

THERE WERE NO COMMISSION DECISIONS OR ORDERS

ADMINISTRATIVE LAW JUDGE DECISION

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## **FEBRUARY 2003**

No cases were filed in which Review was granted during the month of February

Review was denied in the following cases during the month of February:

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Hazel Olson v. Jacobs Ranch Coal Company, Docket No. WEST 2002-305-D (Judge Manning, January 14, 2003)



ADMINISTRATIVE LAW JUDGE DECISIONS



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, DC 20001

February 27, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 2000-79
Petitioner	:	A.C. No. 15-14492-03802
	:	
v.	:	
	:	
LODESTAR ENERGY INC.,	:	
Respondent	:	Mine: Baker Mine

**DECISION ON REMAND**

This matter is before me on remand from the Commission. *Lodestar Energy, Inc.*, 24 FMSHRC 689 (July 2002). In its decision, the Commission affirmed my conclusion that the company had violated section 75.364(b)(1) of the Secretary’s mandatory safety standards, 30 C.F.R. § 75.364(b)(1), as alleged in Citation No. 7640555. *Id.* at 693-94. However, it remanded for additional fact finding and analysis whether the Respondent had adequate notice of the requirements of the regulation. *Id.* at 695. For the reasons set forth below, I find that the company did have adequate notice.

Because this issue was first raised on appeal, the parties were offered the opportunity to present additional evidence and/or to submit briefs. In an October 31, 2002, letter, counsel for the Respondent stated that: “Lodestar has directed me to advise that it will not further contest this matter, but will abide by your ruling on remand.” The Secretary declined the chance to offer further evidence, but did file a brief on the question.

To briefly summarize the facts, intake air entered the Nos. 1 and 2 entries of the “K” longwall panel of Lodestar’s Baker Mine from a common source at crosscut 10. At that crosscut, a Kennedy Stopping partially blocked the No. 1 entry so that while some of the air continued down the No. 1 entry, most of it went down the No. 2 entry. From crosscut 10 until crosscut 73, a distance of 6615 feet, the two entries were separated by coal pillars and permanent stoppings. At crosscut 74, the air from the two entries came together again. The Respondent had been conducting weekly examinations of the No. 2 entry, but not the No. 1 entry. MSHA cited the company under section 75.364(b)(1) for not examining the No. 1 entry. As noted above, the Commission has confirmed that the rule requires a weekly examination of both entries.

The issue now to be decided is whether “a reasonably prudent person, familiar with the mining industry and the protective purpose of section 75.364(b)(1), would have recognized that weekly examinations of the No. 1 entry were necessary to discover and remedy potential dangers to miners.” *Id.* at 695; *Ideal Cement Co.*, 12 FMSHRC 2409, 2416 (November 1990). The Commission has held that:

In deciding whether a party had adequate notice of regulatory requirements, a wide variety of factors are relevant, including the text of the regulation, its placement in the overall regulatory scheme, its regulatory history, the consistency of the agency’s enforcement, and whether MSHA has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question. *See Island Creek Coal Co.*, 20 FMSHRC 14, 24-25 (Jan. 1998); *Morton Int’l, Inc.* 18 FMSHRC 533, 539 (Apr. 1996); *see also Diamond Roofing Co. v. Occupational Safety and Health Review Comm.*, 528 F.2d 645, 649 (5th Cir. 1976); *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997).

*Lodestar*, 24 FMSHRC at 694-95.

Section 75.364(b)(1) provides that: “At least every 7 days, an examination for hazardous conditions shall be made . . . [i]n at least one entry of each intake air course, in its entirety . . . .” Section 75.301, 30 C.F.R. § 75.301, further defines “air course” as “[a]n entry or a set of entries separated from other entries by stoppings, . . . or by solid blocks of coal or rock so that any mixing of air currents between each is limited to leakage.” For a distance of 6615 feet the two entries were separated by stoppings or by solid blocks of coal so that the only mixing of air currents between the two was limited to leakage. However, since neither rule addresses whether entries with a common entry and exit can be separate air courses, the Commission concluded that the rules are ambiguous. *Id.* at 693. Nevertheless, when considering the text of the rules with regard to notice to *Lodestar*, I find that, while the use of the term “set of entries” somewhat confuses the issue, a reasonably prudent person would view the Nos. 1 and 2 entries as separate air courses.

The second factor to be considered is the placement of the rules in the overall regulatory scheme. Section 75.364, 30 C.F.R. § 75.364, is entitled “Weekly examination.” In it are listed a number of areas in a mine which have to be examined on a weekly basis. Among them are unsealed, worked-out areas; intake air courses; return air courses; longwall or shortwall travelways; each seal along return and bleeder air courses and each seal along intake air courses not examined under §75.360(b)(5); each escapeway; each working section not examined under § 75.360(b)(3); and each water pump not examined during a preshift examination. In short, almost every place in the mine, including worked-out areas, has to be examined once a week. I find that

the broad scope of this regulation would put a reasonably prudent person on notice that a 6615 foot air course has to be examined once a week.

A third factor to look at is the regulatory history of the rule. The Secretary first proposed a definition of “air course” in a 1988 proposed rule making. The proposed definition was that:

*“Air course” means an entry or a set of entries separated from other entries by stoppings, overcasts, other ventilation control devices, or solid blocks of coal or rock so that mixtures of air currents between each is limited to leakage. For purposes of the examination required by § 75.364 of Subpart D, two adjacent entries or sets of entries with an open crosscut or crosscuts between them shall be considered separate air courses if the distance between open crosscuts is greater than 300 feet in seam heights below 48 inches and 600 feet in seam heights of 48 inches or above.*

53 Fed. Reg. 2382, 2413 (1988) (emphasis added). However, when the rule was finally adopted in 1992 it did not contain the italicized language.<sup>1</sup> 57 Fed. Reg. 20868, 20915 (1992).

In its preamble discussion of the final rule, MSHA stated that:

For the purposes of the examination required by § 75.364 of this subpart, the proposal would have expanded the definition of air course to include two adjacent entries or sets of entries with an open crosscut or crosscuts between them if the distance between the open crosscuts is greater than 600 feet. Commenters objected to the proposed definition of air course, indicating that the definition requires air courses in the mine that are common at both ends to be examined separately. Also, a commenter noted that since they must be examined separately, each air course must be maintained safe for travel. The Agency has reconsidered this issue and the final rule does not include that part of the definition addressing entries which are common at both ends.

MSHA believes that air courses that are not common should be examined separately and has defined air course to achieve this purpose. The Agency does not consider air courses that are common only at each end to be the same air course if the separation between the common openings is more than 600 feet. Weekly examination of all such separate air courses is necessary to ensure that the ventilation system of the mine is functioning

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<sup>1</sup> It was also slightly reworded to substitute “any mixing” for “mixtures.”

properly. Therefore, as suggested by one commenter, the final rule requires at least one entry of each intake air course to be traveled in its entirety.

*Id.* at 20870.

This explanation is far from a model of clarity. In the first paragraph, MSHA appears to be saying that it did not include the part of the proposed rule concerning air courses that are common at both ends, and the common ends more than 600 feet apart, because both air courses would have to be examined. But then it goes on to say, in the second paragraph, that air courses that are not common *should be examined separately* and that it “does not consider air courses that are common only at each end to be the same air course if the separation between the common openings is more than 600 feet.” Assuming that operators actually read what is written in the Federal Register when trying to figure out what a rule requires, this apparently contradictory explanation provides confusing guidance.

Finally, the last two factors to be considered are the consistency of the agency’s enforcement and whether the agency has published notices informing the regulated community with ascertainable certainty of its interpretation of the standard in question. The evidence is that for 17 inspections prior to the one resulting in this citation, and for at least one inspection subsequent to the citation, the inspector apparently did not recognize that the Nos. 1 and 2 entries were separate air courses. (Tr. 40.) Thus, if there was any consistency in MSHA’s enforcement, it was a consistency of failing to enforce the rule.<sup>2</sup> With regard to published notices, there is no evidence that MSHA has published any notices informing the mining community of its interpretation of the standard in question.

While MSHA obviously could have done a better job of informing the regulated community of the requirements of the rule, a reasonably prudent person familiar with the mining industry should have known that section 75.364(b)(1) required that a 6615 foot entry, separated from an adjacent entry by coal pillars and permanent stoppings, so that the only mixture of air between the two was by leakage, be examined for hazardous conditions in its entirety. Even though the Commission has held that the definition of “air course” and, thus, section 75.364(b)(1) are ambiguous, a reasonable person reading them is more likely to arrive at the Secretary’s interpretation than the Respondent’s. This is especially true when it is viewed in the context of the entire section which requires weekly examinations of all areas of a mine, even worked-out areas. Further, although MSHA’s explanation of the rule in the preamble is confusing, it does indicate a concern that air courses with common openings over 600 feet apart be separately examined.

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<sup>2</sup> On the other hand, there have been no reported cases addressing this issue since the rule was adopted in 1992.

Ultimately, the best reason a reasonably prudent person would know that both entries had to be examined comes down to a statement made by the inspector at the hearing. When asked where in the rules it stated that if air courses with common openings were separated for over a mile they both had to be examined, he replied: "That's just common sense." (Tr. 52.) With all the things that can go wrong in a coal mine, common sense dictates that an entry that is 6615 feet long ought to be examined at least as often as worked-out areas. Accordingly, I find that Lodestar did have sufficient notice of the requirements of the rule.

**Order**

Therefore, Citation No. 7640555 is **AFFIRMED** and Lodestar Energy, Inc. is **ORDERED TO PAY** a civil penalty of **\$45.00** for this violation within 30 days of the date of this decision.

  
T. Todd Hodgdon  
Administrative Law Judge

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**ADMINISTRATIVE LAW JUDGE ORDERS**



FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DENVER, CO 80204-3582  
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February 3, 2003

CDK CONTRACTING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2001-348-RM
	:	C/O No. 7943017; 3/20/2001
	:	
	:	Docket No. WEST 2001-350-RM
	:	C/O No. 7943033; 4/05/2001
v.	:	
	:	Docket No. WEST 2001-422-RM
	:	Order No. 7935403; 4/23/01
	:	
	:	Docket No. WEST 2001-423-RM
	:	Order No. 7935404; 4/23/2001
SECRETARY OF LABOR	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2001-424-RM
ADMINISTRATION (MSHA),	:	Order No. 7935406; 4/23/2001
Respondent	:	
	:	Docket No. WEST 2001-427-RM
	:	Citation No. 7935409; 4/23/2001
	:	
	:	Docket No. WEST 2001-428-RM
	:	Citation No. 7942519; 4/23/2001
	:	
	:	Docket No. WEST 2001-429-RM
	:	Citation No. 7943037; 4/23/2001
	:	
	:	Mine ID 05-00037 L35
	:	Portland Plant/Quarry
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-461-M
Petitioner	:	A.C. No. 05-00037-05506 L35
	:	
v.	:	
	:	Portland Plant & Quarry
CDK CONTRACTING COMPANY,	:	
Respondent	:	

**ORDER DENYING CDK CONTRACTING COMPANY'S  
MOTION TO DISMISS**

CDK Contracting Company ("CDK") filed a motion to vacate the twelve citations and orders of withdrawal (the "citations") in these cases and to dismiss the civil penalty proceeding. These cases involve six section 104(a) citations, four section 104(d) orders, and two section 104(a)/107(a) citation/orders.<sup>1</sup> As grounds for the motion, CDK argues that the Secretary failed to propose penalties for the alleged violations within a reasonable time after the termination of the Secretary's investigation of a fatal accident at the Portland Plant and Quarry as required by section 105(a) of the Mine Act. The Secretary opposes the motion.

On February 24, 2001, a fatal accident occurred when a CDK employee fell from a scaffold ladder at the Portland Plant and Quarry. CDK was a construction contractor at that site. The Department of Labor's Mine Safety and Health Administration ("MSHA") commenced its investigation of the accident that day. On February 27, 2001, MSHA issued two of the section 104(a) citations. On or about March 22, 2001, MSHA issued a section 104(a) citation and a section 104(a)/107(a) citation/order. MSHA issued the remaining citations at issue in these cases in April 2001. CDK contested eight of the twelve citations in a timely manner. MSHA issued its final report on the investigation of the accident on July 9, 2001. The citations were terminated by MSHA on various dates between February 27 and July 13, 2001. On May 17, 2002, MSHA issued its proposed assessment of penalty under 29 C.F.R. § 2700.25. CDK timely filed its contest of the proposed penalties. MSHA proposed penalties for the citations between 13 and 15 months after they were issued and more than 10 months after it issued its final report on the accident.

