

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE  
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July 19, 2010

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-1123
Petitioner	:	A.C. No. 46-05868-179688
	:	
v.	:	Mine: Pinnacle Preparation Plant
	:	
	:	Docket No. WEVA 2009-1124
PINNACLE MINING COMPANY,	:	A.C. No.46-09030-179694
LLC,	:	
Respondent	:	Mine: Green Ridge #1 Mine

**ORDER ACCEPTING LATE FILINGS**  
**ORDER DENYING MOTIONS TO DISMISS**

The Secretary of Labor, Mine Safety and Health Administration (“Secretary”) filed her penalty petition in each of these cases on September 8, 2009. On September 11, 2009, Respondent Pinnacle Mining Company, LLC (“Pinnacle”) filed its motions to dismiss for the Secretary’s failure to timely file the penalty petitions. Pinnacle did not allege that it was prejudiced by this delay. Pinnacle also filed its answer to the penalty petition on September 11, 2009.

On December 11, 2009, the Secretary filed an opposition to Pinnacle’s motion to dismiss and a request to accept the petition out-of-time.<sup>1</sup> The Secretary alleges that the delay was the result of the high rate of contests, resulting in an unprecedented number of petitions to be processed, coupled with a lack of adequate staff to handle the increased workload.

Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (“Mine Act”), states that a mine operator wishing to contest a citation or an order or a notification of proposed assessment of penalty must notify the Secretary of Labor (“Secretary”) of its desire to do so within 30 days of receipt of the citation or order or proposed assessment, at which time the Secretary immediately shall notify the Commission, and the Commission shall afford an opportunity for hearing. Commission Rule 28(a) provides that “within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the

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<sup>1</sup>In future proceedings, the Secretary should file the Motion to File the Petition Out of Time concurrent with or prior to the penalty petition, in accordance with 29 C.F.R. § 2700.9.

Commission a petition for assessment of penalty.” 29 C.F.R. § 2700.28(a).

Pinnacle filed its notices of contest in the above-captioned dockets on March 31, 2009. Accordingly, under Section 2700.28(a), the Secretary’s petitions for assessment of civil penalty should have been filed by May 22, 2009.

Case law demonstrates the Commission’s preference toward resolving cases on the merits rather than based on procedural defects. *See M.M. Sundt Constr. Co.*, 8 FMSHRC 1269, 1271 (Sept. 1986) and *Coal Prep. Services, Inc.*, 17 FMSHRC 1529, 1530 (Sept.1995). It is well-settled that the late filing of a civil penalty petition is not jurisdictional. *See Salt Lake County Road Dept.*, 3 FMSHRC 1714, 1716 (July 1981). While the Secretary should adhere to the 45-day time limit, the Commission has made clear that neither the term “immediately” contained in Section 105(d) of the Mine Act nor the time limit should be construed as a “procedural strait jacket[.]” *Id.* at 1716.

Furthermore, given the unprecedented number of cases currently before the Commission, as well as the unprecedented number of penalty petitions pending before the Secretary, strict adherence to the 45-day time line is unrealistic. *See Solar Energy*, 31 FMSHRC 729, 730 (June 2009) (ALJ Feldman).

In light of all of the foregoing, it is **ORDERED** that the Secretary’s late-filed penalty petitions are **ACCEPTED**. Accordingly, Pinnacle’s motions to dismiss the above captioned dockets are both **DENIED**.

Robert J. Lesnick  
Chief Administrative Law Judge

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