

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET N.W., 6TH FLOOR  
WASHINGTON, D.C. 20006

September 26, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 96-103-M
Petitioner	:	A.C. No. 20-00773-05525-A
	:	
v.	:	Lyon Sand & Gravel
RAYMOND P. ERNST, EMPLOYED	:	
BY LYON SAND & GRAVEL CO.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 96-104-M
Petitioner	:	A.C. No. 20-00773-05524-A
	:	
v.	:	
SCOTT BANDKAU, EMPLOYED BY	:	
LYON SAND & GRAVEL CO.,	:	Lyon Sand & Gravel
Respondent	:	

**ORDER OF DISMISSAL**

Before: Judge Merlin

These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against respondents, Scott Bandkau and Raymond P. Ernst, under 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". Respondents seek to have the petitions dismissed on the ground that the Secretary has failed to act in a timely manner.

These cases involve one citation and four orders issued to respondents' employer, Lyon Sand & Gravel Company, under section 104(d) of the Act, 30 U.S.C. § 814(d), for alleged violations of the Act and its mandatory standards. The five violations were issued on September 21, 1994.

On February 26, 1996, the Secretary issued notices of proposed civil penalty assessments against respondents and on March 22, 1996, respondents timely requested a hearing. 29 C.F.R. § 2700.26. The Secretary had 45 days after receipt of the hearing requests to file his penalty petitions. 29 C.F.R. § 2700.28. In these cases the Secretary received respondent Ernst's hearing request on March 26, 1996, and respondent Bandkau's request on March 27, 1996.

Therefore, the petitions were due on May 10, 1996, and May 13, 1996, respectively. 29 C.F.R. § 2700.8.

The Solicitor failed to file the penalty petitions. On June 4, 1996, orders were issued to the Secretary to show cause within 30 days why these cases should not be dismissed for untimely filing.

On July 12, 1996, the Solicitor filed the penalty petitions. The petitions were accompanied by a motion for leave to file them out of time which offered the following explanation:

The Secretary devoted many hours of review to the above-captioned case in order to determine if a civil penalty was appropriate based on the facts as known to him. This review required the scheduling of meetings between interested parties, both live and by phone which took considerable time and effort. Therefore, the Secretary was not able to reach a conclusion about whether to file a Petition for Assessment of Civil Penalty in the instant case before now.

On August 13, 1996, respondents filed a motion to dismiss. Respondents complain that the penalty petitions were not filed within the required 45 days and point out that they were not filed until after show cause orders were issued. Respondents further complain that the subject citation and orders were issued on September 21, 1994, almost 22 months before the penalty petitions were filed. It is respondents' assertion that the Secretary has failed to demonstrate adequate cause and they have been prejudiced by the delays.

On August 22, 1996, the Solicitor filed a letter stating that he would not be filing additional motions.

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); Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989).

The reasons offered by the Solicitor in these cases to justify the late filings fall short of what is required for a showing of adequate cause. The Solicitor makes the briefest of responses which contains only general statements about events which allegedly caused the untimeliness. The specific circumstances are not addressed. The Solicitor refers to many hours of review, but the actual times spent and the chronology of those times are undisclosed. He mentions many meetings between interested parties, but does not say who the parties were or when the meetings took place. Finally, the Solicitor fails to sufficiently answer respondents' allegations because he does not distinguish between the delay in filing the penalty petition and the delay in the investigation phase. Because the Solicitor's explanation is general and vague, it could apply to any 110(c) case where timeliness becomes an issue.

In James Lee Hancock, Employed by Pittsburg and Midway Coal Company. 17 FMSHRC 1669 (September 1995), I granted requests from the Solicitor for extensions of time to file the penalty petition and rejected claims that there were undue delays by MSHA during its investigation and by the Solicitor in filing the penalty petition. However, in Hancock the Solicitor provided a detailed exposition of the problems encountered in considering the case as well as the sequence of events that occurred. Based upon those circumstances, he justified the time used by the Secretary both in investigation and in filing the penalty petition. The Solicitor here has done none of these things.

It is axiomatic that section 110(c) is an integral and important part of enforcement under the Mine Act. When Solicitors are confronted with allegations such as those made by the respondents here, they must do more than recite generalizations unrelated to what transpired in the case.

Because there has been no showing of adequate cause, it is not necessary to reach the issue of prejudice.

In light of the foregoing, the Solicitor's motion to file the penalty petitions out of time is DENIED.

It is ORDERED that these cases be DISMISSED.

Paul Merlin  
Chief Administrative Law Judge

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