**I. SUMMARY OF THE PARTIES' ARGUMENTS**

CDK argues that these cases must be dismissed because the Secretary failed to notify CDK of the proposed penalties within a reasonable time after the citations were issued, as required by the Mine Act. The Secretary is required "within a reasonable time after the termination of such inspection or investigation [to] notify the operator . . . of the civil penalty to be assessed . . . ." 30 U.S.C. § 815(a). CDK argues that notification of the proposed penalty amount more than 13 months after the citations were issued is not within a reasonable time under the Mine Act. CDK maintains that the Secretary cannot establish that this delay was reasonable. Although these cases involve a fatal accident, the facts are not complex and were fully known by the time the citations were issued. In addition, CDK argues that several of the citations at issue in these cases were issued during a routine inspection rather than as a consequence of the fatal accident.

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<sup>1</sup> Citation No. 7943029 was vacated by MSHA on June 4, 2001, although it is still listed in the Secretary's petition for assessment of penalty in WEST 2002-461-M. Because this citation has been vacated, I have not discussed it in this order.

The Secretary maintains that the proposed penalties were issued within a reasonable time given the circumstances of these cases. She also argues that she demonstrated just cause for any delay. The Secretary states that the special assessments group of MSHA's Office of Assessments was extremely busy during 2001-02. She states that this group has only four employees and two of these employees were unavailable during the relevant period of time. The Secretary points to the fact that during 2001, 2,153 "routine" special assessments were proposed, 217 "fatal/serious injury related" special assessments were proposed, and 204 "section 110(c)" special assessments were considered. In the first nine months of 2002, the numbers were 1,949, 183, and 158, respectively.

The Secretary contends that the relevant time period did not begin to run until MSHA completed its accident investigation. She maintains that the fatality that triggered the investigation was extremely serious and several citations were referred for special assessment. She states that careful consideration of the facts and consideration of the statutory criteria consumed considerable time. All but one of the citations was of a significant and substantial nature and they were all issued during MSHA's investigation of the fatal accident. The citations were in the Office of Assessments from August 6, 2001 until May 17, 2002. There was a backlog of cases in the office for special assessments during that time because one of the four assessors was on extended leave and the other was unavailable as a result of a training program. In addition, the Secretary states that the supervisor of the special assessments group was heavily involved in the development of MSHA's standardized information system, which will completely replicate the records into a web-based system.

The Secretary believes that the reasonableness of time should be analyzed by taking into consideration the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling relief. The Secretary contends that CDK suffered no actual prejudice because both parties used the time to conduct discovery and prepare for trial. The mere potential for prejudice is insufficient. Dismissal of civil penalty proceedings because of a delay that was not prejudicial would clearly run counter to the concern for safe and healthful working conditions that led to the creation of the civil penalty program. The Secretary points to the legislative history of the Mine Act in which the Senate Committee on Human Resources stated that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." (S. Rep. 95-181, at 34, *reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978)).

In response to the Secretary's opposition, CDK states that MSHA's failure to adequately staff its special assessments group does not constitute adequate cause for the delay. There was not an unusually high number of special assessments during 2001-02 and these cases are not particularly complex. The Commission accepted a lengthy delay in proposing a penalty when the caseload of the assessments office increased exponentially. *Steele Branch Mining*, 18 FMSHRC 6, 14 (Jan. 1996). There has been no showing of such an increase here.

Finally, CDK argued that the Secretary's delay actually prejudiced its ability to defend itself in these cases. CDK states that it is no longer operational and that it is in the process of winding down its corporate affairs. It has only one employee at the present time. As a consequence, its potential witnesses are no longer employees of CDK. In addition, those former employees who have knowledge of the facts are no longer in the immediate geographical vicinity of the Portland Plant & Quarry. These key witnesses live in such far flung places as Virginia Beach, Virginia; San Pablo, Colorado; Ponca City, Oklahoma; Aztec, New Mexico; Eldorado, Arkansas; Goldendale, Washington; Wickenburg, Arizona; and San Juan, Puerto Rico. The hourly employee who worked with the deceased and who is the only individual with first-hand knowledge of the events leading up to the accident is believed to reside in Mexico. CDK states that the whereabouts of other witnesses is unknown. CDK believes that it will suffer actual prejudice if it is unable to secure the assistance of these individuals in the preparation of its defense and secure their presence at the hearing.

I permitted the Secretary to respond to CDK's reply because, for the first time, CDK presented argument that it suffered actual prejudice. The Secretary states that CDK's attempt to establish prejudice ignores or mischaracterizes several key factors in the cases. The Secretary states that CDK continued working at the Portland Plant & Quarry for many months after the citations were issued. All of the key witnesses were interviewed by MSHA and extensive discovery was taken, including the deposition of many potential witnesses. She states that witnesses frequently move away from the area of the mine. More importantly, CDK knew that it was working on a short-lived construction project in Colorado, yet it neither opposed the Secretary's motion to stay the pre-penalty contest proceedings nor filed a motion to lift the stay.

## II. ANALYSIS OF THE ISSUES

The Commission has excused the late filing of proposed penalties based on claims of excessive work load, but it made clear that such claims will not receive blanket approval. *Steele Branch*, 18 FMSHRC at 14; *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714, 1717 (July 1981). The assessment in *Steele Branch* arose in 1991-92 when there was a dramatic increase in the number of penalty assessments. See *Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089, 2094 (Oct. 1993). In the present cases, the delay was in large measure caused by the fact that two of the four MSHA employees assigned to the special assessments office were not available for a significant period of time. One employee was on extended leave for an unspecified reason, the other was in training, and the supervisor was heavily involved in developing a new information system. These excuses are not nearly as compelling as the excuse offered by the Secretary in *Steele Branch*.

The accident in these cases was serious and required an analysis of the facts by the Office of Assessments. Proposing penalties following a fatal accident requires a high degree of diligence on the part of assessment office employees and those MSHA officials who review the proposals. The office's staff was reduced and the supervisor's assistance was compromised by a major project. It is important to remember that a penalty is typically proposed within three to

nine months after a citation is issued, so the delay in these cases is not as great as it may first appear. In addition, the Secretary does not begin the assessment process until a citation is terminated and any investigation has been completed. Some of the citations in these cases were terminated in July 2001, when the investigation report was issued. They were all issued during MSHA's investigation of the accident. I find that the penalties involved in these cases were proposed within a reasonable time.

I also find that the Secretary established adequate cause for any delay. I agree with Judge Michael Zielinski's analysis of this issue in *Paiute Aggregates, Inc.*, 24 FMSHRC 950, 954 (Oct. 2002). In that case, Judge Zielinski concluded that the Secretary did not establish that the entire 14 month delay was due to factors beyond her control because she was unable to provide a week-by-week description of the events that occurred while the Office of Assessments was considering what penalties to propose. *Id.* Nevertheless, he held that it is clear that Congress intended that "delays in proposing penalties should not nullify penalty proceedings." *Id.* *Paiute Aggregates* arose under circumstances that are quite similar to the present cases. The showing necessary to establish adequate cause will vary depending upon the length and circumstances of the delay. *Paiute Aggregates, Inc.*, 24 FMSHRC 943, 946 (Oct. 2002) (Judge Zielinski). Thus, a case involving an egregious delay will require greater justification to meet the adequate cause test. *Id.* Here the rather short delay was caused by the Secretary's failure to adequately staff its special assessment office. While this excuse may not be sufficient to justify a lengthy delay, I believe that it satisfies the adequate cause test in this case, given the admonition of Congress cited above, because the penalties were proposed only a few months later than is typical for the Office of Assessments.

CDK argues that it was actually prejudiced by the delay because its witnesses moved away after its Colorado project was completed and the company is winding down its affairs. Although I agree with the Secretary that witnesses frequently move away before a hearing can be scheduled, the situation presented by this case is more serious because CDK's construction project has been completed and CDK no longer employs any of its witnesses. Although CDK may not have known at the time the citations were issued that the company would be going out of business, it knew that its construction project in Colorado would be ending and that many of its employee witnesses would be moving elsewhere.

Section 105 of the Mine Act gives mine operators the right to request a hearing on the merits before penalties are proposed. The Commission's Procedural Rule 20 sets forth an operator's right to contest citations. 29 C.F.R. § 2700.20. The Commission has long held that an operator can contest any citation or order before a penalty is proposed by the Secretary. *Energy Fuels Corp.*, 1 FMSHRC 299, 307-09 (May 1979). CDK protected its rights when it contested the citations in the contest proceedings set forth in the above caption. Although the Commission generally expects operators to wait until a penalty is proposed before requesting that the case be heard, it recognizes that situations will arise in which a hearing on the merits should be held before the Secretary proposes a penalty. If an operator files a pre-penalty notice of contest under Procedural Rule 20 and believes that it requires a hearing before the Secretary files her proposed

penalty assessment under Procedural Rule 25, it can file a motion with the administrative law judge asking that the case be set for hearing. In a companion case to *Energy Fuels*, the Commission provided some examples in which a pre-penalty hearing may be desirable.

Although it is arguably unlikely that the operators [in these consolidated cases] will need a hearing before a penalty is proposed (the alleged violations having been abated and the citations containing no special findings), it might nevertheless be desirable for a hearing to be scheduled quickly if, for example, the allegedly violative conditions often recur, if continuing abatement efforts are expensive, or if another case is being heard on the same issue and early consolidation would be helpful.

*Helvetia Coal Co.*, 1 FMSHRC 321, 322 (May 1979). While the closing of a mine or the winding down of an operator's business is not listed as an example, it is clearly the type of case in which a pre-penalty hearing is desirable.

CDK did not object to the Secretary's motion to stay the eight pre-penalty contest cases. CDK knew that its Colorado project was coming to an end and, at some point, also knew that CDK itself would be winding down its operations. Yet, CDK neither advised me of that fact nor asked that the stay be lifted so that a hearing could be scheduled.<sup>2</sup> The parties engaged in extensive discovery during the period of the stay and depositions were taken of many of CDK's potential witnesses. CDK could have requested that a hearing be scheduled before its witnesses were terminated from employment or upon the completion of discovery. All relevant issues in these eight citations could have been litigated at such a hearing, including whether the alleged violations occurred and, if so, whether they were significant and substantial and the result of CDK's unwarrantable failure to comply with the safety standards. Negligence and gravity issues could have also been adjudicated. All elements of a citation that are subject to eyewitness testimony can be litigated before a penalty is proposed. At the very least, CDK could have made sure that the testimony of its key witnesses was preserved in deposition testimony.

I find that any prejudice suffered by CDK as a result of the Secretary's delay in proposing penalties for the eight citations that it contested could have been prevented if CDK had requested a pre-penalty hearing on the merits of the citations. By forgoing its right to request a pre-penalty hearing when it knew that it would be closing its operations, CDK surrendered its right to claim that it was prejudiced by the Secretary's delay in proposing penalties in these cases.

