

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

January 26, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 98-75-M
Petitioner	:	A. C. No. 44-00061-05536
v.	:	
LESUEUR-RICHMOND SLATE	:	Richmond-Arvonnia Quarry
CORPORATION,	:	
Respondent	:	

**ORDER OF DISMISSAL**

**Before: Judge Merlin**

This case is a petition for the assessment of civil penalties 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 operator has filed a motion to dismiss the penalty petition on the ground that the Secretary failed to file the petition timely.

This case involves two orders that were issued on March 17, 1998, under section 104(d)(2) of the Act, 30 U.S.C. ' 814(d)(2), for alleged violations of mandatory standards.

On July 15, 1998, the Secretary issued a notice of proposed civil penalty assessments. According to the certified mail return receipt, the operator received the notice of proposed civil penalties on July 22, 1998. The operator contends that it timely contested this assessment by letter dated July 23, 1998, and it has provided a copy of the letter together with a certified mail receipt signed by an MSHA employee showing that on July 27, 1998, the letter was received. 29 C.F.R. ' 2700.26. Based upon the receipt date, the 45 day period allowed for filing the penalty petition expired on September 10, 1998. 29 C.F.R. ' 2700.28.

The Solicitor advises that MSHA's Civil Penalty Office has no record of receiving the July 23 letter. MSHA mailed a demand letter for payment on September 23, 1998, and on September 28, 1998, counsel for the operator faxed to MSHA a copy of the July 23 letter. The faxed copy is the only record MSHA has of the operator's contest. Thereafter, the Civil Penalty Office changed the status of the case from closed to open and treated September 28 as the date of receipt of the hearing request. The penalty petition was filed on November 6, 1998, which is within 45 days of September 28.

Under standards established by the courts, the operator is only required to use a method to

effectuate service that is reasonably calculated under all the circumstances to apprise the interested party of the pendency of the action. Mullane v. Central Hanover B. & T. Co., 339 U.S. 306 (1950). Certified mail has been held to satisfy the due process due a litigant or prospective litigant. Fuentes-Argueta v. I.N.S., 101 F.3d 867, 872 (2nd Cir. 1996); U.S. v. Clark, 84 F.3d 378, 381 (10th Cir. 1996); Sarit v. U.S. Drug Enforcement Admin., 987 F.2d 10, 14-15 (1st Cir. 1993). Moreover, the courts have recognized that due process does not require that the interested party actually receive notice. In Re Blinder, Robinson & Co., Inc., 124 F.3d 1238, 1243 (10th Cir. 1997); Fuentes-Argueta v. I.N.S., supra at 872; U.S. v. Clark, supra at 381; Katzson Bros., Inc. v. U.S.E.P.A., 839 F.2d 1396, 1400 (10th Cir. 1988); Weigner v. City of New York, 852 F.2d 646, 650 (2nd Cir. 1988); Stateside Machinery Co., Ltd v. Alperin, 591 F.2d 234, 241 (1979).

The certified mail receipt demonstrates that the operator's request for hearing was properly mailed and served. The receipt also establishes that on July 27, 1998, MSHA received the hearing request. See, Brian Forbes, 20 FMSHRC 461 (April 1998). The Solicitor does not challenge the validity of the certified mail receipt and he does not dispute that on July 27 the contest was received. He merely states that MSHA has no record of receiving the contest and submits an affidavit from the Acting Chief Civil Penalty Compliance Office setting forth general procedures for handling contests. Based upon this record, I find that service by the operator was proper and complete on July 27. I reject the Solicitor's contention that MSHA did not receive notice of the operator's contest until September 28. The fact that MSHA may have misplaced, misfiled or lost the contest does not render service invalid and does not alter the date the contest was filed. Accordingly, the penalty petition was untimely.

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 Secretary must establish adequate cause for the delay in filing, apart from any consideration of whether the operator was prejudiced by the delay. Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989). Adequate cause has been found in a number of situations. See e.g. Medicine Bow Coal Co., 4 FMSHRC 882 (May 1982); Wharf Resources USA Incorporated, 14 FMSHRC 1964 (November 1992); Fisher Sand and Gravel Company, 14 FMSHRC 1968 (November 1992); Roberts Brothers Coal Company, 17 FMSHRC 1103 (June 1995); Lone Mountain Processing Incorporated, 17 FMSHRC 839 (May 1995); Austin Powder Company, 17 FMSHRC 841 (May 1995); Ibold Incorporated, 17 FMSHRC 843 (May 1995); Secretary of Labor v. Roger Chistensen, 18 FMSHRC 1693 (August 1996).

In this case, the Solicitor does not allege adequate cause for late filing and therefore, he offers no reasons why the operator's contest was not recorded when it was received. The Solicitor's sole basis for opposing dismissal is the argument that the date of filing for the contest should be the date MSHA finally recorded receipt. As I have already held, MSHA's errors or lapses do not control filing dates. If the Solicitor had come forward with reasons sufficient to demonstrate adequate cause for not recording receipt, as Solicitors have done in the past, the result here might have been different.

In light of the foregoing, it is **ORDERED** that the operator's motion to dismiss be **GRANTED** and that this case be **DISMISSED**.

Paul Merlin  
Chief Administrative Law Judge

Distribution: (Certified Mail)

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