FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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IN RE: CONTESTS OF RESPIRABLE DUST SAMPLE ALTERATION CITATIONS	MASTER DOCKET NO. 91-1
SOUTHERN OHIO COAL COMPANY, Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	CONTEST PROCEEDINGS Docket Nos. LAKE 91-454-R through LAKE 91-472-R
WINDSOR COAL COMPANY, Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Docket Nos. WEVA 91-1244-R through WEVA 91-1258-R
GREAT WESTERN COAL (KENTUCKY), INC., Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Docket Nos. WEVA 91-1259-R through WEVA 91-1260-R
GREAT WESTERN COAL, INC., Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Docket Nos. KENT 91-867-R through KENT 91-871-R
	Docket Nos. KENT 91-859-R through KENT 91-863-R

HARLAN FUEL COMPANY, Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	)	Docket Nos. KENT 91-864-R through KENT 91-866-R
DRUMMOND COMPANY, INC., Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	)	Docket No. SE 91-225-R Docket Nos. SE 91-239-R through SE 91-241-R Docket No. SE 91-242-R Docket Nos. SE 91-243-R through SE 91-248-R
JIM WALTER RESOURCES, INC., Contestant v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	)	Docket Nos. SE 91-362-R through SE 91-382-R Docket Nos. SE 91-383-R through SE 91-384-R Docket Nos. SE 91-385-R through SE 91-389-R Docket Nos. SE 91-391-R through SE 91-451-R
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner v. ENERGY FUELS COAL, INC., Respondent	)	CIVIL PENALTY PROCEEDING Docket Nos. WEST 91-475 and WEST 91-476

ORDER DENYING MOTIONS TO VACATE CITATIONS

On March 3, 1992, Contestants Southern Ohio Coal Company (SOCCO) and Windsor Coal Company (Windsor) filed a motion for an order vacating the 36 citations issued by the Secretary of Labor (Secretary) to Contestants on April 4, 1991. Each citation alleged a violation of 30 C.F.R. § 70.209(b) because the respirable dust sample submitted by Contestants had been altered by removing a portion of the dust from the sample. As grounds for the motion Contestants state that the Secretary failed to

issue the citations with the "reasonable promptness" required by section 104(a) of the Mine Act. The motion was accompanied by a memorandum in support of the motion and 30 attached exhibits.

On March 18, 1992, the Secretary filed a motion to strike Contestants' motion to vacate together with its supporting memorandum and the associated exhibits, on the ground that the motion to vacate "relies in significant part" on inappropriate documents and materials. On March 30, 1992, Contestants filed an opposition to the Secretary's motion to strike. On March 30, 1992, the Secretary filed a motion for leave to file out of time her previously filed motion to strike Contestants' motion to vacate citations.

On March 25, 1992, Energy Fuels Coal, Inc. (Energy Fuels) filed a motion to vacate the nine citations issued to it on April 4, 1991. Energy Fuels incorporates by reference the memorandum in support of the motion to vacate citations filed by Contestants. On March 31, 1992, the Secretary filed a motion to strike Energy Fuels' motion to vacate.

On April 1, 1992, Great Western Coal (Kentucky), Inc. (Great Western Kentucky), Great Western Coal, Inc. (Great Western), and Harlan Fuel Co. (Harlan) filed a motion to join the Contestants' motion to vacate citations and memorandum in support of the motion.

On April 7, 1992, I issued an order granting the Secretary leave to file out of time but denying her motion to strike and directing her to respond to Contestants' motion to vacate. On April 27, 1992, the Secretary filed a statement in opposition to the motion to vacate. She attached to the motion an appendix containing a graphic representation of the alleged tampered dust samples by month from August 1989 to January 1991, and excerpts from depositions. On May 7, 1992, Contestants filed a reply to the opposition.