CDK did not contest four of the citations at issue under Procedural Rule 20. I agree with CDK that the Mine Act does not "impose on operators the burden to routinely seek an expedited hearing prior to assessment of penalties in order to have a fair opportunity to prepare and present

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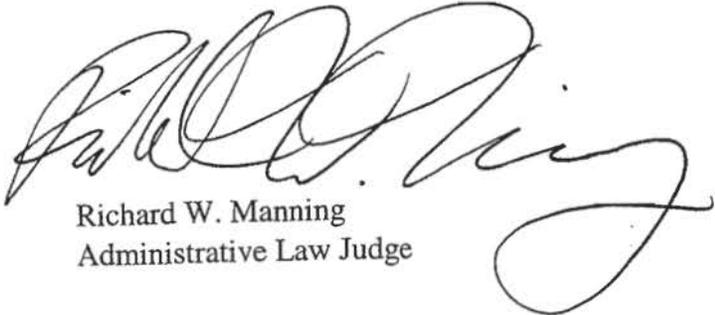
<sup>2</sup> Counsel for CDK advised me of the status of CDK's operations in October 2002, five months after the Secretary proposed penalties in these cases.

its defense.” (CDK Reply at 13). An operator should ordinarily be able to contest citations and penalties in the penalty proceeding without being concerned that it will take so long for the Secretary to initiate the penalty case that its defense will be compromised. Nevertheless, a construction contractor understands that its involvement at a mine will come to an end and that its employees will move on to other jobs. A contractor who is issued citations following a fatal accident would be well advised to directly contest the citations if it knows that its work at a mine will be ending within a year or two. Such citations are likely to be specially assessed by MSHA, an investigation will be conducted which may include a section 110(c) investigation, and penalties will not be proposed as quickly as they normally are by MSHA. Such proceedings sometimes take years to be resolved, even in the best of circumstances. Key witnesses for even a stable production operator are often no longer working at the mine by the time a case is heard if a fatal accident is involved.

In this instance, there is no doubt that CDK will be inconvenienced by the fact that it is no longer operating in Colorado and is winding down its business. Its costs will be higher and some of the witnesses it would like to call may not be available. CDK did not state when its work at the Portland Plant and Quarry came to an end or when it decided to cease all operations. CDK may have faced some of these same obstacles if the penalties had been proposed several months earlier. With respect to the citations that were not contested under Procedural Rule 20, taking into consideration the length and circumstances of the delay, I find that CDK did not establish that it was significantly prejudiced by the fact that the Secretary proposed the penalties a few months later than they would have been if the citations were not issued during a fatality investigation.

### III. ORDER

I find that although the Secretary took several months longer to propose penalties for the citations than normal, the penalties were proposed within a reasonable time. In the alternative, I find that the Secretary demonstrated adequate cause for the delay. I also find that, by not requesting a pre-penalty hearing, CDK waived its right to claim prejudice with respect to the contested citations because it knew that it would be shutting down its operations and terminating its employee witnesses. Finally, I conclude, for the reasons stated above, that CDK was not seriously prejudiced with respect to the citations that it did not contest under Procedural Rule 20. Consequently, CDK Contracting Company’s motion to dismiss is **DENIED**.



Richard W. Manning  
Administrative Law Judge

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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February 3, 2003

CDK CONTRACTING COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	
	:	Docket No. WEST 2001-420-RM
	:	Citation No. 7935401; 4/23/2001
v.	:	
	:	Docket No. WEST 2001-421-RM
	:	Order No. 7935402; 4/23/2001
	:	
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEST 2001-425-RM
	:	Order No. 7935407; 4/23/2001
	:	
	:	Mine ID 05-00037 L35
	:	Portland Plant/Quarry
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	
	:	Docket No. WEST 2002-464-M
	:	A.C. No. 05-00037-05509 L35
v.	:	
	:	
	:	Portland Plant & Quarry
CDK CONTRACTING COMPANY, Respondent	:	

**ORDER DENYING CDK CONTRACTING COMPANY'S  
MOTION TO DISMISS**

CDK Contracting Company ("CDK") filed a motion to vacate the citation and two orders of withdrawal (the "citations") in these cases and to dismiss the civil penalty proceeding. As grounds for the motion, CDK argues that the Secretary failed to propose penalties for the alleged violations within a reasonable time after the termination of the Secretary's investigation of a fatal accident at the Portland Plant and Quarry as required by section 105(a) of the Mine Act. The Secretary opposes the motion.

On February 24, 2001, a fatal accident occurred when a CDK employee fell from a scaffold ladder at the Portland Plant and Quarry. CDK was a construction contractor at that site. The Department of Labor's Mine Safety and Health Administration ("MSHA") commenced its

investigation of the accident that day. On April 23, 2001, MSHA issued the three citations at issue in these cases. CDK contested the citations on May 23, 2001. MSHA issued its final report on the investigation of the accident on July 9, 2001. The citations were terminated on July 13, 2001. On May 17, 2002, MSHA issued its proposed assessment of penalty under 29 C.F.R. § 2700.25. CDK timely filed its contest of the proposed penalties. MSHA proposed penalties for the citations almost 13 months after they were issued and more than 10 months after it issued its final report on the accident.

## I. SUMMARY OF THE PARTIES' ARGUMENTS

CDK argues that these cases must be dismissed because the Secretary failed to notify CDK of the proposed penalties within a reasonable time after the termination of the accident investigation, as required by the Mine Act. The Secretary is required "within a reasonable time after the termination of such inspection or investigation [to] notify the operator . . . of the civil penalty to be assessed . . ." 30 U.S.C. § 815(a). CDK argues that notification of the proposed penalty amount 13 months after the citations were issued is not within a reasonable time under the Mine Act. CDK maintains that the Secretary cannot establish that this delay was reasonable. Although these cases involve a fatal accident, the facts are not complex and were fully known by the time the citations were issued.

The Secretary maintains that the proposed penalties were issued within a reasonable time given the circumstances of these cases. She also argues that she demonstrated just cause for any delay. The Secretary states that the special assessments group of MSHA's Office of Assessments was extremely busy during 2001-02. She states that this group has only four employees and two of these employees were unavailable during the relevant period of time. The Secretary points to the fact that during 2001, 2,153 "routine" special assessments were proposed, 217 "fatal/serious injury related" special assessments were proposed, and 204 "section 110(c)" special assessments were considered. In the first nine months of 2002, the numbers were 1,949, 183, and 158, respectively.

The Secretary contends that the relevant time period did not begin to run until MSHA completed its accident investigation. She maintains that the fatality that triggered the investigation was extremely serious and several citations were referred for special assessment. She states that careful consideration of the facts and consideration of the statutory criteria consumed considerable time. The citations were in the Office of Assessments from August 6, 2001 until May 17, 2002. There was a backlog of cases in the office for special assessments during that time because one of the four assessors was on extended leave and the other was unavailable "due to training during much of the year 2001." (S. Opposition at 7). In addition, the Secretary states that the supervisor of the special assessments group was heavily involved in the development of MSHA's standardized information system, which will completely replicate the records into a web-based system.

The Secretary believes that the reasonableness of time should be analyzed by taking into consideration the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling relief. The Secretary contends that CDK suffered no actual prejudice because both parties used the time to conduct discovery and prepare for trial. The mere potential for prejudice is insufficient. Dismissal of civil penalty proceedings because of a delay that was not prejudicial would clearly run counter to the concern for safe and healthful working conditions that led to the creation of the civil penalty program. The Secretary points to the legislative history of the Mine Act in which the Senate Committee on Human Resources stated that "there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." (S. Rep. 95-181, at 34, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978)).

In response to the Secretary's opposition, CDK states that MSHA's failure to adequately staff its special assessments group does not constitute adequate cause for the delay. There was not an unusually high number of special assessments during 2001-02 and these cases are not particularly complex. The Commission accepted a lengthy delay in proposing a penalty when the caseload of the assessments office increased exponentially. *Steele Branch Mining*, 18 FMSHRC 6, 14 (Jan. 1996). There has been no showing of such an increase here.

Finally, CDK argued that the Secretary's delay actually prejudiced its ability to defend itself in these cases. CDK states that it is no longer operational and that it is in the process of winding down its corporate affairs. It has only one employee at the present time. As a consequence, its potential witnesses are no longer employees of CDK. In addition, those former employees who have knowledge of the facts are no longer in the immediate geographical vicinity of the Portland Plant & Quarry. These key witnesses live in such far flung places as Virginia Beach, Virginia; San Pablo, Colorado; Ponca City, Oklahoma; Aztec, New Mexico; Eldorado, Arkansas; Goldendale, Washington; Wickenburg, Arizona; and San Juan, Puerto Rico. The hourly employee who worked with the deceased and who is the only individual with first-hand knowledge of the events leading up to the accident is believed to reside in Mexico. CDK states that the whereabouts of other witnesses is unknown. CDK believes that it will suffer actual prejudice if it is unable to secure the assistance of these individuals in the preparation of its defense and secure their presence at the hearing.

I permitted the Secretary to respond to CDK's reply because, for the first time, CDK presented argument that it suffered actual prejudice. The Secretary states that CDK's attempt to establish prejudice ignores or mischaracterizes several key factors in the cases. The Secretary states that CDK continued working at the Portland Plant & Quarry for many months after the citations were issued. All of the key witnesses were interviewed by MSHA and extensive discovery was taken, including the deposition of many potential witnesses. She states that witnesses frequently move away from the area of the mine. More importantly, CDK knew that it

was working on a short-lived construction project in Colorado, yet it neither opposed the Secretary's motion to stay the pre-penalty contest proceedings nor filed a motion to lift the stay.

## II. ANALYSIS OF THE ISSUES

The Commission has excused the late filing of proposed penalties based on claims of excessive work load, but it made clear that such claims will not receive blanket approval. *Steele Branch*, 18 FMSHRC at 14; *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714, 1717 (July 1981). The assessment in *Steele Branch* arose in 1991-92 when there was a dramatic increase in the number of penalty assessments. See *Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089, 2094 (Oct. 1993). In the present cases, the delay was in large measure caused by the fact that two of the four MSHA employees assigned to the special assessments office were not available for a significant period of time. One employee was on extended leave for an unspecified reason, the other was in training, and the supervisor was heavily involved in developing a new information system. These excuses are not nearly as compelling as the excuse offered by the Secretary in *Steele Branch*.

The accident in these cases was serious and required an analysis of the facts by the Office of Assessments. Proposing penalties following a fatal accident requires a high degree of diligence on the part of assessment office employees and those MSHA officials who review the proposals. The office's staff was reduced and the supervisor's assistance was compromised by a major project. It is important to remember that a penalty is typically proposed within three to nine months after a citation is issued, so the delay in these cases is not as great as it may first appear. In addition, the Secretary does not begin the assessment process until a citation is terminated. The citations in these cases were terminated in July 2001, three months after they were issued. I find that the penalties involved in these cases were proposed within a reasonable time.

I also find that the Secretary established adequate cause for any delay. I agree with Judge Michael Zielinski's analysis of this issue in *Paiute Aggregates, Inc.*, 24 FMSHRC 950, 954 (Oct. 2002). In that case, Judge Zielinski concluded that the Secretary did not establish that the entire 14 month delay was due to factors beyond her control because she was unable to provide a week-by-week description of the events that occurred while the Office of Assessments was considering what penalties to propose. *Id.* Nevertheless, he held that it is clear that Congress intended that "delays in proposing penalties should not nullify penalty proceedings." *Id.* *Paiute Aggregates* arose under circumstances that are quite similar to the present cases. The showing necessary to establish adequate cause will vary depending upon the length and circumstances of the delay. *Paiute Aggregates, Inc.*, 24 FMSHRC 943, 946 (Oct. 2002) (Judge Zielinski). Thus, a case involving an egregious delay will require greater justification to meet the adequate cause test. *Id.* Here the rather short delay was caused by the Secretary's failure to adequately staff its special assessment office. While this excuse may not be sufficient to justify a lengthy delay, I believe that it satisfies the adequate cause test in this case, given the admonition of Congress cited above,

because the penalties were proposed only a few months later than is typical for the Office of Assessments.

CDK argues that it was actually prejudiced by the delay because its witnesses moved away after its Colorado project was completed and the company is winding down its affairs. Although I agree with the Secretary that witnesses frequently move away before a hearing can be scheduled, the situation presented by this case is more serious because CDK's construction project has been completed and CDK no longer employs any of its witnesses. Although CDK may not have known at the time the citations were issued that the company would be going out of business, it knew that its construction project in Colorado would be ending and that many of its employee witnesses would be moving elsewhere.

Section 105 of the Mine Act gives mine operators the right to request a hearing on the merits before penalties are proposed. The Commission's Procedural Rule 20 sets forth an operator's right to contest citations. 29 C.F.R. § 2700.20. The Commission has long held that an operator can contest any citation or order before a penalty is proposed by the Secretary. *Energy Fuels Corp.*, 1 FMSHRC 299, 307-09 (May 1979). CDK protected its rights when it contested the citations in the contest proceedings set forth in the above caption. Although the Commission generally expects operators to wait until a penalty is proposed before requesting that the case be heard, it recognizes that situations will arise in which a hearing on the merits should be held before the Secretary proposes a penalty. If an operator files a pre-penalty notice of contest under Procedural Rule 20 and believes that it requires a hearing before the Secretary files her proposed penalty assessment under Procedural Rule 25, it can file a motion with the administrative law judge asking that the case be set for hearing. In a companion case to *Energy Fuels*, the Commission provided some examples in which a pre-penalty hearing may be desirable.

