority available to the United States district court judges founded historically in judgments of nonsuit and non-prosequitur at common law, has been circumscribed by this controlling rule, 29 CFR 2700.26(d)(1) and (2). See Link v. Wabash Railroad Company, 370 U.S. 626, 630 (1962); Sheaffer v. Warehouse Employees Union Local No. 730, 408 F.2d 204, 206 (D.C. Cir. 1969) cert. denied 395 U.S. 934.

It does not appear that the Commission rule forecloses a consideration of prejudice suffered by the Respondent as a criteria for evaluating the propriety of dismissal. See, e.g., Messenger v. United States, 231 F.2d 328, 331 (2nd Cir. 1956) (dicta).

While the relative weight to be given each of the policy considerations will be addressed, infra the significance of the policy of prompt disposition has previously been addressed by some of the FMSHRC Commissioners in their confirmation hearings.

> I believe the Commission is principally a judicial body which must deal as expeditiously as possible with cases brought to it. All too often, there are long delays in the adjudicatory process which tend to frustrate the intent of the law and unfairly burden the litigants.

(Statement of Marian P. Nease at 20).

> I believe that one of the prime responsibilities of the Commission is to promptly dispose of those cases that come before it (statement of Richard V. Backley at 39). My personal sense of priority would be to put the prompt issuance of decisions first. (Statement of A. E. Lawson, at 45).

Nomination: Jerome R. Waldie, Marian P. Nease, Frank F. Jestrab, Richard V. Backley, and A. E. Lawson to be members of the Federal Mine Safety and Health Review Commission, before Committee on Human Resources of the Senate, 95th Congress, 2d Session (1978) (hereinafter, nomination: 1978).

E. Factual Analysis

The purpose of the pretrial order of December 15, 1978, was an attempt to narrow the range of issues between the parties, encourage fair settlement negotiations, and facilitate the hearing set for March 28, 1979.

MSHA has clearly failed to meet the requirement of the March 1, 1979, exchange and therefore prevented the initial exploration of the narrowing of issues between the parties.

MSHA's failure to show good cause as to why it should have been allowed an extension of time to file such an exchange was also late; being filed 7 days after the March 1, 1979, required exchange.

MSHA failed to respond to the March 7, 1979, requirement even in its late filing of March 12, 1979, in that it has made no reference to any stipulations of facts, exhibits, issues, or settlements. Thus, MSHA still has not complied with the Judge's order.

MSHA's failure to respond to the March 1, 1979, phone call of Respondent prevents MSHA's counsel from showing some good faith effort to comply with the Judge's order, hence, no good faith can reasonably be inferred.

MSHA failed to give Respondent an opportunity to respond to its motion for an extension of time, in that said motion was served exclusively on the deceased Mr. Marsh. As noted, supra, MSHA had every reason to know Mr. Marsh was no longer a party in the case. This failure to properly serve constitutes a violation of 29 CFR 2700.12(c), which provides: "(c) Whenever a party is represented by an attorney who has signed any document filed on behalf of such party, or otherwise entered an appearance on behalf of such party, service thereafter shall be made upon the attorney." (Emphasis supplied.) The presumption that service is complete upon mailing, 29 CFR 2700.12(b), relies upon the mailing party addressing a proper recipient. Clearly, the motion for an extension of time fails this requirement and hence, the presumption is overcome. Thus, the motion for an extension of time is not timely filed to even comply with the March 7, 1979, requirement. 29 CFR 2700.11(f)(2).(FOOTNOTE 5) This failure results in a deprivation of due process as noted, supra, and is therefore, much more than a technical violation of the Commission's Procedural Rules.

MSHA has failed to comply with the substantive requirements of the December 15, 1978, notice. As noted, the order required a filing with respect to stipulations. As of the date of this writing, MSHA has not yet addressed the issue of stipulations. This is true despite the heading on March 12, 1979, filing, which purports to be the response of the Secretary to the pretrial order.

