

CCASE:  
SOL (MSHA) V. LONG BRANCH ENERGY  
DDATE:  
19941005  
TTEXT:

~2192

SECRETARY OF LABOR : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA) : Docket No. WEVA 94-236  
Petitioner : A. C. No. 46-07857-03538  
:  
v. : Mine No. 14  
LONG BRANCH ENERGY, :  
Respondent :

ORDER ACCEPTING LATE FILING  
ORDER OF ASSIGNMENT

On July 26, 1994, the Solicitor filed the penalty petition in the above-captioned case. On August 24, 1994, the operator filed its answer to the penalty petition and a motion to dismiss because the penalty petition was untimely. On September 7, 1994, the Solicitor filed a response in opposition to the operator's motion to dismiss.

Commission Rule 28 requires that the Secretary file the penalty petition within 45 days of the date he receives an operator's notice of contest for the proposed penalty. 29 C.F.R. 2700.28. The Secretary received the operator's notice of contest on April 19, 1994, and the penalty petition was due June 3, 1994. The petition was sent by certified mail on July 25, 1994 and received at the Commission on July 26. It was therefore, 52 days late.

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission has permitted late filing of the penalty petitions upon a showing of adequate cause by the Secretary and where there has been no showing of prejudice by the operator. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981); Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989).

The Solicitor's response to the motion to dismiss represents that the delay occurred because the case was not sent to his office until July 22, 1994. This was caused by an oversight in the handling of this case by the Office of Assessments which is implementing a new procedure for handling penalty assessments. The Office of Assessments sent its portion of the case file to the wrong MSHA Field Office and the error was not discovered until July 19, 1994. The Solicitor attached a copy of a memorandum from C. Bryon Don, Chief of the Civil Penalty Compliance Office of MSHA's Office of Assessment which sets forth in detail the new assessment procedure and the cause for delay in this

~2193

case. I find these circumstances constitute adequate cause for the delay in the filing of the penalty petition.

The operator alleges that it has been prejudiced by the Secretary's delay in filing because the mine area involved in the citation was abandoned on June 21, 1994, after the due date for filing the petition. I do not find this circumstance prejudicial to the operator's ability to defend itself against the charge of an unguarded trolley wire. Witnesses can still testify about conditions on the day the citation was issued.

In light of the foregoing, it is ORDERED that the operator's motion to dismiss be DENIED.

It is further ORDERED that the late filed penalty petition be ACCEPTED.

This case is hereby assigned to Administrative Law Judge Gary Melick.

All future communications regarding this case should be addressed to Judge Melick at the following address:

Federal Mine Safety and Health  
Review Commission  
Office of Administrative Law Judges  
Two Skyline Place, Suite 1000  
5203 Leesburg Pike  
Falls Church, VA 22041

Telephone No. 703-756-6261

Paul Merlin  
Chief Administrative Law Judge

Distribution: (Certified Mail)

Javier I. Romanach, Esq., Office of the Solicitor, U. S. Department of Labor, Suite 516, Ballston Towers #3, 4015 Wilson Boulevard, Arlington, VA 22203

Mr. Gregory D. Patterson, Long Branch Energy, P. O. Box 776, Danville, WV 25053

/gl