Although it is arguably unlikely that the operators [in these consolidated cases] will need a hearing before a penalty is proposed (the alleged violations having been abated and the citations containing no special findings), it might nevertheless be desirable for a hearing to be scheduled quickly if, for example, the allegedly violative conditions often recur, if continuing abatement efforts are expensive, or if another case is being heard on the same issue and early consolidation would be helpful.

*Helvetia Coal Co.*, 1 FMSHRC 321, 322 (May 1979). While the closing of a mine or the winding down of an operator's business is not listed as an example, it is clearly the type of case in which a pre-penalty hearing is desirable.

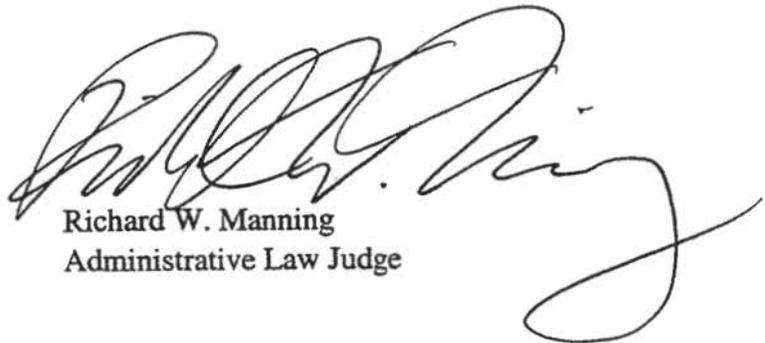
CDK agreed with the Secretary's motion to stay the pre-penalty contest cases during a conference call held on June 27, 2001. CDK knew that its Colorado project was coming to an end and, at some point, also knew that CDK itself would be winding down its operations. Yet, CDK neither advised me of that fact nor asked that the stay be lifted so that a hearing could be

scheduled.\* The parties engaged in extensive discovery during the period of the stay and depositions were taken of many of CDK's potential witnesses. CDK could have requested that a hearing be scheduled before its witnesses were terminated from employment or upon the completion of discovery. All relevant issues could have been litigated at such a hearing, including whether the alleged violations occurred and, if so, whether they were significant and substantial and the result of CDK's unwarrantable failure to comply with the safety standards. Negligence and gravity issues could have also been adjudicated. All elements of a citation that are subject to eyewitness testimony can be litigated before a penalty is proposed. At the very least, CDK could have made sure that the testimony of its key witnesses was preserved in deposition testimony.

I find that any prejudice suffered by CDK as a result of the Secretary's delay in proposing penalties for the three citations at issue could have been prevented if CDK had requested a pre-penalty hearing on the merits of the citations. By forgoing its right to request a pre-penalty hearing when it knew that it would be closing its operations, CDK surrendered its right to claim that it was prejudiced by the Secretary's delay in proposing penalties in these cases.

### III. ORDER

I find that although the Secretary took several months longer to propose penalties for the citations than normal, the penalties were proposed within a reasonable time. In the alternative, I find that the Secretary demonstrated adequate cause for the delay. I also find that, by not requesting a pre-penalty hearing, CDK waived its right to claim prejudice because it knew that it would be shutting down its operations and terminating its employee witnesses. Consequently, CDK Contracting Company's motion to dismiss is **DENIED**.



Richard W. Manning  
Administrative Law Judge

Distribution:

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\* Counsel for CDK advised me of the status of CDK's operations in October 2002, five months after the Secretary proposed penalties in these cases.

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RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

February 3, 2003

CDK CONTRACTING COMPANY,	:	CONTEST PROCEEDING
Contestant	:	
	:	
v.	:	Docket No. WEST 2001-426-RM
	:	Citation No. 7935408; 4/23/2001
	:	
SECRETARY OF LABOR	:	Mine ID 05-00037 L35
MINE SAFETY AND HEALTH	:	Portland Plant/Quarry
ADMINISTRATION (MSHA),	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-5-M
Petitioner	:	A.C. No. 05-00037-05511 L35
	:	
v.	:	
	:	Portland Plant & Quarry
	:	
CDK CONTRACTING COMPANY,	:	
Respondent	:	

**ORDER DENYING CDK CONTRACTING COMPANY'S  
MOTION TO DISMISS**

CDK Contracting Company ("CDK") filed a motion to vacate Citation No. 7935408 in these cases and to dismiss the civil penalty proceeding. As grounds for the motion, CDK argues that the Secretary failed to propose a penalty for the alleged violation within a reasonable time after the termination of the Secretary's investigation of a fatal accident at the Portland Plant and Quarry as required by section 105(a) of the Mine Act. The Secretary opposes the motion.

On February 24, 2001, a fatal accident occurred when a CDK employee fell from a scaffold ladder at the Portland Plant and Quarry. CDK was a construction contractor at that site. The Department of Labor's Mine Safety and Health Administration ("MSHA") commenced its investigation of the accident that day. On April 23, 2001, MSHA issued the citation at issue in these cases. CDK contested the citation on May 23, 2001. MSHA issued its final report on the investigation of the accident on July 9, 2001. On August 16, 2002, MSHA issued its proposed assessment of penalty under 29 C.F.R. § 2700.25. CDK timely filed its contest of the proposed penalty. MSHA proposed the penalty for the citation almost 16 months after it was issued and almost 13 months after MSHA issued its final report on the accident.

## I. SUMMARY OF THE PARTIES' ARGUMENTS

CDK argues that these cases must be dismissed because the Secretary failed to notify CDK of the proposed penalty within a reasonable time after the termination of the accident investigation, as required by the Mine Act. The Secretary is required "within a reasonable time after the termination of such inspection or investigation [to] notify the operator . . . of the civil penalty to be assessed . . ." 30 U.S.C. § 815(a). CDK argues that notification of the proposed penalty amount 16 months after the citation was issued is not within a reasonable time under the Mine Act. CDK maintains that the Secretary cannot establish that this delay was reasonable. Although these cases involve a fatal accident, the facts are not complex and were fully known by the time the citation was issued. CDK maintains that there was not an unusually high number of special assessments during 2001-02. The Commission accepted a lengthy delay in proposing a penalty when the caseload of the assessments office increased exponentially. *Steele Branch Mining*, 18 FMSHRC 6, 14 (Jan. 1996). There has been no showing of such an increase here.

The Secretary maintains that the proposed penalty was issued within a reasonable time given the circumstances of these cases. She also argues that she demonstrated just cause for any delay. The Secretary states that the special assessments group of MSHA's Office of Assessments was extremely busy during 2001-02. She states that this group has only four employees and two of these employees were unavailable during the relevant period of time. The Secretary points to the fact that during 2001, 2,153 "routine" special assessments were proposed, 217 "fatal/serious injury related" special assessments were proposed, and 204 "section 110(c)" special assessments were considered. In the first nine months of 2002, the numbers were 1,949, 183, and 158, respectively.

The Secretary contends that the relevant time period did not begin to run until MSHA completed its accident investigation. She maintains that the fatality that triggered the investigation was extremely serious and many citations were referred for special assessment. She states that careful consideration of the facts and consideration of the statutory criteria consumed considerable time. The citation was in the Office of Assessments from August 2001 until August 16, 2002. There was a backlog of cases in the office of special assessments during that time because one of the four assessors was on extended leave and the other was unavailable because of a training program. In addition, the Secretary states that the supervisor of the special assessments group was heavily involved in the development of MSHA's standardized information system, which will completely replicate the records into a web-based system.

The Secretary believes that the reasonableness of time should be analyzed by taking into consideration the length and circumstances of the delay, the prejudice to the opposing party by reason of the delay, and the circumstances compelling relief. The Secretary contends that CDK suffered no actual prejudice because both parties used the time to conduct discovery and prepare for trial. The mere potential for prejudice is insufficient. Dismissal of a civil penalty proceeding because of a delay that was not prejudicial would clearly run counter to the concern for safe and

healthful working conditions that led to the creation of the civil penalty program. The Secretary points to the legislative history of the Mine Act in which the Senate Committee on Human Resources stated that “there may be circumstances, although rare, when prompt proposal of a penalty may not be possible, and the Committee does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding.” (S. Rep. 95-181, at 34, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978)).

## II. ANALYSIS OF THE ISSUES

The Commission has excused the late filing of proposed penalties based on claims of excessive work load, but it made clear that such claims will not receive blanket approval. *Steele Branch*, 18 FMSHRC at 14; *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714, 1717 (July 1981). The assessment in *Steele Branch* arose in 1991-92 when there was a dramatic increase in the number of penalty assessments. See *Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089, 2094 (Oct. 1993). In the present cases, the delay was in large measure caused by the fact that two of the four MSHA employees assigned to the special assessments office were not available for a significant period of time. One employee was on extended leave for an unspecified reason, the other was in training, and the supervisor was heavily involved in developing a new information system. These excuses are not nearly as compelling as the excuse offered by the Secretary in *Steele Branch*.

The citation at issue originally alleged that Holnam, Inc., the production operator, failed to immediately notify MSHA’s Rocky Mountain District that a fatal accident occurred at the Portland Plant and Quarry. The citation was modified on May 4, 2001, to charge CDK with the violation rather than Holnam, Inc. The proposed penalty is \$100. Thus, the penalty was proposed about 15 months after the citation was issued to CDK.

The accident in these cases was serious and required an analysis of the facts by the Office of Assessments. Proposing penalties following a fatal accident requires a high degree of diligence on the part of assessment office employees and those MSHA officials who review the proposals. The office’s staff was reduced and the supervisor’s assistance was compromised by a major project. It is important to remember that a penalty is typically proposed within three to nine months after a citation is issued, so the delay in these cases is not as great as it may first appear. I find that the penalty involved in these cases were proposed within a reasonable time.

I also find that the Secretary established adequate cause for any delay. I agree with Judge Michael Zielinski’s analysis of this issue in *Paiute Aggregates, Inc.*, 24 FMSHRC 950, 954 (Oct. 2002). In that case, Judge Zielinski concluded that the Secretary did not establish that the entire 14 month delay was due to factors beyond her control because she was unable to provide a week-by-week description of the events that occurred while the Office of Assessments was considering what penalties to propose. *Id.* Nevertheless, he held that it is clear that Congress intended that “delays in proposing penalties should not nullify penalty proceedings.” *Id.* *Paiute Aggregates*

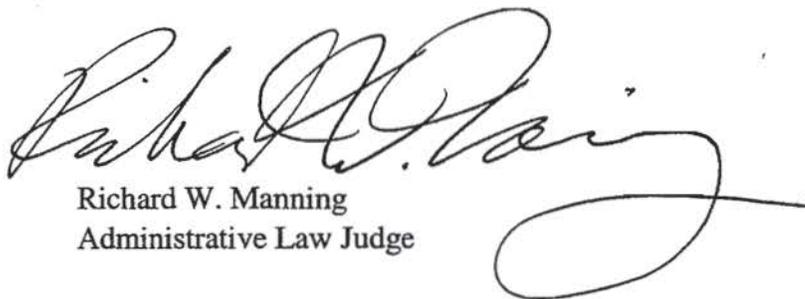
arose under circumstances that are quite similar to the present cases. The showing necessary to establish adequate cause will vary depending upon the length and circumstances of the delay. *Paiute Aggregates, Inc.*, 24 FMSHRC 943, 946 (Oct. 2002) (Judge Zielinski). Thus, a case involving an egregious delay will require greater justification to meet the adequate cause test. *Id.* Here the somewhat short delay was caused by the Secretary's failure to adequately staff its special assessment office. While this excuse may not be sufficient to justify a lengthy delay, I believe that it satisfies the adequate cause test in this case, given the admonition of Congress cited above, because the penalties were proposed only a few months later than is typical for the Office of Assessments.

