

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 13 1981

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),)	CIVIL PENALTY PROCEEDING
)	
Petitioner,)	DOCKET NO. WEST 81-94-M
)	
v.)	MSHA CASE NO. 24-00689-05018
)	
THE ANACONDA COMPANY,)	MINE: Weed Concentrator
)	
Respondent.)	

ORDER

Respondent has filed a motion to dismiss this case. As reason therefor, respondent states that it has been prejudiced by the delay of nearly two years between the time the citation in question was issued and the assessment of a penalty. The Secretary in opposition to the motion argues that the respondent was not prejudiced by the delay as shown by the fact that it had retained sufficient evidence to persuade the MSHA assessment officer to reduce the penalty at a conference held on November 3, 1980.

The Federal Mine Safety and Health Act requires the Secretary to notify the mine operator of a proposed penalty within a reasonable time after the issuance of a citation. The remarks of the Senate Committee clarify the purpose for this requirement.

To promote fairness to operators and miners and encourage improved mine safety and health generally, such penalty proposals must be forwarded to the mine operator and mine representative promptly. The Committee notes, however, 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. S. Rep. No. 95-181, 95th Cong., 1st Sess. 34 (1977).

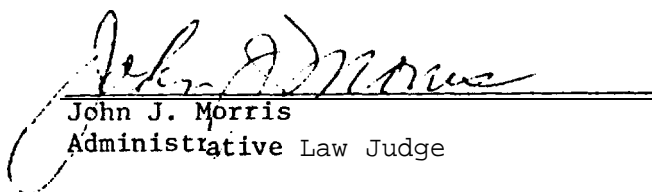
The Commission reasoned in a recent decision that the ¹above expressed intent of Congress demonstrates their overriding concern with effective enforcement, and, thus a citation should be vacated only when to do so implements the remedial purpose of the Act. The Commission also recognized the secondary purpose of protecting mine operators from stale claims. Sec. of Labor v. Salt Lake County Road Dept., Docket No. WEST 79-365-M (July 28, 1981).

The Commission established a two prong test to determine if the late filing of the proposal for penalty addressed to the Commission is in substantial compliance with the Act and, therefore, should not result in the dismissal of the case. The Secretary must show that there was adequate cause for the delay. The mine operator must show that it has been **prejudiced by** the delay. These two requirements are to be balanced against each other with the scales weighing heavily on the side of enforcement. However, the objective of effective enforcement can be thwarted by the Secretary's inexcusable delay over a substantial period of time. The Commission warned the Secretary against any unwarranted dilatory action.

The above test is directly applicable here. Congress perceived that the prompt assessment of a penalty was necessary for effective enforcement. In the present case, the delay of nearly two years is on its face a blatant disregard of this objective. Contrary to the Secretary's statement in its response to the motion, Section 815(a) of the Act provides the statutory authority for the vacation of a citation where the Secretary has been so dilatory in assessing a penalty that effective enforcement of the Act is impossible.

In the present case the citation was issued on December 5, 1978. Due to the delay in the assessment of a penalty, this case was not ripe for the adjudication of the penalty until the filing of the proposal for penalty on February 5, 1981. The Secretary offers no reason for the delay. Such a lengthy delay is inherently prejudicial to the operators' preparation of a proper defense.

For the above stated reasons, the motion to dismiss is granted. This case is dismissed with prejudice.


John J. Morris
Administrative Law Judge

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