On May 15, 1992, Drummond Company, Inc. (Drummond) and Jim Walter Resources, Inc. (JWR) filed motions to vacate 100 citations issued to them on April 4, 1991. Drummond and JWR incorporate by reference the memorandum in support of the motion to vacate citations filed by Contestants.

I.

Motion for Summary Decision

As I noted in my order denying the Secretary's motion to strike, Contestants' motions to vacate citations are being treated as motions for summary decision under Commission Rule 64(b). Contestants, of course, do not seek a summary decision on the merits of the contested citations, i.e., whether

they tampered with the dust samples, but on an extrinsic, time-limitations issue, i.e., whether the citations were issued in compliance with the requirement in section 104(a) of the Mine Act, 30 U.S.C. § 814(a), that if the Secretary believes a mine operator has violated any mandatory standard, "[s]he shall, with reasonable promptness, issue a citation to the operator." The courts have held that the issue of laches may be determined on a motion for summary judgment. EEOC v. Dresser Industries, Inc., 668 F.2d 1199 (11th Cir. 1982); Holmes v. Virsin Islands, 370 F. Supp. 715 (D.C.V.I. 1974). Although laches, as such, is not the issue in these proceedings, the question whether the citations were issued with reasonable promptness is analogous to it.

Under Rule 64(b), Contestants' motions may be granted only if the entire record shows (1) that there is no genuine issue as to any material fact, related to the question raised in the motions; and (2) the movant is entitled to summary decision as a matter of law. The entire record includes the pleadings, depositions, answers to interrogatories, admissions, and affidavits. The Lee Report, referred to in the memoranda of both parties, and a copy of which was sent to me by counsel for other Contestants, is not part of the record, and I will therefore not consider it in ruling on these motions, except to the extent that it is referred to in depositions which are part of the record.

The Federal Courts, in considering Rule 56, F.R. Civ. P., upon which Commission Rule 64(b) is based, have said that summary judgment is a "drastic remedy." United States v. Bosurai, 530 F.2d 1105 (2d Cir. 1976). The burden of proof is on the moving party to show that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. All ambiguities must be resolved and all reasonable inferences drawn in favor of the opponent to the motion. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Garza v. Marine Transport Lines. Inc., 861 F.2d 23 (2d Cir. 1988). Cf. Mullenix, Summary Judgment: Taming the Beast of Burdens, 10 Am. J. Trial Advoc. 433 (1987) (the author questions the practice of relating the burden of proof to the standards required for a directed verdict). The Commission has stated that summary decision "is an extraordinary procedure [which] [i]f used improperly ... denies litigants their right to be heard." Missouri Gravel, 3 FMSHRC 2470, 2471 (1981).

What are the "material facts" with respect to the Pending motions? In broad outline, they may be grouped into four categories: (1) the time lapse between the dates the samples were taken and the date the corresponding citations were issued; (2) the date when the Secretary believed that Contestants violated the mandatory standard: (3) the reason for the delay

in issuing the citations: and (4) whether the delay resulted in prejudice to Contestants. I must look at the entire record to ascertain whether there are genuine issues with respect to these factual categories.

1. All 36 citations involved in this proceeding (SOCCO and Windsor) were issued April 4, 1991. The dust samples upon which the citations are based were taken at the mines between August 4, 1989, and February 15, 1990. The actual dates on which the samples were taken are shown in Exhibit 1 attached to Contestants' motion. I find that there is no genuine issue as to these material facts.

2. Contestants state that Robert Thaxton, MSHA Supervisory Industrial Hygienist and an authorized representative of the Secretary, made the determination of a violation in each case upon his examination of the dust filter. They refer to Thaxton's deposition testimony. This is not contested by the Secretary, and there is no genuine issue as to this fact. Thaxton received the cassettes containing the cited filters between August 31, 1989, and March 2, 1990. These facts appear on Contestants' Exhibit 1 and are based on the Department of Labor Custody Sheets. Thaxton made his determination that a filter was in violation of the standard within an average of 3 to 5 working days after the filter was referred to him. (Secretary's answer to Interrogatories). Therefore, Contestants assert that the time lag between the date the Secretary (in the person of Thaxton) believed that violations were shown and the date the citations were issued varied from approximately 11 months to 19 months in the case of SOCCO Meigs No. 31 Mine; from approximately 8 months to 19 months in the case of SOCCO Martinka No.. 1 Mine; from approximately 13 months to 14 months in the case of SOCCO Meigs No. 2 Mine: and approximately 13 months in the case of Windsor Mine.