I also take into consideration the fact that this citation was part of a group of citations that were specially assessed following the accident investigation. The explanation provided by the Secretary does not support a 15 month period to proposed a \$100 penalty for a violation of section 50.10. If this citation were considered alone, I would dismiss the civil penalty case. On this date, I issued orders denying CDK's motions to dismiss in two other groups of cases that arose after the same accident. (WEST 2001-420-RM, etc., with WEST 2002-464-M; and WEST 2001-348-RM, etc., with WEST 2002-461-M). These other cases involve ten citations and orders that were specially assessed. When taken with these other cases, the Secretary has provided sufficient justification for the length of time she took to propose a penalty for Citation No. 7935408.

In the other CDK cases referenced above, CDK argued that it was actually prejudiced by the delay because its witnesses moved away after its Colorado project was completed and the company was in the process of winding down its affairs. It is not entirely clear from its motion whether CDK is making the same argument in these cases. My ruling on the prejudice issue would be the same here and I incorporate by reference my analysis on that issue from my order in WEST 2002-420-RM, etc.

### III. ORDER

I find that although the Secretary took a longer period of time to propose a penalty for Citation No. 7935408 than normally would be the case, the penalty was proposed within a reasonable time. In the alternative, I find that the Secretary demonstrated adequate cause for the delay taking into consideration the other ten citations that were specially assessed following the accident investigation. I also find that, by not requesting a pre-penalty hearing, CDK waived its right to claim actual prejudice because it knew that it would be shutting down its operations and terminating its employee witnesses. Consequently, CDK Contracting Company's motion to dismiss is **DENIED**.



Richard W. Manning  
Administrative Law Judge

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February 6, 2003

THOMAS P. DYE II,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-408-DM
	:	RM MD 02-11
v.	:	
	:	Mine I.D. 05-01732
	:	Cotter Mill
MINERAL RECOVERY SPECIALISTS, INC.,	:	
Respondent	:	

**ORDER DENYING MOTION TO AMEND COMPLAINT  
TO INCLUDE RECOVERY DYNAMICS LLC AND TBD LLC AS RESPONDENTS**

This proceeding was brought by Thomas P. Dye against Mineral Recovery Specialists, Inc., ("MRSI") under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ("Mine Act") and 29 C.F.R. § 2700.40 *et seq.* The complaint alleges, in part, that MRSI violated section 105(c) of the Mine Act when it did not hire Dye as a permanent employee because he insisted that a recently repaired piece of equipment be fully safety-tested before it was put back into service. MRSI denies the allegations in the complaint. MRSI states that the business of the company has ceased and that it is in the process of winding up and liquidating its affairs.

Mr. Dye filed a motion to amend the complaint to add Recovery Dynamics LLC and TBD LLC as respondents. Mr. Dye states that Recovery Dynamics, also known as Recodyne, is the predecessor of MRSI. It appears that Recovery Dynamics entered into an agreement as a subcontractor to CMS Enterprises Company to provide engineering and design services for a zirconium recovery project at the Cotter Mill, owned and operated by Cotter Corporation. The owners of Recovery Dynamics incorporated MRSI to perform this work. All rights and responsibilities under the agreement were assigned to MRSI. Mr. Dye alleges that Recovery Dynamics and MRSI are one and the same company because they have the same address, phone number, and fax number and because they share other similarities. He alleges that these two entities commingled funds. He also states that they shared employees. He bases his motion on documents that he located on the Internet, records that were kept in the MRSI trailer at the Cotter Mill, and the written statements of Rene L. Lucas, who was the shipping and receiving administrator for MRSI at the mill. Dye states that Dan Dilday was the owner of MRSI and was its project manager at the mill. Mr. Dilday was also working on the White Mesa Mill project for Recovery Dynamics. Thus, Dilday was employed by both entities. Mr. Dye also states that MRSI is owned by a company called TBD LLC. He states that TBD is also owned by Dilday and is located at the same address as MRSI and Recovery Dynamics.

The record in this case does not reveal who owns Recovery Dynamics, TBD, and MRSI. Dye contends that Mr. Dilday was the sole owner of these companies, but he offered no proof. MRSI admits that the owners of MRSI also own Recovery Dynamics. Dye enclosed 19 attachments to support his motion. Many of these attachments are Internet records kept by the Tennessee Secretary of State. These records show that Mr. Dilday was the registered agent for a number of companies including TBD and EN2 LLC, which is a medical equipment supply company. (Attach. 2 & 15). The principal office of these companies is listed as 200 East Main Street, 6<sup>th</sup> Floor, Johnson City, Tennessee. These records show that a number of other companies are also headquartered at the same address including MRSI and Recovery Dynamics. (Attach. 2, 5, 16 & 19). These records also list David R. Tierney and W. Dan Black as registered agents for Recovery Dynamics. (Attach. 18 & 19). None of these records specify who are the shareholders of these corporations.

A written statement of Ms. Lucas explains that there was a drawer of files in the MRSI trailer at the Cotter Mill relating to Recovery Dynamics' work for International Uranium Corporation in Utah. (Attach. 1). Ms. Lucas helped organize files for MRSI and in her statement she asserts that over three million dollars was paid to MRSI under the relevant contract between March 2000 and January 2001. *Id.* Mr. Dye contends that the two companies must have commingled funds because MRSI is now claiming that it is insolvent. Ms. Lucas states that "I find it odd that MRSI would claim that they're broke when I know for a fact that, though MRSI did buy some equipment . . . , a major portion of what they received was for salaries, wages, expenses, and services." (Attach. 1 at 2).

Dye also produced Internet records of the Colorado Secretary of State to show that Dilday was president of Rooster's Bar and Grill, Inc., in Canon City, Colorado. (Attach. 6). Dye and Lucas visited this establishment and state that they were told by Christine Smith that Mr. Dilday sold his interest in the bar for \$1. (Attach. 7). Ms. Smith, who told them that she is the current owner of the bar, advised Dye and Lucas that she had to pay \$60,000 for these same shares. Lucas's statement on this matter includes other allegations including a description of a conversation Ms. Smith said that she overheard at her bar to the effect that MRSI made sure that the zirconium recovery project failed so that it "could file the patent [on the zirconium recovery process] and collect the insurance money." According to the statement, the insurance money was obtained by deliberately destroying equipment.

Section 105(c)(1) provides that no person shall discharge or in any manner discriminate against a miner in any coal or other mine subject to the Mine Act because he has made a safety complaint. A miner is defined as any individual working at a mine. A "coal or other mine" is defined in section 3(h)(1) of the Mine Act to include facilities used in the milling of minerals. The term "person" is defined in section 3(f) as any "individual, partnership, association, corporation, firm, subsidiary of a corporation or other organization." In this case, Mr. Dye filed a complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that MRSI discriminated against him for making safety complaints in violation of section 105(c). When MSHA determined that Mr. Dye was not discriminated against, he brought

this action on his own behalf. At all pertinent times, Dye was employed by MRSI at its project at the Cotter Mill.

Mr. Dye was never employed by Recovery Dynamics. Recovery Dynamics was not a mine operator at the Cotter Mill. A mine “operator” is defined in section 3(d) of the Mine Act as “any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine.” MRSI was an independent contractor performing services as an operator at the Cotter Mill. There has been no showing that Recovery Dynamics was in any way involved in operating, controlling or supervising the work being performed at the Cotter Mill. There has also been no showing that Recovery Dynamics was an independent contractor performing services or construction at the Cotter Mill.

The fact that the owners of Recovery Dynamics incorporated MRSI to carry out the terms of the contract to provide services for the zirconium recovery project does not establish that Recovery Dynamics was an operator at the Cotter Mill. It is clear that both corporations used the same office and phone system in Johnson City, Tennessee. It is also clear that the two corporations shared some employees. These facts do not establish that the two corporations were one and the same or that Recovery Dynamics was an operator at the Cotter Mill. Although it appears that Mr. Dilday was employed by both corporations, there is no evidence to show that he was working for anyone other than MRSI when carrying out his duties under the contract at the zirconium recovery project. The information provided by Mr. Dye does not prove that the two corporations should be treated as one mine operator. The evidence concerning the money paid MRSI under the contract is just an assertion; it does not establish that the two companies commingled funds. I conclude that Recovery Dynamics was not an operator at the Cotter Mill and cannot be held liable for any discrimination against Dye under section 105(c) of the Mine Act.

Mr. Dye presented very little information to support his motion with respect to TBD. Dye apparently bases his contention that TBD owns MRSI on the information he obtained when he entered the name of MRSI’s website (mineralrecovery.com) at domainwatch.com, which apparently is an Internet resource that provides information on Internet domain names. When he entered the website name for MRSI at the domain watch website, it listed TBD LLC as the “organization” that holds the domain name. (Attach. 14). This information is insufficient to establish ownership. Although it is clear that Dilday has a relationship with TBD, there is no showing that TBD was an operator at the Cotter Mill. For the reasons discussed above, I conclude that there is no proof that TBD was an operator at the mill and I conclude that TBD is not subject to liability under section 105(c) of the Mine Act.

A court must generally recognize and uphold a corporate entity unless specific, unusual circumstances call for the exception. (18 Am. Jur. 2d *Corporations* § 58, at 868-69). If a corporation is used as an intermediary to perpetrate fraud or promote injustice, its identity as a corporate entity may be pierced. The “corporate veil may be pierced . . . when . . . the corporate

form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud.” *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). I find that Mr. Dye did not establish that MRSI was used by its owners to perpetrate fraud or promote injustice. Dye presented information that he believes shows that MRSI, Recovery Dynamics, and TBD were rather shady operations that engaged in fraudulent transactions, but this information is insufficient to establish that allegation because the information presented is pure speculation and hearsay. Mr. Dye has not presented sufficient evidence to warrant piercing the corporate veil.

The corporate form can also be set aside in certain situations if it can be shown that the unity of ownership and interest is so great that the individuality or separateness of two corporations has ceased. (18 Am. Jur. 2d *Corporations* § 56, at 861-62). I find that Mr. Dye failed to establish that MRSI was the alter ego of Recovery Dynamics or TBD. The fact that Recovery Dynamics and MRSI had the same owners is not enough to ignore the corporate form. Likewise, that Dilday performed services for both corporations and that all three corporations used the same address and support staff is insufficient to establish that they were alter egos. “The fact that the stockholders, officers or directors in two corporations may be the same persons does not operate to destroy the legal identity of either corporation, nor does the fact that one corporation exercises a controlling influence over another through the ownership of stock or through the identity of stockholders make either the agent of the other or merge the two corporations into one. . . .” (*Id.* at § 57, p 865). Dye has not demonstrated that financial transactions were improperly accounted for in the books of the corporations or that the corporations did not honor the corporate form in all respects. It has not been established that Recovery Dynamics or TBD were in any way involved at the Cotter Mill or that the three corporations were treated as one by the owners. As discussed above, Dye’s allegations of fraudulent transactions is too speculative to form the basis for the motion.

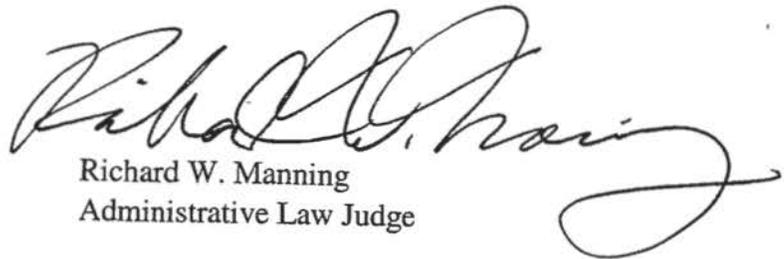
In some circumstances, a successor may be required to remedy wrongful discrimination. A successor is a corporation that assumes the rights and liabilities of the corporation that engaged in the discrimination. In such cases a variety of relevant liability and economic factors are considered, as follows:

- (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment, and methods of production, and (9) whether he produces the same products.

*Sec’y of Labor on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 394, 397-98 (Mar. 1987)

(citation omitted). It has not been shown that Recovery Dynamics or TBD are successors to MRSI. MRSI performed services at the Cotter Mill for about two years. MRSI is no longer performing any services at the mill and neither Recovery Dynamics nor TBD ever performed any services at the mill. It has not been shown that the same jobs exist at Recovery Dynamics or TBD or that the same services are provided by Recovery Dynamics or TBD at any location in the United States. Consequently, I conclude that Mr. Dye has not established that Recovery Dynamics or TBD are successors to MRSI.

