

CCASE:
MSHA V. LIVINGSTON MARBLE & GRANITE
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 92-430-M
Petitioner	:	A. C. No. 24-00016-05504
	:	
v.	:	Docket No. WEST 92-573-M
LIVINGSTON MARBLE & GRANITE,	:	A. C. No. 24-00016-05503
Respondent	:	
	:	Livingston Marble
	:	
	:	Docket No. WEST 92-574-M
	:	A. C. No. 24-00660-05512
	:	
	:	Docket No. WEST 92-575-M
	:	A. C. No. 24-00660-05513
	:	
	:	Travertine Cutting & Polishing
	:	Plant

ORDER DENYING MOTION TO DISMISS
ORDER ACCEPTING LATE FILING
ORDER OF ASSIGNMENT

On October 6, 1992, the operator filed a motion to dismiss the above-captioned cases. The operator asserts that the Commission lacks jurisdiction because the penalty petitions were not timely filed. On August 3, 1992, the Solicitor had filed motions to accept late filing in WEST 92-430-M, WEST 92-573-M and WEST 92-574-M along with the penalty proposals. The proposal for WEST 92-575-M was received on August 10, 1992.

Commission Rule 27 requires that the Secretary file the penalty proposal within 45 days of the date she receives the operator's notice of contest for the proposed penalty. 29 C.F.R. 2700.27. The operator contests the proposed penalty by mailin in the so called "blue card" which has been provided to it for this purpose. Under Commission precedent, the date of receipt by the Secretary is the date the operator mailed the blue card. J.P. Burroughs, 3 FMSHRC 854 (1981). Assuming in these cases the blue cards were mailed the same day they were signed, the Secretary's subsequent penalty proposals for WEST 92-430-M, WEST 92-573-M and WEST 92-574-M were 46 to 60 days late. The penalty proposal for WEST 92-575-M was mailed to the Commission on the 45th day and therefore is timely.

The 45 day requirement has not be viewed as jurisdictional by the Commission nor as a statute of limitation, rather the Commission has permitted late filing upon a showing of adequate

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cause by the Secretary and no showing of prejudice by the operator. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981). Accordingly, the operator's motion to dismiss on the ground that the Commission lacks jurisdiction must be denied.

The Denver Solicitor's motion to accept late filing represents that the delay occurred because the cases were not sent to the her office until July 24. As recognized by the Commission in Salt Lake County Road Department, supra, even when the Mine Act was new the Secretary was engaged in voluminous litigation throughout the nation. I further take note of the precipitous rise in the volume of contested cases over the last few years. In view of the circumstances set herein, I find that adequate cause exists for the relatively short delays of 46 to 60 days. In addition, the operator has not shown any prejudice by the delays.

In light of the foregoing, the Secretary's motion to accept late filing of the penalty proposals in WEST 92-430-M, WEST 92-573-M, and WEST 92-574-M is GRANTED.

It is further ORDERED that the operator's motion to DISMISS in WEST 92-430-M, WEST 92-573-M, WEST 92-574-M and WEST 92-575-M be denied.

These cases are hereby assigned to Administrative Law Judge August F. Cetti.

All future communications regarding these cases should be addressed to Judge Cetti at the following address:

Federal Mine Safety and Health
Review Commission
Office of Administrative Law Judges
Colonnade Center
Room 280, 1244 Speer Boulevard
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Paul Merlin
Chief Administrative Law Judge

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