The Secretary states that MSHA's national policy-level decisionmakers, as a collective group, did not reach the determination that the investigation warranted the issuance of citations until November 1990. She refers to the deposition testimony of Edward Hugler, then Deputy Administrator for Coal Mine Safety and Health, and Ronald Schell, newly-appointed Chief of the Division of Health. The Secretary asserts that she is not bound by the opinions of individual MSHA employees, e.g., Thaxton, who may personally have been persuaded at an earlier date that tampering was the cause of AWCs, because she and her agents had a responsibility to satisfy themselves that the AWC phenomena established violations. Therefore, the Secretary asserts that the time lag between the date the Secretary (in the persons of her decisionmakers) believed that violations were shown and the date the citations were issued was approximately 4 months.

Here, there is a genuine dispute as to a material fact, namely, the length of the delay between the time the Secretary believed there was a violation and the time she issued the citations. In an ordinary situation, an inspector, as an authorized representative of the Secretary, observes a condition in a mine, determines that a violation has occurred, and issues a citation immediately or within a short period of time. When dust samples are submitted by a mine operator showing an average concentration of respirable dust in excess of the amount permitted by the regulations, a citation is issued after the samples are analyzed and weighed in the MSHA Pittsburgh dust processing laboratory. The cases under consideration here are unusual and far more complex than the run-of-mine violations. They involve allegations that a large number of mine operators, indeed, almost the entire coal mining industry, deliberately tampered with the dust samples to falsify the dust levels present in the mine atmosphere. Clearly, such charges required an extensive investigation and reference to high-level Labor Department officials before the issuance of citations. Under the circumstances, the fact that Thaxton "believed" in August 1989 that the operators violated the standard did not ipso facto justify the issuance of citations. The determination by the Secretary that citations were justified was not made (resolving factual doubts in the Secretary's favor) until November 1990. Nevertheless, there is still approximately a 4-month delay between that date and the date the citations were issued. The Secretary does not dispute that fact. Therefore, for the purpose of ruling on the motions, I conclude that there is no genuine dispute as to the fact that a delay of approximately 4 months took place from the time the Secretary believed that violations occurred until the citations were issued.

3. The Secretary has advanced as the reason for her failure to issue citations promptly after concluding that violations occurred that she was requested by the U.S. Attorney's office, with whom she had been cooperating throughout the course of her investigation, not to issue the citations until after April 1, 1991, when the criminal investigation of Peabody Coal Company was completed, so as not to jeopardize the criminal proceedings. The citations were issued shortly after the Peabody indictments. Although the parties obviously do not agree as to the gravity of the reason for delay, nor whether the delay was justified, there does not seem to be any genuine issue of fact as to the Secretary's reason for delay. The question of justification must be considered in determining whether the movants are entitled to summary decision as a matter of law.

4. Contestants assert that the delay in issuing the Citations prejudiced them in four different respects: (1) Had the Contestants been notified of the alleged violations in August 1989 (when the earliest cited samples were taken), they might have taken steps to prevent the issuance of subsequent citations:

(2) non-cited samples taken at the same time as the cited samples have been disposed of or destroyed, thus preventing Contestants from comparing cited samples with non-cited samples: (3) parts of the cassettes containing the cited filters have been discarded, including the plastic covers, plugs, sealing tape, and aluminum foil backing, which might explain the AWCs; and (4) potential witnesses have ceased working for Contestants and may be unavailable to testify, and memories of those still available have faded. I conclude that there is no genuine issue as to these facts. I should note, however, that these assertions of prejudice relate in large part to the time period prior to the Secretary's conclusion that violations occurred. Nevertheless, the questions as to the significance of the facts and whether they establish prejudice must be considered in determining whether the movants are entitled to summary decision as a matter of law.