For the reasons discussed above, Mr. Dye's motion to amend his complaint of discrimination to include Recovery Dynamics LLC and TBD LLC as respondents is **DENIED**.



Richard W. Manning  
Administrative Law Judge

Distribution:

Mr. Thomas P. Dye, 1428 S 4<sup>th</sup> Street, Canon City, CO 81212-9664

Mineral Recovery Specialists, Inc., 200 E. Main Street, 6<sup>th</sup> Floor, Johnson City, TN 37604

RWM

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

February 11, 2003

AGGREGATE INDUSTRIES, WEST	:	CONTEST PROCEEDINGS
CENTRAL REGION, INC.,	:	
Contestant	:	Docket No. WEST 2002-317-RM
	:	Citation No. 7914271; 01/22/2002
v.	:	
	:	Docket No. WEST 2002-318-RM
	:	Citation No. 7914268; 01/24/2002
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2002-319-RM
ADMINISTRATION (MSHA),	:	Citation No. 7914269; 01/24/2002
Respondent	:	
	:	Docket No. WEST 2002-320-RM
	:	Citation No. 7943951; 01/31/2002
	:	
	:	Fort Collins Plant
	:	Id. No. 05-04733
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-32-M
Petitioner	:	A.C. No. 05-04733-05501
	:	
v.	:	Docket No. WEST 2003-33-M
	:	A.C. No. 05-04733-05502
AGGREGATE INDUSTRIES, WEST	:	
CENTRAL REGION, INC.,	:	Fort Collins Plant
Respondent	:	

**DISCOVERY ORDER**  
**ORDER TO INITIATE CONFERENCE CALL**

Aggregate Industries, West Central Region, Inc., (“Aggregate Industries”) filed two motions seeking information concerning the Secretary’s special assessment process. In its motion to compel, Aggregate Industries seeks an order compelling the Secretary to produce all documents that it requested “concerning the special assessment related to the alleged unwarrantable failure violation . . . including, but not limited to the MSHA form 7000-32, Special Assessment Review Form, prepared by MSHA to support and obtain a special assessment of \$30,000.” In its motion to take depositions, Aggregate Industries asks that the Secretary be ordered to “designate one or more managing agents or other persons to testify . . .

concerning the special penalty assessments, and factors, information and documents related to such penalty assessments, including the Special Assessment Review Form, concerning those citations contested in these proceedings.” The Secretary opposes both motions.

### **I. Special Assessment Review Form**

With respect to the Special Assessment Review Form, the Secretary maintains that the document is irrelevant and subject to the deliberative process privilege. She contends that it is irrelevant because the Commission assesses penalties *de novo*. She maintains that it is subject to the deliberative process privilege because it contains predecisional, deliberative recommendations made by the MSHA inspector to his supervisors about whether a special assessment should be initiated. The Secretary knows of no other documents concerning the special assessment that have not already been provided to Aggregate Industries.

As discussed in more detail below, I agree with the Secretary that her special assessment process in 30 C.F.R. § 100.5 is totally irrelevant in these proceedings. Commission administrative law judges assess penalties taking into consideration the six penalty criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), without regard to the Secretary’s special assessment provisions. If I find that the Secretary has established violations in these cases, I will assess each penalty based only on the penalty criteria without taking into consideration how the Secretary assessed the violation.

The Special Assessment Review Form contains facts that the MSHA inspector presents to his supervisor to support a special assessment. Thus, this form may contain factual information that relates to the penalty criteria. The deliberative process privilege protects communications between subordinates and supervisors within the government that are “antecedent to the adoption of an agency policy.” *Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987, 992 (June 1992) (citation omitted). The deliberative process privilege “covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). Documents that are protected by the privilege “are those which would inaccurately reflect or prematurely disclose the views of the agency, suggesting as agency position that which is as yet only a personal position.” *Id.* Nevertheless, “even if the document is predecisional at the time it is prepared, it can lose that status if it is adopted, formally or informally, as the agency position on an issue or is used by the agency in its dealing with the public.”<sup>1</sup> *Id.*

The Secretary provided a copy of the Special Assessment Review Form for my *in camera* review. After reviewing the document, I find that it is not protected by the deliberative process privilege. First, the only substantive writing on the form is in section 10, which contains the

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<sup>1</sup> A more detailed discussion of the deliberative process privilege is contained in my order in *Newmont Gold Co.*, 18 FMSHRC 1532 (August 1996).

facts the inspector used to support his recommendation. He describes, in one short sentence, why he believed that the operator was especially negligent with respect to Citation No. 7914271. The citation was issued under section 104(d)(1) of the Mine Act. The body of the citation itself contains the same information. The inspector's determination with respect to negligence was adopted by the Secretary as the agency's position. Thus, even if the review form had once been protected by the privilege, its protected status was lost when MSHA adopted his recommendation.

In addition, the Secretary's position with respect to the Special Assessment Review Form is inconsistent at best. I take official notice of the fact that I have been assigned several cases in the past few years in which this form was attached to the Secretary's petition for assessment of penalty as a part of Exhibit A. In addition, the Secretary has introduced this form into evidence at hearings to support her case. *See, e.g., Basin Resources, Inc.*, 19 FMSHRC 1565, 1570-71 (Sept. 1997) (ALJ); *S & M Construction, Inc.*, 18 FMSHRC 1018, 1051-52 (June 1996) (ALJ). The Secretary cannot make her Special Assessment Review Form public in some cases and claim that it is privileged in others.

I find that the Special Assessment Review Form has some marginal relevance to the Secretary's high negligence and unwarrantable failure determinations. For the reasons set forth above, the Secretary is hereby **ORDERED** to provide counsel for Aggregate Industries a copy of the Special Assessment Review Form for Citation No. 7914271 within ten days of this order.

## **II. Depositions of MSHA Assessment Office Officials**

Aggregate Industries seeks to depose the "MSHA employee best suited to testify concerning penalty assessments in this matter." The Secretary contends that such depositions would neither produce relevant evidence nor would they appear likely to lead to the discovery of admissible evidence. Aggregate Industries contends that it is "entitled under Fed. R. Civ. P. 30(b)(6) to discover any evidence concerning or supporting the petition for assessment of penalty. . . ." It bases its argument on its belief that "the Secretary of Labor intends to offer evidence to support the petition for assessment of penalty."

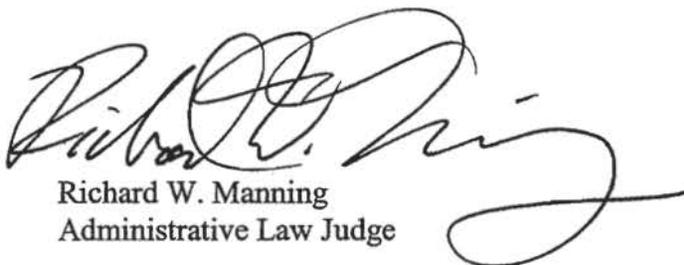
I find that the information that Aggregate Industries seeks to obtain is totally irrelevant to these cases. First, I will not admit any evidence from the Secretary concerning her proposed assessments except as it relates to the six criteria under section 110(i) of the Mine Act. Evidence concerning her special assessment procedures will not be admitted. More importantly, Commission judges assess penalties *de novo* by examining the penalty criteria of section 110(i). *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (March 1983), *aff'd* 736 F. 2d 1147 (7<sup>th</sup> Cir. 1984). Commission administrative law judges must enter findings of fact on each of the six penalty criteria. *Cantera Green*, 22 FMSHRC 616, 621-22 (May 2000). A judge must explain how his findings with respect to the penalty criteria contributed to his penalty assessment. A judge does not consider the Secretary's regulations at 30 C.F.R. Part 100 when assessing penalties. Consequently, the information that Aggregate Industries seeks is irrelevant to the

issues raised in these cases.

The Secretary will have the burden of proof with respect to the six penalty criteria.<sup>2</sup> Aggregate Industries will have the opportunity to cross-examine the Secretary's witnesses on the criteria and to introduce evidence of its own. For the reasons set forth above, Aggregate Industries' motion to take depositions is **DENIED**.

### **III. Conference Call Concerning Hearing Date.**

Counsel for the Secretary shall initiate a conference call on or before February 21, 2003, to establish a hearing date for these cases. If I do not hear from the parties by that date, the hearing will commence on April 22, 2003.



Richard W. Manning  
Administrative Law Judge

Distribution:

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John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550 (Fax and First Class Mail)

RWM

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<sup>2</sup> Aggregate Industries will have the burden of establishing that the proposed penalties will adversely affect its ability to continue in business.

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

February 13, 2003

THOMAS P. DYE II,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-408-DM
	:	RM MD 02-11
v.	:	
	:	Mine I.D. 05-01732
	:	Cotter Mill
MINERAL RECOVERY SPECIALISTS, INC.,	:	
Respondent	:	

**ORDER ACCEPTING DOCUMENTS INTO EVIDENCE**  
**ORDER ALLOWING RESPONDENT TO PRESENT EVIDENCE**  
**WITHOUT APPEARING AT THE HEARING**

This proceeding was brought by Thomas P. Dye against Mineral Recovery Specialists, Inc., ("MRSI") under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ("Mine Act") and 29 C.F.R. § 2700.40 *et seq.* The complaint alleges, in part, that MRSI violated section 105(c) of the Mine Act when it did not hire Dye as a permanent employee because he insisted that a recently repaired piece of equipment be fully safety-tested before it was put back into service. MRSI denies the allegations in the complaint.

MRSI filed a motion to accept its pleadings, sworn affidavits, and other documents as evidence in this case. As part of this motion, MRSI states that, because it is no longer in operation, it will not be able to attend the hearing that is presently scheduled for March 4, 2003. MRSI asks that it not be held in default for its failure to appear but that Mr. Dye be required to present his case and that the court take into consideration the written documents that it has submitted. In support of the motion, MRSI states that it was incorporated to provide services to CMS Enterprises ("CMS") on a zirconium recovery project at the Cotter Mill in Fremont County, Colorado. Upon cancellation of the project by CMS, effective August 16, 2002, MRSI had served its purpose and had no other jobs or projects. MRSI states that it now has a negative net worth and that its business has ceased. MRSI filed articles of dissolution with the State of Tennessee on December 23, 2002. MRSI states that it is in the process of negotiating with its creditors and winding up its affairs. It asserts that it does not have the means to defend itself at a hearing.

MRSI argues that under these circumstances, "it would be inequitable for MRSI to suffer a default judgment merely because it is unable to pay for further legal representation." (Motion at 4). MRSI was represented by counsel until, by order dated January 22, 2003, I permitted counsel to withdraw because he stated that he had not been paid for any of his services. MRSI

states that it “desires that this case be decided on the merits rather than on MRSI’s inability to finance its defense or on procedural grounds.” *Id.* at 5.

In lieu of appearing at a hearing, MRSI presented an affidavit of Daniel R. Dilday, an affidavit of Davis Tilton, an affidavit of James Miller, and several other documents. MRSI asks that these documents be accepted into the record, along with the documents that have been previously submitted, and that these documents be considered when I decide this case. Finally, MRSI presented its argument as to why I should enter an order finding that MRSI did not discriminate against Mr. Dye.

Mr. Dye opposes the motion. He argues that MRSI has not demonstrated that it is “broke.” He contends that the evidence MRSI presented is not reliable because the accounting firm that prepared the balance sheet stated that “[m]anagement has elected to omit substantially all of the disclosures and the statements of cash flows required by generally accepted accounting principles.” The accounting firm further stated that “[i]f the omitted disclosures were included in the financial statements, they might influence the user’s conclusions about the Company’s assets, liabilities, equity, revenues, and expenses.” Mr. Dye believes that MRSI has not shown that it cannot defend itself at a hearing.

