

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

August 11, 1998

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 98-24-M
Petitioner	:	A. C. No. 27-00083-05526
	:	
v.	:	
	:	Swenson Gray Quarry
SWENSON GRANITE COMPANY, LLC,	:	
Respondent	:	

**ORDER OF DISMISSAL**

**Before: Judge Merlin**

This case is a petition for the assessment of a civil penalty 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 seeks to have the petition dismissed on the ground that the Secretary failed to timely file the petition for the assessment of a civil penalty.

This case involves an order that was issued on August 7, 1997, under sections 107(a) and 104(a) of the Act, 30 U.S.C. ' ' 817(a) and 814(a), for an alleged violation of the Act and mandatory standards.

On March 2, 1998, the Secretary issued a notice of proposed civil penalty assessment. The operator timely contested this assessment by filing a request for hearing within 30 days. The request was received on March 23, 1998. 29 C.F.R. ' 2700.26. The Secretary had 45 days after receipt of the contest to file the penalty petition. 29 C.F.R. ' 2700.28. Therefore, the petition was due on May 7, 1998.

The Solicitor failed to file the penalty petition within 45 days. Indeed, the Solicitor did nothing until June 18, 1998, when the Commission's Docket Office contacted him to inquire about the penalty petition. The Solicitor mailed the petition on the same day and the petition was received by the Commission on June 22, 1998. The Solicitor did not file a motion seeking leave to file the petition out of time.

On July 14, 1998, the operator filed a motion to dismiss because the Solicitor failed to file the penalty petition within 45 days. The operator asserts that the Secretary has failed to demonstrate adequate cause and that it has been prejudiced by the delay.

On July 23, 1998, the Solicitor filed an opposition to the motion to dismiss. The Solicitor represents the following: on April 8, 1998, the case was received in the Boston Regional Office and was assigned to him while he was on vacation; on April 13 he returned from vacation, but worked on other matters for the next two weeks; on April 27 he reviewed the file in this case and determined that it should be referred to MSHA under MSHA's ACRI (Alternate Case Resolution Initiative) Program; on April 28 he forwarded the case to MSHA's Northeast District Office; sometime in May 1998, the District Office notified him that it would not handle the case.

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 good 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).

Late filings have been permitted where there has been a rise in the mine safety caseload together with a lack of support personnel. Salt Lake, supra; Medicine Bow Coal Co., 4 FMSHRC 882 (May 1982). See also Wharf Resources USA Incorporated, 14 FMSHRC 1964 (November 1992); Fisher Sand and Gravel Company, 14 FMSHRC 1968 (November 1992). Out of time filing of the penalty petition was allowed when the delay was due to the adoption by MSHA of a new system for handling mine safety cases. Roberts Brothers Coal Company, 17 FMSHRC 1103 (June 1995). So too, late filing was permitted when it was due to a mistake in the computation of the 45 days by a Conference and Litigation Representative (CLR) when the CLR program was new. Lone Mountain Processing Incorporated, 17 FMSHRC 839 (May 1995); Austin Powder Company, 17 FMSHRC 841 (May 1995); Ibold Incorporated, 17 FMSHRC 843 (May 1995). An extraordinary circumstance like a government shutdown also has been recognized as adequate reason for late filing. Secretary of Labor v. Roger Chistensen, 18 FMSHRC 1693 (August 1996).

In this case the only heavy caseload the Solicitor relies upon is his own. He sets forth in detail what he was doing in the two weeks after he received the case. This type of excuse is far different from those set forth above. Here the case was at all times in the hands of an experienced Solicitor who must be held responsible to handle his assignments properly. If such an excuse were accepted here, every Solicitor could justify tardiness by explaining he was busy with something else. Since all Solicitors are almost always, if not always, busy, the time requirements of the Act and regulations would be rendered meaningless. More importantly, despite the two week period when he was busy elsewhere, there was still time for the Solicitor to file a timely petition. Late filing occurred because the Solicitor closed the case when he sent the file to MSHA for handling under ACRI. The Solicitor knew, or should have known, that sending the case to MSHA did not excuse him from filing required pleadings. I reject the Solicitor's assertion it was

inevitable that under ACRI a situation would arise where MSHA and the Solicitor would slip up because each thought the other was handling a case. The fault here lies with the Solicitor who should not have closed the case. Had the Commission's Docket Office not telephoned the Solicitor, one can only speculate when the petition would have been forthcoming and when he did file, the Solicitor did not seek permission to file out of time. These circumstances do not constitute adequate cause to justify the late filing.

Because there has been no showing of adequate cause, it is not necessary to reach the issue of prejudice.

In light of the foregoing, the operator's motion to dismiss is **GRANTED**.

It is **ORDERED** that this case is **DISMISSED**.

Paul Merlin  
Chief Administrative Law Judge

Distribution: (Certified Mail)

David L. Baskin, Esq., Office of the Solicitor, U. S. Department of Labor, Room E-375, John F. Kennedy Federal Building, Boston, MA 02203

Henry Chajet, Esq., David J. Farber, Esq., Michael T. Palmer, Esq., Patton Boggs, L.L.P., 2550 M Street, N.W., Washington, DC 20037

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