II.

Reasonable Promptness

Whether Contestants are entitled to a summary decision as a matter of law depends upon whether the facts, concerning which I have found there is no genuine issue, establish (1) that the Secretary did not issue the contested citations with reasonable promptness; and (2) her failure to do so is as a matter of law fatal to their validity.

Section 104(a) of the Mine Act provides in part: "If, upon inspection or investigation, the Secretary ... believes that an operator ... has violated this Act, or any mandatory health or safety standard, ... [s]he shall, with reasonable promptness, issue a citation to the operator .... The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act." The Mine Act's predecessor, the Coal Act of 1969, provided in section 104(b): "If, upon any inspection of a coal mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard . . , [s]he shall issue a notice to the operator . . . ." Section 104(f) of the Coal Act provided: "Each notice . . . issued under this section shall be given promptly to the operator ...."

After the Coal Act and before the Mine Act, Congress passed the Occupational Safety and Health Act (OSH Act) in 1970. Section 9(a) of the OSH Act provides in part: "If, upon inspection or investigation, the Secretary ... believes that an employer has violated ... any standard ... or ... regulations ..., [s]he shall with reasonable promptness issue a citation to the employer." Unlike the Mine Act, the OSH Act, in section 9(c) provides a statute of limitations: "No citation may

be issued under this section after the expiration of six months following the occurrence of any violation." Therefore, cases under the OSH Act are of limited utility in resolving the issue before me.

The legislative history of the Mine Act describes the situations which may justify the Secretary's delay in issuing a citation after she believes a violation has occurred:

> Section 105(a) provides that if, upon inspection or investigation, the Secretary ... believes an operator has violated ... any standard, . . . [s]he shall with reasonable promptness issue a citation to the operator. There may be occasions where a citation will be delayed because of the complexity of issues raised by the violations, because of a protracted accident investigation, or for other legitimate reasons. For this reason, section 105(a) provides that the issuance of a citation with reasonable promptness is not a jurisdictional prerequisite to any enforcement action.

S. Rep. No. 181, 95th Cong., 1st Sess. 30 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess. Lesislative History of the Federal Mine Safety and Health Act of 1977 at 618 (1978).

The first Commission case where the question of reasonable promptness in issuing citations was raised was Secretary v. Peabody Coal Co., 1 FMSHRC 473 (ALJ) (1979). The judge considered the reason for the delay and whether the delay resulted in prejudice to the operator. The inspector who issued the citations was uncertain that the conditions observed were violations and, if they were, what corrective action should be recommended. Therefore he consulted with his superiors, which did "not appear [to the judge] to be inappropriate," and the delay of 2 business days was found not to be unreasonable. "This is particularly so where there is no showing that such delay was in any way prejudicial ...." Id. at 480-481.

In a case under the Coal Act, a Commission judge determined that the issuance of a citation 35 days after the completion of an accident investigation (40 days after the alleged violation) was "an unreasonable delay in informing [the mine operator] of the allegations lodged against it." Secretary v. Bethlehem Mines Corp., 1 FMSHRC 1280, 1289 (ALJ) (1979). The judge's opinion did not discuss whether the operator was prejudiced by the delay.