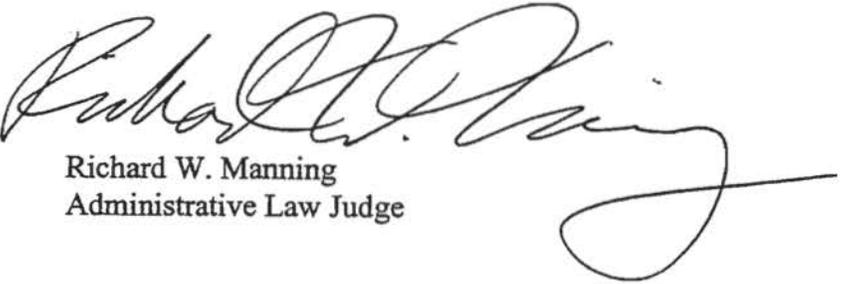
I agree with Mr. Dye that the financial records submitted by MRSI are questionable. Nevertheless, MRSI states that it is unable to attend the hearing in this case. It is asking that it not be held in default for its failure to appear, but that I enter a decision on the merits taking into consideration the documents it has submitted. I find that MRSI’s request is reasonable under Procedural Rule 66(b), 29 C.F.R. § 2700.66(b), and that it does not prejudice Mr. Dye. Consequently, if MRSI does not appear at the hearing, I will not enter an order of default but will hold the hearing with only Mr. Dye and his witnesses. I will also admit each affidavit described above and the other documents submitted by MRSI into evidence at the hearing, unless Mr. Dye presents sufficient cause to exclude a particular exhibit. I will determine how much I will credit each exhibit admitted into evidence in my decision on the merits.

At the hearing, Mr. Dye will be required to present evidence that he engaged in protected activity and that MRSI’s adverse actions were motivated at least in part by that protected activity. If Mr. Dye is unable to establish this *prima facie* case, I will dismiss this proceeding. If Mr. Dye establishes his *prima facie* case and the evidence submitted by MRSI does not sufficiently rebut Mr. Dye’s *prima facie* case, then I will enter a decision holding that Mr. Dye was discriminated against in violation of section 105(c) of the Mine Act. If, however, I find that MRSI’s evidence rebuts the case presented by Mr. Dye by establishing that either no protected activity occurred or that the actions it took against Mr. Dye were in no part motivated by the protected activity, I will dismiss the case. In the alternative, if I find that MRSI established that the actions it took against Mr. Dye were motivated in part by unprotected activities and that it would have taken these actions for the unprotected activity alone, I will dismiss this case. This manner of presenting evidence is not any different from what would occur if MRSI were present at the hearing. I will, of course, take into account that Mr. Dye is being deprived of the opportunity to cross-examine

Messrs. Dilday, Tilton, and Miller. MRSI will be at a disadvantage at the hearing because it may not be able to fully respond to Dye's *prima facie* case. This method of proceeding is designed to prevent a complainant from prevailing by default in a case where he could not establish a *prima facie* case. Mr. Dye will have to show that he should prevail on the merits.

MRSI's motion for a finding of no discrimination is taken under advisement. I will consider this motion and the argument presented by MRSI, at pages six through ten of its motion, after all of the evidence has been presented at the hearing and the record is closed.

For the reasons set forth above, MRSI's motion to admit the pleadings, the three sworn affidavits, and the other documents submitted by MRSI into evidence at the hearing is **GRANTED**. MRSI's motion that it not be held in default if it fails to appear at the hearing is also **GRANTED**. MRSI's motion for a finding of no discrimination is taken under advisement until the record in this case is closed.



Richard W. Manning  
Administrative Law Judge

Distribution:

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Mineral Recovery Specialists, Inc., 200 E. Main Street, 6<sup>th</sup> Floor, Johnson City, TN 37604

RWM

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001

February 14, 2003

M & H COAL COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2002-176-R
	:	Citation No. 7004521;07/02/2002
v.	:	
	:	Docket No. PENN 2002-177-R
SECRETARY OF LABOR,	:	Citation No. 7004522;07/02/2002
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Mercury Slope
Respondent	:	Mine ID 36-01920

## **ORDER GRANTING SECRETARY'S MOTION** **FOR SUMMARY DECISION** **AND** **STAY ORDER**

These cases are before me on Notices of Contest filed by M&H Coal Company under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the "Act"), 30 U.S.C. § 815(d). M&H contests the issuance of a citation and an order by an MSHA inspector alleging that it was mining pillars in violation of its approved roof control plan. The Secretary has moved for summary decision, pursuant to Commission Procedural Rule 67, 29 C.F.R. § 2700.67, contending that the entire record shows that there is no genuine issue as to any material fact and that the Secretary is entitled to summary decision as a matter of law as to the validity of the alleged violations. For the reasons set forth below, the Secretary's motion is granted.

### **Facts**

The pleadings, responses to discovery, affidavits and other portions of the record establish that, for purposes of this motion, there is no genuine issue as to the following facts. While certain of the facts might ultimately be disputed by the Secretary, for present purposes, the facts are assumed to be as alleged by M&H.

M&H operates a deep anthracite coal mine. As of May 2002, its approved roof control plan did not provide for the removal of pillars on the 3rd level west gangway of its Mercury Slope Mine. By letter dated May 18, 2002, it submitted a proposed addendum to its roof control plan to the MSHA District Director, pursuant to which it proposed to mine main haulage pillars in that area. On June 20, 2002, Kenneth Richter, a consultant to M&H, was advised by a MSHA field office supervisor that he and a MSHA roof control specialist favored approval of the addendum, but that they had been unable to convince John A. Kuzar, MSHA's District Director,

to approve it. It was suggested that M&H might be able to persuade him. In a phone conversation that morning, Richter spoke with Kuzar, who confirmed that he was going to deny the requested addendum, remarking that he had never seen anything like the proposed addendum. Neither Kuzar, nor the other MSHA staff who participated in the conversation had ever been in M&H's mine. Richter responded that M&H had removed pillars in the manner proposed for fifty years and never had any problems. Kuzar responded that M&H was now mining deeper than it ever had before, he felt that the proposed mining was too deep, and he feared they would have a collapse resulting in fatalities. Kuzar also referred to a computer analysis that indicated that the pillars could not be removed safely, and advised that his technical support group had not yet finished its analysis of the proposal. Richter countered that the computer program was designed for bituminous, not anthracite, coal. Richter answered two questions posed by other MSHA staff. Kuzar stated that he was going to deny the requested addendum and that M&H would get the written response in a few days.

On June 21, 2002, the day after the phone conversation, M&H commenced pillar recovery at the subject location, in violation of its approved roof control plan. M&H hoped to be able to demonstrate that pillar removal could be done safely. On July 1, 2002, M&H received a letter dated June 28, 2002, from Kuzar advising that the proposed addendum to the roof control plan was disapproved. The letter stated the reasons for the denial and listed five "circumstances" upon which the decision was based. M&H continued to remove the pillars at the subject location. On July 2, 2002, MSHA inspected the mine, and observed the ongoing pillar recovery operations. Citation No. 7004521, was issued, citing M&H for conducting mining operations in violation of its approved roof control plan.<sup>1</sup> Order No. 7004522 was also issued, directing that all pillaring operations cease. M&H then ceased pillaring operations.

M&H filed notices of contest, challenging the citation and order, alleging that MSHA's denial of the proposed addendum to its roof control plan was arbitrary and capricious, and requesting a reversal of MSHA's determination that the pillars could not be removed in accordance with its proposed plan and its customary and usual practices. By letters dated July 26, and 30, 2002, M&H requested a "conference" to discuss the reasons for the denial of the addendum, pursuant to 30 C.F.R. § 75.220(b)(2). A meeting was held on August 7, 2002, at which M&H agreed to have tests run on the compressive strength of its coal. Following those tests, on August 29, 2002, Kuzar reaffirmed the denial of the requested addendum.

### The Applicable Law

The Mine Act and regulations require that operators conduct mining in conformance with a mine-specific roof control plan, approved by the Secretary. 30 U.S.C. § 862, 30 C.F.R. § 220.

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<sup>1</sup> The citation initially charged a violation of 30 C.F.R. § 75.220(a)(1) which requires that an operator develop and follow a roof control plan approved by MSHA's District Manager. It was modified following a conference to allege a violation of subsection (c), which states that: "No proposed roof control plan or revision to a roof control plan shall be implemented before it is approved."

The regulations provide that the operator be notified in writing of the denial of a proposed revision to a plan and that “the deficiencies of the plan or revision and recommended changes will be specified and the mine operator will be afforded an opportunity to discuss the deficiencies and changes with the District Manager.” 30 C.F.R. § 75.220(b). While the Secretary of Labor retains the ultimate authority and responsibility to determine the contents of the plan, her discretion is not unbounded. In discussing comparable provisions of the regulations applicable to ventilation plans, the Commission stated:

The requirement that the Secretary approve an operator’s mine ventilation plan does not mean that an operator has no option but to acquiesce to the Secretary’s desires regarding the contents of the plan. Legitimate disagreements as to the proper course of action are bound to occur. In attempting to resolve such differences, the Secretary and an operator must negotiate in good faith for a reasonable period concerning a disputed provision. Where such good faith negotiation has taken place, and the operator and the Secretary remain at odds over a plan provision, review of the dispute may be obtained by the operator’s refusal to adopt the disputed provision, thus triggering litigation before the Commission. *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2773 (Dec. 1981).

*Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985).

Both the Secretary and the operator are obligated to engage in good faith negotiations and an operator who fails to do so may be precluded from challenging the denial of a proposed amendment. *Id.* and see *C.W. Mining Co.*, 18 FMSHRC 1740, 1746-47 (Oct. 1996); *Peabody Coal Co.*, 15 FMSHRC 381, 387-88 (March 1993).

M&H does not dispute that, on July 2, 2002, it was removing pillars in non-conformance with its approved roof control plan, as alleged in the citation and order. Through these notices of contest, it seeks to obtain a declaration that the decision to deny the proposed addendum to its roof control plan was arbitrary and capricious, that the addendum should have been approved and it should not have been cited for the violations.<sup>2</sup> The dispute here is centered on whether M&H and the Secretary fulfilled their respective obligations to negotiate prior to the issuance of the citation. The Secretary contends that M&H did not fulfill its obligation to negotiate and, therefore, is precluded from challenging the correctness of the decision to deny the proposed addendum. M&H contends that the Secretary did not fulfill her obligation to negotiate and that further attempts to negotiate beyond the July 20, 2002, phone conversation would have been futile.

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<sup>2</sup> While M&H also challenges the gravity and negligence determinations made by the inspector and stated on the citation, the main thrust of these actions is a challenge to the alleged violations, i.e., to reverse the denial of its proposed roof control plan addendum. The Secretary’s motion, and this order, are directed only to the fact of the violation itself.

Two key elements of good faith negotiation are clear notice of a party's position and adequate discussion of disputed provisions. *C.W. Mining Co., supra*. The Secretary's obligation to negotiate is reflected in 30 C.F.R. § 220(b), which requires that when denying a proposed addendum, the District Manager must do so in writing, specifying the reasons for the denial. The District Manager must then afford the operator an opportunity to discuss the reasons for the denial. The District Manager's June 28, 2002, letter appropriately stated the reasons for the denial and the considerations upon which it was based. After receiving the letter, M&H made no attempt to discuss the issues with Kuzar. It continued to mine the pillars and the citation and order were issued the following day.

The regulations and cases that discuss the duty to negotiate under the regulatory scheme for approval of roof control and similar plans make clear that the duty to negotiate begins with the District Manager's written rejection of a proposed addendum citing the reasons for the denial. None of the cases cited by either party sanction an operator's implementation of a proposed addendum in anticipation of the District Manager's formal decision. In *C.W. Mining Co., supra*, the operator was found to have fulfilled its duty to negotiate in good faith where the citation in question was issued over two months after MSHA had provided a detailed written notice of deficiencies in the operator's plan, during which time the parties met and discussed all of the items cited by MSHA and the operator submitted two revised plans. In *Carbon County Coal Co., supra*, negotiations over MSHA's dissatisfaction with the operator's proposed plan were conducted for several months before the subject citation was issued. In *Peabody Coal, supra*, the subject citation was issued one month after MSHA's rejection of a plan, during which time the parties met and discussed all of the issues and the operator submitted two revised plans.