Except in very unusual situations, respondents in penalty proceedings are commonly willing to stipulate with MSHA on the applicability of the Act to the mine, and to the status of the inspectors as duly authorized representatives of the Secretary.

Though there is no requirement that a respondent must so stipulate if there is a good faith contest on these issues, the failure of MSHA to seek such common stipulations may be inferred from the fact that Deskins does not mention their absence in its motion to dismiss. Such problems would be naturally addressed in preliminary matters. I therefore reiterate my finding that MSHA has not complied with the substantive requirements of the order of December 15, 1978, due on March 7, 1979.

MSHA's March 12, 1979, filing also fails to meet the intent of the March 7, 1979, requirement in that it purports to retain the right to submit additional exhibits at the hearing, should such evidence appear warranted. This attempt to retain the authority to submit such

further evidence, would, if permitted, destroy the purpose of the pre-hearing filing, and would constitute an attempted return to trial by surprise.

F. Prejudice to Respondent

The aforementioned failures prejudice the Respondent in several practical ways. Assuming that the hearing date had remained March 28, 1979, Respondent would have been required to offer a proffer on issues where stipulations could have been had. Therefore, the time and expense of preparation would have been manifestly increased. The time to enter into negotiations for settlement based on a preliminary factual exchange had been reduced from 28 days to 16 days, slightly more than one-half. MSHA's failure to serve Deskins with the motion for an extension of time added uncertainty as to whether the case would go to hearing, and prevented Deskins from reasonably determining the hearing's status. The time delay also allowed MSHA extra time to contemplate and meet the stipulated testimony of Deskins' witnesses which was not available to Deskins with respect to MSHA's witnesses.

I conclude that MSHA's failure to communicate with Deskins prevented Deskins from having the opportunity of having a reasonable time to explore settlement with MSHA (Dismissal, p. 3). Deskins would also have had insufficient time to respond to MSHA's motions and still prepare for the hearing.(FOOTNOTE 6)

Assuming, arguendo, that prejudice should be judged in light of the cancellation of the hearing of March 28, 1979, as argued by MSHA (Reply, p. 8), there remains prejudice to Deskins' position.(FOOTNOTE 7) As noted above, MSHA has still not responded to the requirements for stipulations and thus Deskins has had the expense of having to prepare its proffer on issues and exhibits which should have been stipulated. Further, MSHA's attempt to leave open submission of other exhibits means that Deskins would potentially be exposed to exhibits of which it would not be aware, merely at the discretion of the Secretary's representative (Response of MSHA to Pretrial Order, March 12, 1979 p. 2). Counsel for Deskins must find new time to

prepare for its case (Dismissal, pp. 3, 4). Counsel for Deskins must make new arrangements for its witnesses, thus expending further time and money. The equitable exchange envisioned by the judge in the December 15, 1978, order cannot be accomplished. I conclude that the prejudice to Respondent is reduced by continuing the hearing date, but by no means eliminated. Such prejudice is relevant. See, supra; see also Messenger v. United States, 231 F.2d 328, 331 (2nd Cir. 1956) (dicta).

G. Proper Administration of Justice

The above-noted failures to timely and substantively comply with the Judge's orders and Commission rules do amount to a failure of prosecution pursuant to 29 CFR 2700.26 (d)(1) and (2). It has been necessary, in order to reduce the prejudice to Respondent, to grant a continuance in this case because of the referenced Government failures. Because of the judge's advance trial schedule, a continuance to MSHA would have extended this case a minimum of 4 more months beyond the March 28, 1979, hearing date. MSHA is responsible here for the proximate consequences of its own omissions. In effect, MSHA's failures have been tantamount to a motion for continuance.

As noted by FMSHRC Chairman Jerome R. Waldie:

> As I understand, what the Congress has attempted * * * is that you have sought to bring about a more efficient dispatch of the regulatory activities of the Federal Government in terms of mine safety and health and that you have found deficiencies in terms of the speed * * * [and] the effeciency with which enforcement activities have been conducted * * *.

Nomination: 1978 at 11.