The case of Old Dominion Power Co. v. Secretary 3 FMSHRC 2721 (ALJ) (1981), aff'd, Secretary v. Old Dominion bower Co., 6 FMSHRC 1886 (1984), rev'd on other srounds sub nom., Old Dominion Power Co. v. Donovan, 772 F.2d 92 (4th Cir. 1985),

involved a delay of 1 year in issuing a citation after the inspector determined that a violation occurred. The delay resulted from "the complexity of the law with respect to whether MSHA should cite only a production operator for the violations of independent contractors working on mine property." 3 FMSHRC at 2737. The judge concluded that "[t]he evidence ... shows that no prejudice to OD resulted because of the fact that OD was not specifically cited for a period of 1 year [since] OD had participated in the thorough investigation which MSHA made into the cause of the accident and MSHA personnel ... discussed the fact that MSHA was considering the question of finding OD to be an operator under the ... Act ...." Id. at 2739.

The Commission referred to the last sentence in section 104(a) that the requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of the Act. It then discussed prejudice: "Most important, ... Old Dominion has not shown that it was prejudiced by the delay. Indeed, Old Dominion was aware from the time of its employee's fatal accident that an investigation involving its actions was being conducted by MSHA, and it has been given a full and fair opportunity to participate in all stages of this proceeding." 6 FMSHRC at 1894.

In Emerald Mines Co. v. FMSHRC, 863 F.2d 51 (D.C. Cir. 1988), the Court of Appeals affirmed the Commission's decision upholding orders and citations issued for past violations not directly observed by the inspector. In its opinion the court said at page 58, "Section 104(a) requires that citations issue 'with reasonable promptness,' and this requirement could be construed to cover not only the inspection to citation time lag but the violation to citation span as well. In any event, the Secretary is under a general obligation to act reasonably and would not do so were she to resurrect distant violations to place an operator on a section 104(d) chain. A 'reasonable promptness* requirement here would comport with, and be no less administrable than, other timely action specifications contained in the Mine Act."

The Wilberg Mine fire which began in December 1984, spawned a number of Commission cases. In March 1987, the Secretary issued citations and orders charging Emery Mining Company as an operator with certain violations and charging Utah Power & Light with derivative liability as a successor-in-interest. Commission Judge Morris held that Utah Power & Light was not cited as an operator and could not be held liable as a successor-in-interest. Thereafter in April 1988, the Secretary sought to modify the citations and orders so as to charge Utah Power & Light with direct liability as an operator. The judge denied her motion. Energy Mining Corn. and/or Utah Power and Lisht Co. v. Secretary, 10 FMSHRC 1337 (ALJ) (1988): "I conclude that the purported modifications cannot stand. In particular, the modifications are

untimely, were not issued 'forthwith' nor with 'reasonable promptness,' and the modification conflicts with the procedural requirements of the Act: further they are prejudicial to [Utah Power & Light]." Id. at 1346.

Judge Morris specifically addressed the delay in issuing the 104(a) citations holding that they were not issued with reasonable promptness: "While reasonable promptness is not a per se jurisdictional bar to their issuance, the legislative history indicates there must be a reasonable basis for the delay, such as a 'protracted accident investigation.' ... Here, the protracted accident investigation could justify the initial delays. But by August 13, 1987 the last of the citations and orders had been issued and there appears to be no legitimate basis for the further delay until April 1988 to cite [Utah Power and Light]." Id. at 1351 (citation omitted). The judge discussed and rejected the Secretary's contention that Utah Power & Light was not prejudiced by the delay.

The Commission has thus grappled with the issue of the reasonable promptness requirement despite the provision in 104(a) of the Act that the requirement is not a "jurisdictional prerequisite" to enforcement of the Act. And the Court of Appeals stated in Emerald Mines, at 58, that "the Secretary is under a general obligation to act reasonably," and she may not issue citations for "distant violations" without a reasonable basis for the delay. Therefore, I conclude that the Commission and the courts must still consider whether a delay in issuing a citation has a reasonable basis, and whether the delay resulted in prejudice to the mine operator. There are, then, three factors which must be considered here: (1) the length of the delay; (2) the reason for the delay; and (3) whether the delay resulted in prejudice to the mine operators. The Commission has indicated that the most important of these factors is (3), the question of prejudice.

