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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
PETITIONER

v.

INDUSTRIAL CONSTRUCTORS CORP.,
RESPONDENT

CIVIL PENALTY PROCEEDING

Docket No. WEST 83-70-M
A.C. No. 04-04492-05501 NYO

Grey Eagle Mine

DECISION

Before: Judge Morris

In this case Petitioner filed a proposal for assessment of a civil penalty under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., (the "Act"). The Secretary of Labor seeks to impose a civil penalty which arose from an inspection of the Grey Eagle Mine on November 18, 1982. It is alleged respondent violated a safety regulation promulgated under the Act.

After notice to the parties, a hearing on the merits was scheduled in Missoula, Montana for April 17, 1984. Prior to the hearing the parties submitted the case on stipulated facts.

The parties filed briefs in support of their positions.
Issues

The initial issue is whether the Secretary forfeited his right to collect a civil penalty by reason of his delay in proposing a penalty.

A secondary issue is whether the proposed penalty is proper.
Stipulation

The parties stipulated as follows:

- (1) That respondent does not defend the issued citation 2086224 alleging a violation of standard 30 C.F.R. 55.9-40(c) (FOOTNOTE 1), on the merits;

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(2) That respondent's defense is based on its contention that petitioner forfeited its right to collect a penalty by unduly delaying notification of respondent of the assessment of penalty herein;

(3) That the inspection herein was conducted on November 18, 1982;

(4) That the notice of proposed assessment was sent by petitioner to respondent on March 30, 1983;

(5) That the inspector's statement, attached as Exhibit 1, is admissible for the purpose of establishing the basis of the proposed assessment.

Discussion

The Act, in Section 105(a), provides that if the Secretary issues a citation under Section 104 he shall "within a reasonable time after the termination of such inspection notify the operator . . . of the civil penalty proposed to be assessed. . . ."

The stipulated facts indicate the inspection took place on November 18, 1982, but the notice of proposed assessment was not sent to respondent until March 30, 1983.

The issue, then, is whether the time span of 132 days constitutes a "reasonable time" for the Secretary to notify the operator of the proposed penalty.

While a citation under Section 104(a) must be issued "with reasonable promptness," a civil penalty notification appears less demanding. Under Section 105(a) the notice of penalty must be issued "within a reasonable time."

The Act itself does not articulate the meaning of a "reasonable time." In construing the legislative intent in these circumstances it is proper to look to the legislative history. In reviewing the enforcement procedures of the Act, the Senate Committee on Human Resources in its report stated on this subject as follows:

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 proceeding. Senate Report No. 95-181, 95th Cong. 1st Session (1977) reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 2nd Session at 618, July 1978.

In this case respondent does not claim it was prejudiced by the delay and it admits the violation of the standard.

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In support of its position respondent cites Northern Aggregates, Inc., 2 FMSHRC 1062 (1980), and J.P. Burroughs and Son, Inc., 3 FMSHRC 854 (1981). In the initial case Commission Judge Gary Melick dismissed a notice of contest filed 2 1/2 months after the required 30 days. In the second case the Commission considered whether an operator's notice of contest had to be received by the Secretary, or mailed by the operator, within 30 days after the operator received the notice.

The cited cases are not controlling. The Act requires an operator to file its notice of contest within 30 days. On the other hand, the Secretary is not limited to a specific number of days. As indicated, he is only required to notify the operator of a proposed penalty "within a reasonable time."

Respondent's brief refers to a period of 45 days within which the Secretary must notify respondent of a penalty. I believe respondent has mistakenly relied on Commission Rule 27, 29 C.F.R. 2700.27. The foregoing rule requires the Secretary to file a proposal for penalty with the Commission within 45 days after he receives a notice of contest from a respondent. The most pertinent rule is Commission Rule 25, 29 C.F.R. 2700.25. It mandates the action the Secretary is required to take in connection with notifying an operator of a penalty. But that rule does not impose any time restraints on the Secretary.

The Act is remedial in nature and it seeks to assure, to the extent possible, the safety and health of the nation's miners. In view of these factors and in view of the expressed legislative intent, I am unwilling to impose the ultimate sanction of dismissal because the Secretary did not notify the operator of the proposed penalty until 132 days after the inspection.

For the above reasons respondent's contentions are denied and the citation is affirmed.

Civil Penalty

The statutory criteria for assessment of a civil penalty is set forth in 30 U.S.C. 820(i).

The parties stipulated the inspector's statement is admissible to establish the proposed assessment. The exhibit addresses the issues of negligence, gravity and abatement. Based on the stipulation of the parties and the statutory criteria, I consider the proposed penalty of \$68 to be proper.

Based on the foregoing stipulation and the conclusions of law herein, I enter the following:

