

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE  
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July 22, 2010

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2007-508
Petitioner	:	A.C. No. 15-18752-123358-Y68
	:	
v.	:	
	:	
GENERAL DRILLING, Div. of GE,	:	
Respondent	:	Mine: Lake City Quarry
	:	

**ORDER OF DISMISSAL**

Before: Judge McCarthy

**Factual and Procedural Background**

This case was assigned to me on July 12, 2010. It is before me on a Petition for Assessment of Civil Penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). The Respondent has filed a motion to dismiss the Civil Penalty Proceeding on the basis of the Secretary’s inexcusable and prejudicial delay in filing the petition. The Secretary filed an Answer to the Motion to Dismiss, with attached affidavits.

Citation No. 6110609 was issued on January 9, 2007 while General Drilling was performing contract drilling services at the Lake City Quarry mine owned by Florida Rock Industries. The violation cited involved a cracked windshield in the operator cab of a drill, creating a line of vision hazard that was reasonably likely to result in fatal injuries from high negligence and constituted an unwarrantable failure to comply with a mandatory standard set forth in 30 C.F.R. § 56.14103(b). An informal conference was held with the MSHA District Office on January 30, 2007, but no modification of the citation occurred.

On July 26, 2007, the Secretary issued a proposed assessment of penalty in the amount of \$2,000.00. It is undisputed that the Respondent filed a timely contest that was received by the Secretary on August 28, 2007. Pursuant to Commission Rule 28(a), 29 C.F.R. 2700.28(a), upon receipt of the mine operator’s penalty contest, the Secretary had 45 days to issue her Petition for Assessment of Civil Penalty. That is, the Petition was due on or about October 13, 2007. The Petition was not filed until on or about February 9, 2010. The Secretary gave no explanation in her Petition why it was filed 28 months late.

After receiving the Petitioner’s belated filing, Respondent promptly filed its Answer and Motion to Dismiss on February 12, 2010. Respondent argues that no adequate cause has been

established for the egregious delay under Commission precedent, and that such delay is both inherently and actually prejudicial to the operator's preparation of a proper defense.

On March 23, 2010, the Secretary filed an Answer to the Motion to Dismiss, with attached affidavits. According to Petitioner's affidavits, MSHA's Civil Penalty Compliance Office prepared a contest package and transmitted it to MSHA's District Office on September 14, 2007. Petitioner concedes that the District Office never transmitted the contest package to the Solicitor's Office so that a Petition for Assessment of Civil Penalty could be filed. Rather, more than two years later, on or about November 25, 2007, the Commission informed the Solicitor's Office that no Petition had been filed. After additional investigation, the Solicitor's Office eventually mailed the Petition to Respondent on February 9, 2010. Thereafter, in June 2009, the procedure for processing contests to proposed assessments was upgraded to a web-based program.

### **Disposition**

The Commission has held that in order to survive a motion to dismiss an untimely petition, the Secretary must first establish adequate cause for the late filing. Once adequate cause is established, the Commission then examines whether the delay has been prejudicial to the operator. *MSHA v. Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089, 2093 (Oct. 13, 1993), *citing MSHA v. Salt Lake County Rd. Dep't*, 3 FMSHRC 1714 (July 28, 1981) *and MSHA v. Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 26, 1982).

Concededly, the Commission has permitted the filing of untimely petitions in a number of cases based on factors such as the Secretary's extraordinarily high caseload, lack of clerical personnel, and confusion of filing deadlines because of amended standards. *See, e.g., Salt Lake County*, 3 FMSHRC at 1714; *MSHA v. Lone Mountain Processing Inc.*, 17 FMSHRC 839 (May 31, 1995). In the present matter, by contrast, the Secretary does not specifically establish any such factors or make any such contention, she just cites such precedent without demonstrating that such factors played any role in the late filing. In fact, the Secretary contends and the record establishes that the filing delay occurred solely because the contest file(s) were misplaced or never received by the MSHA District Office, and no procedures were in place to catch the error. In these circumstances, the Secretary has failed to establish adequate or good cause for the stale petition. Moreover, the cases relied on to establish adequate cause for late filing involved significantly shorter delays. For example, in *Salt Lake County*, the delay was less than two months. 3 FMSHRC at 1714. In *Lone Mountain*, the delay was only 16 days. 7 FMSHRC at 839. In *Rhone-Poulenc of Wyoming Co.*, the delay was only 11 days. 15 FMSHRC at 2094. As emphasized above, in the present case, the delay was two years and four months, and only discovered after Commission inquiry.

Even assuming arguendo that good cause has been demonstrated by the Secretary on this record, I find in the alternative that dismissal is warranted because Respondent has established that the two-year, four-month delay has resulted in actual prejudice to the Respondent's ability to defend itself in this matter. Respondent contends, and the Secretary does not dispute, that Florida Rock Industries sold the mine property to Vulcan Materials Company in November

2007, and Vulcan subsequently suspended mining at this operation. Respondent also contends, and the Secretary does not dispute, that Respondent will no longer be able to locate and subpoena those employees of Florida Rock Industries, who could support its defense to the contested citation through trial testimony. In addition, Respondent asserts that even if such witnesses can be located, their ability to recall events that occurred more than three years ago, with specificity, is questionable. Although the Secretary had adequate opportunity to respond to Respondent's arguments of actual prejudice in its Answer to Respondent's motion to dismiss, the Secretary failed to address the facts asserted or rebut the arguments presented. In these circumstances, I find that Respondent has established a sufficient factual basis to demonstrate actual prejudice in the preparation of its case based on the stale Petition.

In light of the foregoing, the Respondent's Motion to Dismiss is hereby **GRANTED** and the Petition for Assessment of Civil Penalty is **DISMISSED**.

Thomas P. McCarthy  
Administrative Law Judge

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