For the purposes of ruling on the motions, I have found that the citations involved here were issued approximately 4 months after the Secretary believed that violations were shown. The Secretary states that the delay in issuing the citations was justified by the continuing criminal investigation: she was requested by the U.S. Attorney's Office not to issue citations or otherwise indicate her awareness of the suspected tampering violations, because this would have jeopardized the grand jury investigation by revealing the nature of the potential criminal charges and the targets of the investigation. Although the continuing criminal investigation involves companies other than Peabody, the Peabody case seems to have been the primary concern of the U.S. Attorney. After the Peabody indictments were handed down, and pleas were entered, the citations were issued. There is no indication that SOCCO or Windsor was or is the target of any criminal investigation. Thus, the question is whether a

pending criminal investigation of other coal companies justifies a substantial delay *in* issuing citations to SOCCO and Windsor. There is an important public purpose served in not prematurely revealing matters involved in a criminal investigation. There is also an important public purpose in requiring the Secretary to issue a citation with reasonable promptness after she has determined that a violation has occurred. The public policy against premature disclosure of criminal investigations is, on balance, of greater importance than the requirement that the Secretary issue citations promptly, especially since the requirement is by the terms of the statute not a jurisdictional prerequisite. Therefore, I conclude that the Secretary has established an adequate justification for the delay. This brings me to the question of prejudice to the mine operators.

Socco and Windsor urge that the delay in issuing the citations has prejudiced them in preparing and conducting their defense to the violations charged by limiting the evidence they could seek to introduce.

First, they argue that "[i]f the allegations had been brought to (their] attention at the time the samples were taken, [they] could have investigated them and, if necessary, taken corrective measures .. .[to avoid] the alleged defects in the subsequently cited samples ...." Contestants have asserted that AWCs can result from naturally occurring conditions, e.g., physical attributes of the cited filters, rather than tampering. However, the record does not indicate what corrective measures might have been taken by the Contestants to avoid additional AWC citations. Whatever harm has resulted to the operators' cases has not been shown to be prejudicial.

Second and third, Contestants argue that "[h]ad MSHA issued the citations promptly, Contestants would have demanded that it preserve not only the cited samples, but also any [non-cited] samples submitted at the time, establishing a 'norm' for measuring the alleged 'abnormality' of the cited samples." I agree with Contestants that the disposal of the non-cited filters taken at the same time as the cited filters and the discarding of cassette parts of the cited filters limits in some degree their ability to demonstrate that AWCs result from physical attributes of the cited filters. However, as I noted above, the delay in issuing these citations was (for the purpose of ruling on these motions) from November 1990 until April 1991. The disposal of the non-cited filters and cassette parts occurred before that time. For this reason, I conclude that the delay did not prejudice the mine operators' cases.

Finally, Contestants argue that "the delay has diminished the availability of testimonial evidence" because potential witnesses have ceased working for them and the memories of witnesses who are still available have faded with the passage of

time. I agree with Contestants that personnel changes and the faded memories of remaining employees reduces in some degree their ability to demonstrate that they properly handled the filter cassettes. However, the fact that witnesses have ceased working for Contestants does not establish their unavailability. contestants have not shown that the potential witnesses are indeed unavailable, nor what their testimony would be. Thus, they have failed to show prejudice. I conclude that a delay of 4 months in issuing the citations is not prejudicial to Contestants' ability to defend themselves in these proceedings.

Because the statutory mandate that section 104(a) citations be issued with "reasonable promptness" is not a jurisdictional prerequisite to enforcement, because the Secretary has established an adequate justification for the delay, and because Contestants have not shown that they were prejudiced, I conclude that they are not entitled to summary decision as a matter of law.

ORDER

Accordingly, the motions to vacate the citations filed on behalf of SOCCO, Windsor, Energy Fuels, Great Western Kentucky, Great Western, Harlan, Drummond, and JWR are DENIED.

James A. Broderick

James A. Broderick
Administrative Law Judge

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