

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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January 30, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-379-M
Petitioner	:	A. C. No. 41-00009-05554
	:	
v.	:	
	:	
CACTUS CANYON QUARRIES,	:	
INCORPORATED,	:	
Respondent	:	Mine: Fairland Plant and Quarries

**ORDER DENYING MOTION TO RECONSIDER**  
**ORDER DENYING LEAVE TO FILE AN APPEAL**  
**AND**  
**ORDER DENYING CERTIFICATION UNDER RULE 76**

**Before: Judge Barbour**

**PROCEDURAL POSTURE**

On November 5, 2001, the Commission received the Secretary's Motion to File Petition Out of Time in the above captioned case. In support of her motion, she asserts that the file was misplaced in the Office of the Solicitor, and was not brought to the attention of the assigned attorney until October 29, 2001. Sec. Mot. at 1. Further, she contends that the attorney promptly took action to file the penalty petition. *Id.* Indeed, the Certificate of Service shows that the attorney filed the petition on October 30, 2001, one day after he claims to have received the case file.

The Secretary is required to file the penalty petition with the Commission within 45 days of receipt of a timely contest of the proposed penalty assessment. 29 C.F.R. 2700.28(a). The date stamped on the notice of contest shows that the Civil Penalty Office received the notice on August 28, 2001. Hence, the Secretary should have filed her penalty petition on or before October 15, 2001. This means the penalty petition was 15 days late.

Subsequently, on November 13, 2001, the Commission received the Respondent's Response to Late Filing and for Sanctions and Answer to Petition. In the motion, the Respondent requests that the case be dismissed due to the Secretary's failure to demonstrate adequate cause for the delay in filing the penalty petition. Resp. Mot. at 1. The Respondent further states that it was prejudiced by the delay, contending that witnesses had been transferred or moved to other jurisdictions; that the delay had caused problems with a subsequent inspection; and the delay hurt its ability to offer witnesses with a clear memory. *Id.*

On December 13, 2001, I issued an order in which I determined that the Secretary had demonstrated adequate cause and accepted the late-filed penalty petition. The Respondent, thereafter, filed its Motion to Reconsider, and Motion for Leave to File Appeal of Order Granting Motion to File Petition Out of Time. I have reviewed the Respondent's arguments, and I conclude, again, that the Secretary has demonstrated adequate cause for filing her penalty petition out of time.

In addition, on January 23, 2002, I received a motion requesting certification of this ruling under Commission Rule 76 (29 C.F.R. § 2700.76). I have reviewed the Respondent's arguments and I conclude that certification is not appropriate.

### **DISCUSSION**

Section 105(d) of the Mine Act states in pertinent part: “[i]f, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of penalty issued under subsection (a) or (b) of this section . . . , the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing.” In interpreting the 45-day rule, the Commission has stated that “Rule [28] implements the meaning of ‘immediately’ in section 105(d).” *Salt Lake Co. Road Dept.*, 3 FMSHRC 1714, 1715 (July 1981). Thus, it is apparent that the purpose of Rule 28 is to effectuate swift enforcement. *Id.*

However, while the Secretary should adhere to the 45-day time limit, the Commission has made clear that neither the term “immediately” nor the time limit should be construed as a “procedural strait [jacket].” *Id.* at 1716. Moreover, in *Salt Lake*, the Commission considered Congress' intent when it drafted the Mine Act, stating that the “considerations of procedural fairness to operators must be balanced against the severe impact of dismissal of the penalty proposed upon the substantive scheme of the statute and, hence, the public interest itself.” *Id.* Indeed, when Congress created the Mine Act, it did so with the purpose of promoting safety and health in the mining industry. S. Rep. No. 95-181, at 1 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 589 (1978).

Mindful of the Act's purpose, the Commission held in *Salt Lake* that the Secretary may request permission for late filing if the request is (1) based upon adequate cause, and (2) the operator has an opportunity to object to the late filing on the grounds of prejudice. 3 FMSHRC at 1715.

I have previously held that "adequate cause is based upon the reasons offered and the extent of the delay." *Jerry Hudgeons*, 22 FMSHRC 272, 273 (Feb. 2000). It is conceivable that a case file could be misplaced in the Solicitor's Office in light of the large number of cases processed. However, had the delay been lengthy, my disposition might have been different because the Solicitor's Office should make periodic efforts to check files to ensure that cases are processed in a timely manner. Fifteen days is not a lengthy delay, and after having balanced the procedural fairness to the operator against the severity of dismissal and in the interest of achieving the purpose of the Mine Act, I find that the Secretary's reason coupled with the short delay is adequate cause.

The Respondent should be aware that, in keeping with the public interest, the Commission grants procedural leniency not only to the Secretary, but to operators as well. An operator is required to file an answer to the penalty petition within 30 days after service of the petition pursuant to Commission Rule 29. 29 C.F.R. § 2700.29. However, in the interest of reaching the merits of the case, the Commission issues a Show Cause Order to an operator if it fails to answer within 30 days in an effort to allow a request for hearing before a case is dismissed.

Regarding prejudice, the Respondent contends that the short delay has prejudiced its ability to present its case in that witnesses have moved to other jurisdictions or memories have faded. The contentions are not convincing. The inspection, which led to this case, occurred in August 2000. This is not such a long time ago as to assume memories of the events at issue have diminished irrevocably. Also, if witnesses are geographically unavailable the parties may agree upon, or the judge may order, other means to secure the necessary evidence — e.g., the submission of sworn statements.

Accordingly, the Respondent's Motion to Reconsider is **DENIED**.

The Respondent's Motion for Leave to File an Appeal and its Motion for Certification also are **DENIED**. The essential contention raised by the Respondent is that I have abused my discretion by permitting the Secretary to file her petition out of time. As counsel for the Secretary notes, the exercise of my discretion has been based on well established legal principles concerning late filings and the determination of prejudice (Secretary of Labor's Opposition to Operator's Motion for Certification of Interlocutory Ruling 5-9). There is no conflict within the Commission nor among its judges concerning these principles. Thus, the exercise of my discretion has not raised a controlling question of law and certification will not materially advance the final disposition of this proceeding.

The Respondent is again **ORDERED** to file its answer to the penalty petition within 30 days, i.e., on or before March 1, 2002.<sup>1</sup>

David F. Barbour  
Chief Administrative Law Judge

Distribution: (Certified Mail)

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<sup>1</sup> I note in passing that the tone of Respondent counsel's Motion to Reconsider and Response to Motion to Deny Petition for Interlocutory Review is somewhat surprising. In the future, counsel may wish to be mindful that a motion is an exercise in legal argument, not in self-serving rhetoric.