

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 6, 1996

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-98-M
Petitioner	:	A. C. No. 48-01019-05525A
	:	
v.	:	Gypsum Quarry No. 6
	:	
ROGER CHRISTENSEN, EMPLOYED	:	
BY GEORGIA-PACIFIC	:	
CORPORATION,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-99-M
Petitioner	:	A. C. No. 48-01019-05526A
	:	
v.	:	
	:	
JESSE MARTINEZ, EMPLOYED	:	Gypsum Quarry No. 6
BY GEORGIA-PACIFIC	:	
CORPORATION,	:	
Respondent	:	

ORDER DENYING MOTION TO DISMISS

ORDER ACCEPTING LATE FILING

ORDER OF ASSIGNMENT

These cases are petitions for the assessment of civil penalties filed by the Secretary of Labor against the individual respondents, Roger Christensen and Jesse Martinez, 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".

The instant cases are based upon a citation dated August 22, 1994, issued to respondents' employer, Georgia-Pacific Corporation, for an alleged violation of the Act and its mandatory standards. A penalty petition was previously filed under section 110(a) of the Act, 30 U.S.C. § 810(a), against the employer and that case, Docket No. WEST 95-326, is presently on stay before Administrative Law Judge August F. Cetti pending assignment of these cases.

Respondents have filed motions to dismiss on the ground that the Secretary has failed to timely file the penalty petitions. The Secretary filed a response.

On April 5, 1996, the respondents filed a supplement in support of their motions to dismiss advising that the inspector who issued the citation for these cases recently died of cancer. Respondents assert that they are further prejudiced by this development.

On April 15, 1996, an order was issued directing the Solicitor to respond to the respondents' April 5 supplemental reply and advise how she wished to proceed in this matter.

On May 15, 1996, the Solicitor advised that a mistake has occurred and the inspector who issued the citation for these cases has not died and is available to testify. It remains to be resolved whether the respondents' original motion to dismiss should be granted.

On November 13, 1995, the Secretary of Labor issued proposed penalty assessments against respondents. Thereafter, respondents filed timely requests for hearing which were received by the Secretary on December 7, 1995. The Secretary had 45 days after the hearing requests to file the penalty petitions. 29 C.F.R. § 2700.28. The petition for Docket No. WEST 96-98-M was filed on February 6, 1996, and the petition for Docket No. WEST 96-99 was filed on February 1, 1996. 29 C.F.R. § 2700.5(d). The petitions were due on January 22, 1996, and therefore, were 10 and 16 days late respectively.

The Solicitor attached a notice to her penalty petitions stating that the petitions were untimely because the employees of the Department of Labor together with many other parts of the Government were placed on furlough from December 15, 1995, to January 8, 1996. The Solicitor advises that these cases were received by the Denver Office of the Solicitor on December 24, 1995, when the office was closed due to the shutdown. When the office reopened, petitions were filed with the Commission in the order they were received. In addition, the Solicitor states that the Secretary requested an extension of time in a letter sent to the undersigned prior to the shutdown advising that certain filings would be late due to the shutdown and requesting that the time for filing be tolled.

In seeking to have these cases dismissed because the petitions were not timely filed within 45 days, respondents argue that the Secretary has failed to demonstrate adequate cause for the late filing. Respondents assert that their requests for

hearing were filed one week prior to the furlough and the Government reopened two weeks prior to the date the petitions were due. According to respondents, they have been prejudiced because the citation in question was issued over a year and half ago and they have not had access to all information supporting the petitions.

The arguments of respondents are not persuasive. The delay was caused by the three week partial government shutdown which caused a backup in the Solicitor's work. When the Government reopened, it was not just a matter of filing the petitions in these cases, but of coping with all the work which had not been processed for the period involved. The Solicitor's approach of filing petitions in order of their receipt was fair and reasonable. The shutdown constituted good cause for the Solicitor's brief delay in filing the petitions. Secretary of Labor v. Bruce Eaton, Employed by Austin Powder Company, Docket No. YORK 96-13-M, unpublished (March 3 1996). See also, Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981); Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989).

Respondents allege they have been prejudiced by the delay in filing the petitions. Much of the delay occurred between the issuance of the citation and the Notice of Proposed Assessment, almost fifteen months. I previously have held that a seventeen month delay in assessing penalties against an individual under section 110(c) does not constitute grounds for dismissal. A comprehensive investigation and various levels of internal review are necessary for a proper evaluation of agent liability and the existence of a knowing violation in a 110(c) case. Secretary of Labor v. James Lee Hancock, Employed by Pittsburg & Midway Coal Co., 17 FMSHRC 1671, 1674-1675 (September 1995). See also, Cedar Creek Quarries et al., 17 FMSHRC 1509 (August 1995). Also, respondents have furnished no specifics beyond the general assertion of prejudice. I will not in these cases infer prejudice solely from the passage of time.

In light of the foregoing, the respondents' motions to dismiss these cases are DENIED, and it is ORDERED that the late filed penalty petitions be ACCEPTED.

It is further ORDERED that these cases be assigned to Administrative Law Judge Cetti.

All future communications regarding these cases should be addressed to Judge Cetti at the following address:

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Review Commission
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