

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

April 7, 1999

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 99-30-M
Petitioner	:	A. C. No. 30-03138-05511
	:	
v.	:	Wingdale Mine
PATTERSON MATERIALS	:	
CORPORATION,	:	
Respondent	:	

**ORDER ACCEPTING LATE FILING**  
**ORDER DIRECTING OPERATOR TO ANSWER**

On March 17, 1999, an order was issued directing the Secretary to show cause why this case should not be dismissed for failure to timely file the penalty petition.

On March 22, 1999, the Commission received the Solicitor's penalty petition for the one violation involved in this case. The Solicitor also filed a motion to accept late filing together with a sworn statement. According to the Solicitor, this case and another civil penalty proceeding involving this operator, Docket No. YORK 98-43-M, were assigned to her. The Solicitor states that she confused this matter with YORK 98-43-M and inadvertently filed this case in the file folder for YORK 98-43-M. On the evening of March 18, 1999, in the course of a routine review of her files, the Solicitor discovered the error, and mailed the petition and motion on the next day, March 19, 1999.

Commission Rule 2700.28(a), 29 C.F.R. § 2700.28(a), requires that a penalty petition be filed within 45 days from receipt of the operator's penalty contest. The contest in this case was received on January 26, 1999, and the petition was due on March 12, 1999. Filing is effective upon mailing and the petition was mailed on March 19, 1999. 29 C.F.R. § 2700.5(d). Therefore, the petition was 7 days late.

On March 26, 1999, the operator filed a motion to dismiss. The operator asserts that the reasons offered by the Solicitor do not constitute adequate cause for the late filing of the penalty petition. According to the operator, some sort of inevitable outside force rather than a self-created problem, such as misfiling, can constitute adequate cause. The operator further contends that the Solicitor would not have been aware of the late filing were it not for the show cause order. Finally, the operator asserts that it will be prejudiced, along with all other similarly situated operators, if the motion is granted because the Secretary will be able to justify any late filing by claiming clerical lapses or other manner of inadvertence or inattention.

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 apart from any consideration of whether the operator was prejudiced. Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989).

A determination of adequate cause is based upon the reasons offered and the extent of the delay. I have accepted late filings where the Solicitor has claimed that delays were caused by clerical errors in handling cases. In Apac Oklahoma, Docket No. CENT 97-187-M, unpublished (December 16, 1997) (attached), a petition that was 24 days late was accepted where the case was inadvertently placed with another file and overlooked. In M. Jamieson Company, 12 FMSHRC 901 (March 1990), a late petition was permitted where the delay was relatively short and the file had been erroneously placed in with another matter involving the same operator. However, I have not permitted late filings based on mishandling of cases where the delay was lengthy. Phelps Dodge Morenci Inc., 1993 WL 395589 (June 1993); Lawrence Ready Mix Concrete Corp., 6 FMSHRC 246 (Feb 1984). Nor I have accepted a late penalty petition where the Solicitor claimed that the case was mishandled when he had referred the matter to MSHA under the Alternate Case Resolution Initiative (ACRI). Swenson Granite Company, LLC, 20 FMSHRC 859 (August 1998). In Swenson, I held that sending the case to MSHA did not excuse the Solicitor from his responsibility of filing required pleadings.

The circumstances in this case are similar to those cited above where late filing was permitted. The delay here was very short and the error was discovered by the Solicitor herself. The operator's assertion that the show cause order alerted the Solicitor to the delay is unfounded. The Solicitor's sworn statement that she discovered the error upon her own review of her files is supported by the return receipt card in the Commission's file showing that the Solicitor did not receive the show cause order until March 24, 1999. Under these limited circumstances, I find that the Solicitor has demonstrated adequate cause for the short delay. In addition, I find there is no prejudice from the seven day delay.

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

It is further **ORDERED** that the operator filed its answer to the penalty petition within 30 days of the date of this order.

Paul Merlin  
Chief Administrative Law Judge

Attachment

Distribution: (Certified Mail)

Suzanne Demitrio, Esq., Office of the Solicitor, U. S. Department of Labor, 201 Varick Street, Room 707, New York, NY 10014

John F. Klucsik, Esq., Devorsetz, Stinziano, Gilberti, Heintz & Smith, P.C., 555 East Genesee Street, Syracuse, NY 13202-2159

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

December 16, 1997

SECRETARY OF LABOR	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. CENT 97-187-M
Petitioner	:	A. C. No. 34-00050-05551
	:	
v.	:	East Quarry
APAC OKLAHOMA, INCORPORATED,	:	
Respondent	:	

**ORDER ACCEPTING LATE FILING**  
**ORDER OF ASSIGNMENT**

On November 10, 1997, the Commission received the Solicitor's penalty petition for the two violations involved in this case. The Solicitor also filed a motion to accept late filing setting forth the reason for the delay. According to the Solicitor, the operator's penalty contest was forwarded to the Solicitor's office on September 10, 1997. However due to a clerical error, the case was inadvertently placed with another file and overlooked. The Solicitor further states that the enormous number of files handled by the Solicitor's office also contributed to the untimely filing.

Commission Rule 2700.28(a), 29 C.F.R. § 2700.28(a), requires that the penalty petition be filed within 45 days from receipt of the operator's penalty contest. The contest was received on August 28, 1997, and the petition was due on October 14, 1997. 29 C.F.R. § 2700.8. Filing is effective upon mailing and the petition was sent on November 7, 1997. 29 C.F.R. § 2700.5(d). Therefore, the petition was 24 days late.

On December 4, 1997, the operator filed an answer along with an opposition to the Solicitor's motion to accept late filing. The operator asserts that the Solicitor's motion should be denied and the case dismissed because the Solicitor failed to comply with Commission rules for filing a petition. The operator further states that it has not been prejudiced by the delay but that it will be prejudiced if the Solicitor is allowed to proceed without consequences for his untimely filing. Counsel does not allege actual prejudice from the delay.

The Commission has not viewed the 45 day requirement as jurisdictional or as a statute of limitation. Rather, the Commission has permitted late filing of penalty petitions upon a showing of adequate cause by the Secretary where there has been no showing of prejudice by the operator. Salt Lake County Road Department, 3 FMSHRC 1714, 1716 (July 1981); Rhone-Poulenc of Wyoming Co., 15 FMSHRC 2089 (Oct. 1989). There has been no showing of

prejudice in this case. I find the Solicitor's representations as to the inadvertent mishandling of this case constitute adequate cause for the relatively short delay in the filing of the penalty petition which should not prejudice the operator's presentation of its case. However, I take note that the Solicitor's statement with respect to a heavy caseload is not supported by the Commission's own records which show that the number of new cases filed has decreased.

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

It is further **ORDERED** that this case be assigned to Administrative Law Judge David Barbour.

All future communications regarding this case should be addressed to Judge Barbour at the following address:

Federal Mine Safety and Health  
Review Commission  
Office of Administrative Law Judges  
Two Skyline Place, Suite 1000  
5203 Leesburg Pike  
Falls Church, VA 22041

Telephone No. 703-756-5232  
Telephone No. 703-756-6201 (Fax)

Paul Merlin  
Chief Administrative Law Judge

Distribution: (Certified Mail)

David Rivela, Esq., Office of the Solicitor, U. S. Department of Labor, 525 Griffin Street, Suite 501, Dallas, TX 75202

Timothy E. Bixler, Esq., APAC, Inc., Law Department, 900 Ashwood Parkway, Suite 700, Atlanta, GA 30338

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