

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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February 7, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 99-266
Petitioner	:	A. C. No. 41-03164-03544
v.	:	
	:	Jewett Mine
NORTHWESTERN RESOURCES CO.,	:	
Respondent	:	

**ORDER DENYING MOTION
TO CERTIFY FOR INTERLOCUTORY REVIEW**

This case is before me on a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Before assigning the case to me, former Chief Administrative Law Judge Paul Merlin denied the Respondent’s opposition to the Secretary’s motion to accept late filing of the petition. On January 11, 2000, the Respondent filed a motion requesting that Judge Merlin’s ruling be certified for interlocutory review. The Secretary did not respond to the motion.

Interlocutory review is governed by Commission Rule 76, 29 C.F.R. § 2700.76. Rule 76(a)(1)(i), 29 C.F.R. § 2700.76(a)(1)(i), provides that:

- (1) Review cannot be granted unless:
 - (i) The Judge has certified, upon his own motion or the motion of a party, that his interlocutory ruling involves a controlling question of law and that in his opinion immediate review will materially advance the final disposition of the proceeding

I find that the motion must be denied because the ruling does not involve a controlling question of law.

In *Salt Lake County Road Dept.*, 3 FMSHRC 1714 (1981), the Commission held that the late filing of a Petition for Assessment of Civil Penalty was not jurisdictional, that is, that automatic dismissal was not required when the petition was not filed on time. *Id.* at 1716. Instead, it established a two part test for determining whether a late-filed petition should be dismissed: (1) The Secretary must establish adequate cause for the delay; and (2) If adequate

cause is established, the Respondent must show prejudice. *Id.* The determination of both parts of the test is within the discretion of the judge or Commission.

In effect, the Respondent is arguing that Judge Merlin abused his discretion in allowing the petition to be filed late. If a matter is discretionary, it does not involve a controlling question of law. Accordingly, the motion to certify is **DENIED**.

T. Todd Hodgdon
Administrative Law Judge
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