

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 25, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-71-M
Petitioner	:	A. C. No. 03-00256-05559 A
v.	:	
JERRY HUDGEONS, EMPLOYED BY	:	Foreman Quarry & Plant
ASH GROVE CEMENT COMPANY,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-72-M
Petitioner	:	A. C. No. 03-00256-05560 A
v.	:	
FRED WALKER, EMPLOYED BY	:	Foreman Quarry & Plant
ASH GROVE CEMENT COMPANY,	:	
Respondent	:	

ORDER DENYING MOTION TO DISMISS

ORDER ACCEPTING LATE FILING

ORDER DIRECTING SECRETARY TO AMEND PENALTY PETITIONS

ORDER DIRECTING RESPONDENTS TO ANSWER AMENDED PETITIONS

On October 7, 1999, the Secretary Labor issued penalty assessments against Jerry Hudgeons and Fred Walker pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, (30 U.S.C. § 810(c)), hereinafter referred to as the "Act". In accordance with section 105(d) of the Act, (30 U.S.C. § 815(d)), Hudgeons and Walker timely notified the Mine Safety and Health Administration (MSHA) on November 2, 1999, that they wished to contest the proposed penalty assessments. Copies of the notices were forwarded to the commission and the above docket numbers were assigned to these cases. On December 20, 1999, the Solicitor on behalf of the Secretary of Labor and MSHA filed penalty petitions in these matters.

On January 19, 2000, counsel for Hudgeons and Walker filed motions to dismiss on the ground that the Secretary has failed to timely file the penalty petitions. Counsel further asserts that respondents are prejudiced because considerable time has passed since the citations involved were issued in June, 1998 and the investigation of the citations was initiated by the Secretary in January, 1999.

On February 4, 2000, the Solicitor filed responses to the motions to dismiss as well as motions to accept late filing of the penalty petitions. The Secretary advises that the cases were received by the Solicitor's Dallas Regional Office on December 8, 1999. However, the person responsible for assigning the matters to the appropriate Solicitor, Acting Counsel for Safety and Health, Janice H. Mountford, was away during the week of December 6, 1999 and December 13, 1999, on official business. The Solicitor states that apart from Ms. Mountford's duties as a supervisor, she also carries her own caseload. The responsibility to assign the cases was given to another supervisor in the Dallas office but these files were inadvertently misplaced. The cases were not assigned to a Solicitor until December 17 (Docket No. CENT 2000-72-M) and December 21 (Docket No. CENT 2000-71-M). The Solicitor promptly filed a petition for each case the next business day following the Solicitor's receipt of each case.

The hearing contests filed by Hudgeons and Walker were received by MSHA on November 2, 1999. The Secretary had 45 days after receipt of the hearing requests to file the penalty petitions. 29 C.F.R. § 2700.28. The petitions were due on December 17, 1999. 29 C.F.R. § 2700.8. Filing is effective upon mailing and the petition in Docket No. CENT 2000-71-M was mailed on December 22, 1999, and the petition for Docket No. CENT 2000-72-M was mailed on December 20, 1999. 29 C.F.R. § 2700.5(d). The petitions were therefore, 5 and 3 days late respectively.

The Commission has permitted late filing of penalty petitions where the Secretary demonstrates adequate cause for the delay and where the respondent fails to show prejudice from the delay. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981). The Secretary must establish adequate cause apart from any consideration of whether the operator has been prejudiced. Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989).

A determination of adequate cause is based upon the reasons offered and the extent of the delay. Late filings have been accepted where the delay caused by clerical error was of short duration. In Apac Oklahoma, Docket No. CENT 97-187-M, unpublished (December 16, 1997) (attached to Patterson Materials Corp, 21 FMSHRC 463, 466 (April 1999)), a delay of 24 days was permitted where the Solicitor claimed clerical error, and in M. Jamieson Company, 12 FMSHRC 901 (April 1990), a delay of a relatively short period of time was allowed where the matter was misfiled by the Solicitor and the Solicitor promptly filed a response to the show cause order. In addition, a late filing has been accepted where the delay was only 7 days and the Secretary discovered the error and did not wait until either the Commission or the operator took action. Patterson Materials Corp, 21 FMSHRC 463 (April 1999).

Late filings have not been permitted based on mishandling of cases where the delay was lengthy. In Phelps Dodge Morenci Inc., 1993 WL 395589 (June 1993), a delay of over five months was not countenanced where the Regional Solicitor's Office misplaced the case upon receipt and the Solicitor did not file the petition until after the Commission issued a show cause order. See also, Hecla Mining Company, 1993 WL 395630 (June 1993) (where a delay of five months resulted in a dismissal of the petition).

The circumstances in the subject cases are similar to those cited above where late filing was permitted. The delay here was very short and the petitions were promptly filed once they were assigned. Therefore, I find that the Secretary has demonstrated adequate cause for the delay.

It is now necessary to determine whether the respondents nevertheless have demonstrated sufficient prejudice to justify dismissal. The respondents have not alleged specific prejudice from the three to five day delay involved in these matters. Rather, the respondents refer to the length of time from the issuance of the citations to the operator and the time accrued since the initiation of the special investigation. These time delays do not involve the filing of the petitions. The only prejudice that can be evaluated here is that caused by the untimely petitions, and the respondents have failed to demonstrate specific prejudice from these short delays. Therefore, I find that sufficient prejudice does not exist to warrant dismissal of these matters.

Finally, the Solicitor is advised that the petitions incorrectly name Hudgeons' and Walker's employer Ash Grove Cement Company as the respondent. Moreover, the petitions fail to identify section 110(c) as the authority for assessing penalties against individual employees. Rather, they erroneously cite section 110(a), which is the basis for assessing fines against operators. The Solicitor must amend his petitions to reflect the correct respondents and the proper statutory sections.

In light of foregoing, it is **ORDERED** that the motion to dismiss is **DENIED**.

It is further **ORDERED** that the Solicitor's late filed penalty petitions are **ACCEPTED**.

It is further **ORDERED** that within 15 days the Solicitor filed amended petitions that reflect the proper respondents and statutory sections involved.

It is further **ORDERED** that within 30 days of the date the Solicitor files his amended petitions the respondents file answers to the amended petitions.

David F. Barbour
Chief Administrative Law Judge

Distribution: (Certified Mail)

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