

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

June 24, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 99-152-M
Petitioner	:	A. C. No. 08-00008-05570
	:	
v.	:	Cabbage Grove
LIMEROCK INDUSTRIES,	:	
INCORPORATED,	:	
Respondent	:	

**ORDER OF DISMISSAL**

**Before: Judge Merlin**

On April 16, 1999, the operator filed a request to set aside the final judgment and dismiss the citations in this matter which has been assigned the docket number captioned as above.

On July 28-30, 1998, the fourteen citations in this case were issued to the operator. During the same inspection other citations and orders were issued to the operator which are contained in four other cases pending before the Commission (Docket Nos. SE 99-17-M, SE 99-18-M, SE 99-19-M, and SE 99-20-M). On October 5, 1998, the Secretary of Labor issued notices of proposed penalty assessments in this case and the four others. By letter dated October 19, 1998, the operator contested the assessments in all five cases. The files of the four other cases show that on October 22, 1998, MSHA received the operator's contests.

Thereafter, in December 1998, the Solicitor filed with the Commission petitions for the assessment of civil penalties in the other four cases. A petition was not filed in this case. Instead the Solicitor sent the operator a letter dated March 24, 1999, stating that the assessment in this case had become final and demanding payment.

In an order dated April 20, 1999, I stated that it appeared the operator had timely contested the penalty assessments in this case and that the Solicitor had failed to timely file a penalty petition. Therefore, I ordered the Secretary to show cause why this case should not be dismissed for failure to file the penalty petition within 45 days of the date the operator's contest was received as required by Commission regulations. 29 C.F.R. § 2700.28(a).

On May 17, 1999, the Solicitor filed the penalty petition accompanied by a response to the show cause order and by a motion to accept late filing. Attached to the response is a statement from Charles H. Brinkley, Acting Chief MSHA Civil Penalty Compliance Office, admitting that the operator had timely contested the proposed penalty assessment and that due to clerical error the case was not forwarded to the Commission. According to Mr. Brinkley, the failure to process the case was the reason the demand letter was erroneously sent and the error was not discovered until the operator protested the demand for payment and the case was

examined in light of the protest.

On June 10, 1999, the operator filed a motion to dismiss the penalty petition because it was not filed timely and the Secretary did not demonstrate adequate cause for the untimeliness.

The penalty petition was due on December 7, 1998. 29 C.F.R. § 2700.8. Filing is effective upon mailing and the petition was mailed on May 13, 1999. 29 C.F.R. § 2700.5(d). It was therefore, more than five months late.

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. I have not permitted late filings 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. And in Lawrence Ready Mix Concrete Corp., 6 FMSHRC 246 (Feb 1984), the petition was dismissed where the delay was a year and a half and the filing came only after a show cause order was issued. Finally, I have not accepted a late penalty petition where the Solicitor claimed that the case was mishandled when he had referred the matter to MSHA under the Alternate Case Resolution Initiative (ACRI). Swenson Granite Company, LLC, 20 FMSHRC 859 (August 1998). In Swenson, I held that sending the case to MSHA did not excuse the Solicitor from his responsibility of filing required pleadings.

However, I have accepted late filings where the delay caused by clerical error was of short duration. Apac Oklahoma, Docket No. CENT 97-187-M, unpublished (December 16, 1997) (attached to Patterson Materials Corp, 21 FMSHRC 463, 466 (April 1999) ), M. Jamieson Company, 12 FMSHRC 901 (March 1990). And I have accepted late filings where 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).

The circumstances in this case are similar to those cited above where late filing was not permitted. The delay here was very long and the error was only discovered when the operator responded to MSHA's demand for payment. In addition, the Solicitor has not offered any other special factors beyond its statement of clerical error. If this five months delay were allowed, a clerical error of any kind always would provide a basis to avoid the regulation. Therefore, I find that the Solicitor has failed to demonstrate adequate cause for the delay and the case must be dismissed.

In light of the foregoing, it is **ORDERED** that this case is **DISMISSED**.

Paul Merlin  
Chief Administrative Law Judge

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