MSHA's attorney had the obligation to attempt to respond to the prehearing orders of the judge or at least timely file objections or motions for extensions which would not require an extension of the hearing date, especially where, as here, the attorney had more than 3 months' notice of the hearing.

While courts have split on what factually constitutes want of prosecution, they have dismissed the plaintiff whose attorney had argued the press of other business, see Garden Homes Inc. v. Mason, 249 F.2d 71, 72 (1st Cir. 1957) cert. denied, 356 U.S. 903 (rejected plaintiff's counsel's argument that he could not be present at the trial because of appearance before the Supreme Judicial Court of Massachusetts), and whose counsel knew he was busy but waited, Schwarz v. United States, 384 F.2d 833, 835 (2nd Cir. 1967) (knew he was busy trying cases well in advance, but waited until the eve of the court date before advising court of fact), and whose counsel had

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other counsel in office, Maiorani v. Kawasaki Kisen K.K. Kobe, 425 F.2d 1162 (2nd Cir. 1970) cert. denied, 399 U.S. 910, reh. denied, 400 U.S. 855 (counsel engaged in litigation outside the United States, but other counsel in plaintiff's counsel's office could have acted for plaintiff's counsel), and insituations where there was approximately 3 months notice of trial date and case was slightly less than 1 year old, Jameson v. DuComb, 275 F.2d 293, 294 (7th Cir. 1960) (action for libel filed November 12, 1958, pretrial held and trial date set April 27, 1959; plaintiff fails to appear at trial September 8, 1959, because out-of-town on business).

Conclusion

The policy considerations involve weighing the Commission and judicial policy in favor of prompt disposition, the duty of the Petitioner to proceed with due diligence, the prejudice to the Respondent, the judge's authority to issue orders which are timely complied with, and the Commission's authority to enforce compliance with its regulations against the right of the Government to have its case heard on the merits. Though the latter right is weighty and the sanction of dismissal is drastic, the Government has freely chosen its representative and is bound by his omissions, which amount to a failure to prosecute. See generally, Link v. Wabash Railroad Company, 370 U.S. 626 (1962); Annot., 15 ALR Fed. 407, 435-436 (1973).

ORDER

WHEREFORE the above-captioned is DISMISSED with prejudice.

Malcolm P. Littlefield
Judge

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FOOTNOTES START HERE
~FOOTNOTE_ONE
1. The certificate of service indicates mailing by Attorney Marsh on June 3, 1978.

~FOOTNOTE_TWO
2. March 7, 1979. See 29 CFR 2700.12(b).

~FOOTNOTE_THREE
3. See 29 CFR 2700.11(f)(2).

~FOOTNOTE_FOUR
4. Though not timely filed being 3 days late, the MSHA reply will be addressed as it can also be seen as a response to the show cause order of the Judge. 29 CFR 2700.12 provides in relevant part:

"Each motion filed with the Judge or the Commission during the pendency of any proceeding shall be in writing and shall contain a short and plain statement of the grounds upon which it is based. A statement in opposition to the motion may be filed by any party within 10 days after the date of service."

(Emphasis supplied.)

~FOOTNOTE_FIVE
5. 29 CFR 2700.11(f)(2) provides:

"A request for an extension of time must be filed within the time allowed for the filing or serving of the document and must be filed in the same office in which the document in connection with which the extension is requested must be filed."

~FOOTNOTE_SIX
6. Deskins was entitled to 10 days from the date of the judge's forwarding of the motion for an extension of time, moving the due date of mailing to March 19, 1979. As it would have taken the Judge time to address the motion for extension and reply, Deskins would have had less than 8 or 9 days to prepare for the hearing.

~FOOTNOTE_SEVEN
7. It is the Judge's opinion that prejudice to Respondent is more properly judged as of the time of dismissal. See Sandee Manufacturing Company v. Rohm & Haas Company, 298 F.2d 41, 43 (7th Cir. 1962). But see Hicks v. Bekins Moving & Storage, 115 F.2d 406, 409 (9th Cir. 1940).