

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 6, 2002

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. WEVA 2002-21 |
| Petitioner | : | A. C. No. 46-01968-04383 |
| | : | |
| v. | : | |
| | : | |
| CONSOLIDATION COAL COMPANY, | : | |
| Respondent | : | Mine: Blacksville No. 2 |

ORDER ACCEPTING LATE FILING
ORDER TO RESPONDENT TO ANSWER

Before: Judge Barbour

On January 28, 2002, the Commission received the Secretary of Labor’s Motion For Leave to File Out of Time, in the above captioned case. The Secretary failed to timely file her penalty petition. In support of her motion, the Secretary asserts that the Solicitor’s Office received the present case, Docket No. WEVA 2002-21, on January 18, 2002 along with another case, Docket No. WEVA 2002-20. Mot. at 1. When Docket No. WEVA 2002-20 was transferred to the Mine Safety and Health Administration’s (“MSHA”) District Three Office to be handled by a CLR, the documentation case was inadvertently transferred along with another case. *Id.* The assigned counsel, the Secretary further proffers, realized what happened on January 24, 2002, and instructed the MSHA office to return the documentation via overnight mail. *Id.* at 1-2. In addition, the Secretary states that the case was further delayed because MSHA did not receive the mail for an extended period-of-time due to the recent anthrax contamination in the U.S. Postal Service, and, thus, the processing of this case by the Office of Assessments was delayed. *Id.* at 2. The Respondent does not object to this motion. *Id.*

According to the date stamped on the notice of contest, MSHA received the operator’s contest on November 29, 2002. Therefore, the Secretary should have filed her penalty petition on or before January 14, 2002. The Secretary’s Certificate of Service shows that the penalty petition was filed on January 28, 2002, 14 days after the due date.

Section 105(d) of the Mine Act states in pertinent part: “[i]f, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends to contest the issuance or modification of an order issued under section 104, or citation or a notification of proposed assessment of penalty issued under subsection (a) or (b) of this section . . . , the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing”. Further, 29 C.F.R. § 2700.28(a) states that, “within 45 days of receipt of a timely contest of a proposed penalty assessment, the Secretary shall file with the Commission a petition for assessment of penalty”. Moreover, the Commission has stated that “Rule [28] implements the meaning of ‘immediately’ in section 105(d)”. *Salt Lake Co. Road Dept.*, 3 FMSHRC 1714, 1715 (July 1981). Thus, it is apparent that the purpose of Rule 28 is to effectuate swift enforcement. *Id.*

While the Secretary should adhere to the 45-day time limit, the Commission has made clear that neither the term “immediately” nor the time limit should be construed as a “procedural strait [jacket]”. *Id.* at 1716. The Commission has further stated that the Secretary may request permission for late filing if the request is (1) based upon adequate cause, and (2) the operator has an opportunity to object to the late filing on the grounds of prejudice.¹ *Id.*

There are various situations from which adequate cause may arise. Clerical mishaps have been considered adequate cause for late filings. A Solicitor has been permitted to file a penalty petition out of time because the file for the case had been inadvertently misplaced. *Jerry Hudgeons*, 22 FMSHRC 272, 274 (Feb. 2000). The Commission has held that a rise in caseload coupled with a lack of personnel support has been considered adequate cause. 3 FMSHRC 1714; *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982). A late-filed penalty petition has also been accepted where the delay was due to the adoption by MSHA of a new system for handling mine safety cases. *Roberts Brothers Coal Co.*, 17 FMSHRC 1103 (June 1995). In addition, a government shutdown has been considered adequate for a late filing. *Roger Christiansen*, 18 FMSHRC 1693 (Sept. 1996).

Adequate cause is based upon the reasons offered and the extent of the delay. 22 FMSHRC at 273. I conclude that the clerical error and the unforeseen anthrax contamination in the postal service constitute adequate cause for filing the penalty petition 14 days out of time.

¹In footnote one of the Secretary’s motion, the Secretary disagrees with the Commission’s position that the Secretary must establish adequate cause apart from any consideration of whether the operator is prejudiced by the delay. Commission decisions are binding precedent in Mine Safety cases, however, and the Commission has clearly stated that “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. 1993), *aff’d*, 57 F.3rd 982 (10th Cir. 1995)(emphasis added). Therefore, as binding precedent, Commission Judges must make separate determinations for adequate cause and prejudice to the operator before they accept late filings.

In addition, as the Respondent has not alleged any prejudice from the delay, I conclude that the short delay is not prejudicial.

In light of the foregoing, it is **ORDERED** that the Secretary's late filed penalty petition is **ACCEPTED**.

It is further **ORDERED** that the Respondent file an answer to the penalty petition within 30 days of the date of this order.

David F. Barbour
Chief Administrative Law Judge

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