

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, Suite 1000  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041  
June 5, 2001

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEVA 2001-61  
Petitioner : A. C. No. 46-01453-04265  
 :  
v. : Humphrey No. 7  
 :  
CONSOLIDATION COAL COMPANY :  
Respondent :

**ORDER GRANTING MOTION FOR RECONSIDERATION**  
**GRANTING THE SECRETARY’S MOTION FOR LEAVE TO FILE OUT-OF-TIME**  
**AND DENYING RESPONDENT’S MOTION TO DISMISS**

This case is before me on a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the “Act”). 30 U.S.C. § 815(d). The Secretary moved for leave to file the petition beyond the time allowed under Commission Procedural Rules. The petition, absent a copy of the motion for leave to file out-of-time, was served on Respondent and an answer was filed. The Secretary’s motion for leave to file out-of-time was granted as unopposed. Respondent was unaware of the Secretary’s motion, until it received the May 21, 2001, Order Accepting Late Filing - Order of Assignment. Respondent has moved to reconsider the granting of the Secretary’s motion and moved to dismiss. Respondent does not claim that it has suffered prejudice as a result of the untimely filing. For the reasons set forth below, Respondent’s motion to reconsider is granted and, upon reconsideration, the Secretary’s motion to late-file the petition is granted and Respondent’s motion to dismiss is denied.

*Facts*

Civil penalties were assessed by the Secretary’s Mine Safety and Health Administration (MSHA) for alleged violations of mandatory health and safety standards. Respondent timely served a notice of contest on March 13, 2001. Commission Procedural Rule 28(a), 29 C.F.R. § 2700.28(a), specifies that a petition for assessment of civil penalties shall be filed within 45 days of receipt of a timely contest. The petition should have been filed by April 27, 2001. It was not filed until May 3, 2001, six days late.

Along with the petition, the Secretary filed a motion for leave to file the petition out-of-time. The Secretary argued that there was adequate cause for the untimely filings, relying upon a sworn statement by the Assistant District Manager for Inspection Programs. In essence, the

Secretary asserts that the untimely filings were the result of inadvertent delay in the transmittal of the case to the Office of the Solicitor. The delay resulted from a temporary reduction in secretarial staffing due to the retirement of a secretary in MSHA's Morgantown, West Virginia, field office. The experienced secretary in the Fairmont, West Virginia field office, who normally is responsible for timely forwarding of cases to the Office of the Solicitor, was detailed to perform the retired secretary's duties and was attempting to perform both jobs, devoting most of her time to the detailed position's responsibilities. Apparently, there was also a misunderstanding that led to a failure of one office to retain a copy of a packing list which resulted in an unnecessary delay while that office awaited a copy of the packing list, a problem that is claimed to have been corrected. The materials were transmitted to the Solicitor's Office on April 30, 2001, where it was recognized that the time for filing had expired. A petition for assessment of civil penalties and a motion for leave to late file were promptly filed with the Commission on May 3, 2001.

### *Applicable Law*

The Commission has made clear that the time limits for filing a penalty petition are not to be lightly regarded by the Secretary and that adequate cause must be shown to justify a late filing. Even if adequate cause is shown, a motion to dismiss may be granted if the delay has resulted in prejudice to Respondent. *Rhone-Polenc of Wyoming Co.*, 15 FMSHRC 2089 (October 1993); *Salt Lake Co. Road Dept.*, 3 FMSHRC 1714 (July 1981). In *Salt Lake*, the Commission was critical of the Secretary's reliance on high case loads and limited clerical help as a justification for untimely filing and also admonished the Secretary to proceed with a timely motion to extend time when extra time is legitimately needed.

Nevertheless, the Commission reversed the dismissal that had been entered in that case, holding that "effectuation of the Mine Act's substantive scheme, in furtherance of the public interest" precluded automatic dismissal of an untimely filed petition. *Id.* at 1716. It established the "adequate cause" test for justifying a late filing and recognized that "procedural fairness" could dictate dismissal where an operator could establish that it had suffered prejudice as a result of any delay. The Commission concluded its analysis with the following language: "Allowing \* \* \* an objection [based on prejudice] comports with the basic principle of administrative law that substantive agency proceedings, and effectuation of a statute's purpose, are not to be overturned because of a procedural error, absent a showing of prejudice." (*Id.* citations omitted).

### *Analysis*

The delay in filing here was minimal. It was attributable to a temporary staffing shortage and an error in processing by MSHA field offices. The processing error has been corrected. The materials to support the petition for assessment of civil penalties were forwarded to the Solicitor's Office after the due date for filing had passed. The Solicitor's Office immediately noted the error and promptly filed the petition and a motion for leave to file out-of-time.

On the facts of this case, I find that the Secretary has fulfilled her burden of showing

adequate cause for the delay. Because Respondent claims no prejudice attributable to the delay, the Secretary's motion for leave to file out-of-time will be granted.

**ORDER**

Respondent's motion to reconsider the May 21, 2001, Order granting the Secretary's motion for leave to file the petition out-of-time is granted. Upon reconsideration, the Secretary's motion for leave to file out-of-time is granted. Respondent's motion to dismiss is denied.

Michael E. Zielinski  
Administrative Law Judge

Distribution:

Daniel M. Barish, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Suite 516, Arlington, VA 22203 (Certified Mail)

Robert Vukas, Esq., Consolidation Coal Company, 1800 Washington Road, Pittsburgh, PA 15241 (Certified Mail)

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