

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1730 K STREET, N.W. , 6TH FLOOR
WASHINGTON, D.C. 20006-3868

January 20, 1999

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| SECRETARY OF LABOR | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. CENT 98-292 |
| Petitioner | : | A. C. No. 29-00845-03591 |
| | : | |
| v. | : | |
| THE PITTSBURG & MIDWAY COAL | : | |
| MINING COMPANY, | : | York Canyon Surface Mine |
| Respondent | : | |

ORDER ACCEPTING APPEARANCE
ORDER ACCEPTING LATE FILING
ORDER OF ASSIGNMENT

It is **ORDERED** that the Conference and Litigation Representative (CLR) be accepted to represent the Secretary in accordance with the notice of unlimited appearance he has filed with the penalty petition. Cyprus Emerald Resources Corporation, 16 FMSHRC 2359 (November 1994).

This case is a petition for the assessment of a civil penalty filed by the Secretary of Labor under section 105(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 815(a) .

The CLR has filed a motion to accept late filing of the penalty petition. A penalty petition must be filed within 45 days from receipt of the operator's notice of contest which requested a hearing. 29 C.F.R. ' 2700.28(a). A review of the Commission file shows that the contest was received by MSHA on September 29, 1998. The petition was due on November 13, 1998. 29 C.F.R. ' 2700.8. Filing is effective upon mailing and the petition was sent on November 18, 1998. 29 C.F.R. ' 2700.5(d). The petition was, therefore, 5 days late.

According to the CLR, the operator's notice of contest was forwarded to Denver and received by the Denver District 9 Office, Conference and Litigation Representative, on October 9, 1998. However, the CLR states that the petition was late because of the database problem with the computer and a breakdown in communication. The operator has filed a motion in opposition arguing that a breakdown in communication within the agency does not constitute adequate cause.

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission permits 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 operator has not alleged prejudice. Therefore, the issue to be resolved is whether the Secretary has demonstrated adequate cause.

Late filings have been permitted where there has been a rise in the mine safety caseload together with a lack of support personnel. Salt Lake, supra; Medicine Bow Coal Co., 4 FMSHRC 882 (May 1982). See also Wharf Resources USA Incorporated, 14 FMSHRC 1964

(November 1992); Fisher Sand and Gravel Company, 14 FMSHRC 1968 (November 1992). Out of time filing of the penalty petition was allowed when the delay was due to the adoption by MSHA of a new system for handling mine safety cases. Roberts Brothers Coal Company, 17 FMSHRC 1103 (June 1995). So too, late filing was permitted when it was due to a mistake in the computation of the 45 days by a Conference and Litigation Representative (CLR) when the CLR program was new. Lone Mountain Processing Incorporated, 17 FMSHRC 839 (May 1995); Austin Powder Company, 17 FMSHRC 841 (May 1995); Ibold Incorporated, 17 FMSHRC 843 (May 1995). An extraordinary circumstance like a government shutdown also has been recognized as adequate reason for late filing. Secretary of Labor v. Roger Chistensen, 18 FMSHRC 1693 (August 1996). In this case, the reason given is a database problem with the computer and a breakdown in communication. I find this circumstance constitutes adequate cause, but in future cases the CLR should explain the problem in more detail and furnish dates.

In light of the foregoing, the motion to accept late filing is **GRANTED**.

The operator has filed its answer. Accordingly, this case is hereby assigned to Administrative Law Judge Richard W. Manning.

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

Federal Mine Safety and Health
Review Commission
Office of the Administrative Law Judges
Colonnade Center
Room 280, 1244 Speer Boulevard
Denver, Colorado 80204

Telephone No. 303-844-3577
Telephone No. 303-844-5268 (Fax)

Paul Merlin
Chief Administrative Law Judge

Distribution: (Certified Mail)

Ned Zamarripa, Conference and Litigation Representative, U. S. Department of Labor, MSHA,
CMS& H, P. O. Box 25367 DFC, Denver, CO 80225

Steven R. Ellinwood, Esq., Pittsburg & Midway Coal Mining Co., P. O. Box 6518, Englewood,
CO 80155-6518

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Ned Zamarripa
Conference and Litigation Representative
U. S. Department of Labor, MSHA
CM S& H, P. O. Box 25367 DFC
Denver, CO 80225

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Steven R. Ellinwood, Esq.
Pittsburg & Midway Coal Mining Co.
P. O. Box 6518
Englewood, CO 80155-6518