If M&H was convinced that its proposed addendum would not be approved, it was obligated to await the written decision specifying the reasons for the denial, and thereafter attempt to negotiate with MSHA. If unable to achieve its goal through negotiation, it apparently would have had two options. The first would have been to seek direct court review of the denial, pursuant to 30 U.S.C. § 811(d).<sup>3</sup> The second would have been to notify the Secretary that it continued to dispute the denial and would commence mining the pillars at a specified time, essentially, requesting that a citation be issued so that it could challenge the citation and the denial of the proposed addendum in a proceeding before the Commission. M&H did not await the written decision and made no attempt to negotiate after receiving it. It cannot now attack the denial of the proposed addendum.

M&H maintains that it was excused from any obligation to attempt to negotiate because in the June 20, 2002, phone conversation, Kuzar "refused to further consider the addendum, to receive or consider information from M&H Coal Company about its mine, rendering any further attempts by M&H at negotiation with MSHA absolutely futile." Respondent's memorandum of

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<sup>3</sup> Because the provisions of such plans are enforceable as mandatory standards, it appears that an operator may obtain direct judicial review of the Secretary's denial of a proposed plan addendum pursuant to section 101(d) of the Act, 30 U.S.C. § 811(d). See *United Mine Workers of America v. Dole*, 870 F.2d 662, n. 13 at 670 (D.C. Cir. 1989).

law in opposition to the motion at p. 2. I reject its argument that the futility of negotiation, or fulfilment of its duty to negotiate, could be established based upon a phone conversation prior to the final decision.

However, assuming *arguendo*, that the “futility of negotiation” position had legal merit, M&H failed to establish the alleged futility and would not have been relieved of its obligation to negotiate in good faith. M&H initiated the June 20 phone call to Kuzar in order to try and convince him to approve the proposed addendum. Accepting M&H’s description of the conversation, at no time did Kuzar state, unequivocally, that the addendum would never be approved, or that he would not consider any information that M&H might submit in support of its proposal. As noted above, Kuzar had a legal obligation to itemize all of the reasons for the denial in his written decision and to discuss the decision with M&H. There is nothing in the facts submitted by M&H to suggest that he did not intend to fulfill that obligation.

In fact, there were several facts known to M&H that should have lead it to conclude that eventual approval of the proposal was at least possible. It knew that the MSHA field office supervisor and one of the roof control specialists favored approval of the addendum. It knew that Kuzar’s technical support group had not finished its investigation, and it might also be able to challenge some of the factors that Kuzar was relying on, such as his belief that the proposed pillar removal was deeper than M&H had conducted such operations in the past. The conversation apparently did not touch upon the first three factors later itemized in the written denial. In fact, after the citation and order were issued, M&H submitted additional information to Kuzar, and agreed to have coal from the mine tested for compressive strength.

The precedent that M&H seeks to establish here is somewhat alarming. Having been apprised of the likely denial of its proposed addendum, it immediately commenced mining in violation of its approved roof control plan, and continued to mine in violation of the plan after receipt of the written decision. It did not inform MSHA that it was doing so. It claims that it was attempting to prove that mining pursuant to the procedure contained in the proposed addendum could be done successfully and safely. But, it was also mining as much coal as it could before being ordered by MSHA to cease pillar removal. It deliberately chose to embark upon a mining procedure that MSHA had determined posed a serious risk to miners – not as a limited operation to prompt issuance of a citation in order to generate litigation before the Commission – but to generate as much evidence and coal as possible prior to MSHA’s discovery of the operation. To permit an operator to litigate the correctness of MSHA’s decision under these circumstances would encourage operators to violate § 75.220(c) and to virtually ignore adverse decisions on proposed plan addenda.

Based upon the foregoing, the Secretary’s motion for summary decision is **GRANTED**, Citation No. 7004521 and Order No. 7004522 are affirmed as to the alleged violations of 30 C.F.R. § 220(c). M&H will not be permitted to challenge the denial of the proposed addendum to its roof control plan in these proceedings. The parties did not directly address the gravity and negligence determinations in the motion and opposition and those issues can be dealt with more efficiently in a challenge to the proposed civil penalties.

Accordingly, further proceedings in these cases are hereby **STAYED**, pending assessment of civil penalties.



Michael E. Zielinski  
Administrative Law Judge  
202-434-9981

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/mh

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, DC 20001

February 26, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2002-187-M
Petitioner	:	A.C. No. 41-03751-05516
	:	
	:	Docket No. CENT 2002-188-M
	:	A.C. No. 41-03751-05517
	:	
v.	:	Docket No. CENT 2002-249-M
	:	A.C. No. 41-03751-05518
	:	
	:	Docket No. CENT 2002-266-M
BIG BUCK ASPHALT,	:	A.C. No. 41-03751-05519
Respondent	:	
	:	Docket No. CENT 2003-18-M
	:	A.C. No. 41-03751-05520
	:	
	:	Docket No. CENT 2003-91-M
	:	A.C. No. 41-03751-05522
	:	
	:	Phelps Pit

**ORDER DENYING MOTION TO APPROVE SETTLEMENT**

Before: Judge Feldman

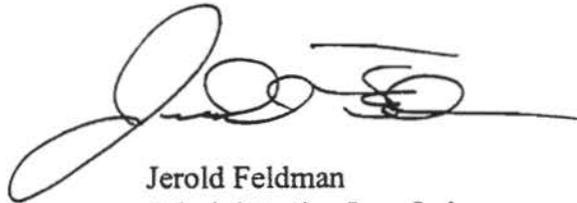
These cases are before me upon petitions for assessment of civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act). The Secretary has filed a motion to approve a settlement agreement and to dismiss these matters. A reduction in civil penalty from \$48,262 to \$12,065 is proposed. The parties propose that the proposed \$12,065 civil penalty will be paid in an initial installment of \$2,500, with the remaining \$9,565 to be paid in nineteen monthly installments. The proposed substantial reduction and extended payment schedule are based on Big Buck Asphalt's reported financial condition that allegedly precludes its ability to pay a higher civil penalty.

In support of its assertion that payment of a higher penalty would impact on its ability to remain in business, the parties rely on a financial statement for the year ending February 28, 2002, for Four G. Asphalt, Inc.'s d/b/a Big Buck Asphalt prepared by a certified public accountant. The financial statement furnished by the Secretary lacks the Accountant's Review

Report designated as page 1 in the Table of Contents. Consequently, the financial statement does not reflect whether the information contained therein was audited. In this regard, the financial statement notes that the reported amounts of revenues and expenses are based on management "estimates and assumptions." Unaudited financial statements do not provide a basis for establishing payment of a civil penalty will adversely affect a mine operator's ability to continue in business. *See Spurlock Mining Co., Inc.*, 16 FMSHRC 697, 700 (April 1994).

The financial statement reflects gross income of \$1,276,154 and an unspecified "cost of revenue" of \$1,304,010 resulting in a reported loss of \$27,856. The financial statement reflects Pete Gallegos, Sr., is the President of Big Buck Asphalt. The financial statement further reflects that Pete Gallegos Paving, Inc., "is the parent owner" and "primary customer" of Big Buck Asphalt. Javalina Ready-Mix, Inc., also owned by Pete Gallegos Paving, Inc., also is a significant customer of Big Buck Asphalt.

I am unable to approve the settlement terms without additional information concerning the relationship between Big Buck Asphalt and Pete Gallegos Paving, Inc. Specifically, **IT IS ORDERED** that the parties provide, **within 21 days of this Order**, additional information and financial documentation concerning whether the financial condition of Pete Gallegos Paving, Inc., is a relevant consideration in determining whether there is a financial hardship that justifies the structured payment schedule and substantial reduction in the civil penalty proposed by the parties. The information should include a complete list of the corporate officers and management personnel of each corporation and a description of their responsibilities and job duties. The parties may provide any additional information they deem relevant. All financial documentation submitted should be audited. Accordingly, the Motion to Approve Settlement **IS DENIED**. If sufficient information to support the proposed settlement is not provided within 21 days, these matters will be scheduled for hearing.



Jerold Feldman  
Administrative Law Judge

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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280

DENVER, CO 80204-3582

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February 26, 2003

ROBERT G. JUNGERS,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEST 2002-532-DM
	:	WE MD 02-13
v.	:	
	:	Mine I.D. 04-05363
U.S. BORAX, INC.,	:	Boron Operations
Respondent	:	

**PREHEARING ORDER**

This proceeding was brought by Robert G. Jungers against U. S. Borax, Inc., under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* ("Mine Act") and 29 C.F.R. § 2700.40 *et seq.* Mr. Jungers alleges, in part, that the actions of Joe Ellison in taking down "illustrated clean-up areas designated to each crew" that was taped on a window put him "in a potentially hostile work place, heaped on dysfunctional stress, and was tort." Jungers states that Ellison took this action because Jungers had spend time with OSHA compliance officers. In its answer, U.S. Borax denies Mr. Jungers allegations and maintains that he has not stated a claim that can be remedied under section 105(c)(3) of the Mine Act.

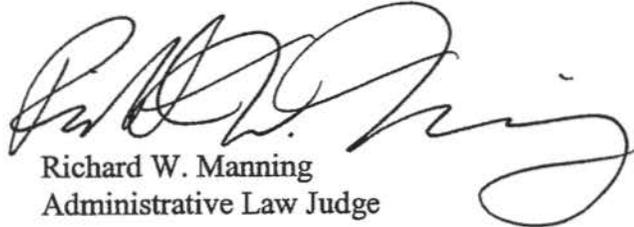
It is important for Mr. Jungers and U.S. Borax to understand the limits of my jurisdiction. I do not have authority to determine whether any actions taken against Mr. Jungers by U.S. Borax were unfair and unreasonable unless such actions violated the anti-discrimination provisions of the Mine Act at 30 U.S.C. § 815(c). Under that provision, a mine operator is prohibited from discriminating against a miner because he complained about safety or health conditions at the mine or refused to perform a task that he reasonably and in good faith believed presented a hazard to his safety or health. A miner's safety complaints or actions are known as "protected activity." A mine operator may not take adverse action against a miner for such protected activity.

If the parties are unable to settle the case and if the case is not otherwise dismissed, a formal hearing will be held. The issues at the hearing will include whether U.S. Borax discriminated against Mr. Jungers. At a hearing, Mr. Jungers will be required to present evidence that he engaged in protected activity and that U.S. Borax's adverse actions were motivated at least in part by that protected activity. U.S. Borax may attempt to rebut Mr. Jungers' case at the hearing by presenting evidence that either no protected activity occurred, no adverse actions were taken, or that the actions taken with respect to Mr. Jungers were in no part motivated by the protected activity. If U.S. Borax is unable to present such evidence, it may present evidence that the actions it took with respect to Jungers were also motivated by unprotected activities and that it would have taken these actions for the unprotected activity alone.

The Federal Mine Safety and Health Review Commission is not part of the Department of Labor's Mine Safety and Health Administration (MSHA). Section 105(c)(3) of the Mine Act authorized Mr. Jungers to file this case on his own behalf. This provision provides him with an opportunity to try to establish that he was discriminated against. Consequently, this case is not an appeal of MSHA's decision not to file a discrimination complaint on behalf of Mr. Jungers, but it is a new, independent proceeding brought by Mr. Jungers on his own behalf. I do not have the authority to review MSHA's investigation to determine whether it was competent or to determine whether MSHA's decision to not bring a case was defensible. I do not have a copy of MSHA's investigation file in this matter. Neither MSHA nor the Secretary of Labor is a party in this proceeding. If Mr. Jungers and U.S. Borax are not able to settle this case and it is not dismissed, Mr. Jungers will be required to present evidence at a hearing to establish that U.S. Borax discriminated against him in violation of section 105(c) of the Mine Act, as described above.

1. In order to encourage the parties to settle this case, counsel for U.S. Borax shall contact Mr. Jungers to discuss settlement. The parties shall confer as often as necessary to negotiate a settlement. If the parties are unable to settle the case, they shall attempt to narrow the issues, enter into stipulations, and discuss proposed hearing dates.

2. On or before **March 27, 2003**, the parties shall initiate a conference call with me to discuss the status of the case, potential hearing dates, and other matters that they wish to discuss.



Richard W. Manning  
Administrative Law Judge

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RWM