

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 30, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-253
Petitioner	:	A.C. No. 12-02374-139953
	:	
	:	Shamrock Mine
	:	
v.	:	Docket No. LAKE 2008-254
	:	A.C. No. 12-01732-139936
	:	
SOLAR SOURCES, INC.,	:	Craney Mine
Respondent	:	

CORRECTED ORDER DENYING RESPONDENT’S MOTION TO DISMISS¹
AND
PREHEARING ORDER

These civil penalty proceedings concern two alleged violations of the new miner training provisions in Part 48 of the Secretary’s regulations. The cited violations were designated as non-significant and substantial in nature to reflect that it was unlikely that the violations will result in an accident causing serious injury. See, e.g., *Cement Division, National Gypsum*, 3 FMSHRC 822, 825 (April 1981). The Secretary has proposed a total civil penalty of \$120.00 in these matters.

Solar Sources, Inc., (Solar) has filed a Motion to Dismiss these cases based on its assertion, in essence, that the Secretary failed to file the underlying Petitions for Assessment of Civil Penalty within a reasonable time period as contemplated by section 105(a) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act). 30 U.S.C. § 815(a). The Secretary opposes Solar’s motion.

¹ This Order corrects the Order issued earlier today in these proceedings to more accurately reflect the Commission’s past and current caseload.

Section 105(a) provides:

If, after an inspection or investigation, *the Secretary* issues a citation or order under section 104, [she] *shall, within a reasonable time* after the termination of such inspection or investigation, *notify the operator . . . of the civil penalty proposed*

(Emphasis added). Thus, this statutory provision requires the Secretary to file a Petition for Assessment of Civil Penalty within a reasonable period of time after a notice of contest is filed.

Commission Rule 28, 29 C.F.R. § 2700.28, provides that the Secretary shall file her petition for assessment of civil penalty within 45 days of receipt of a mine operator's contest of a proposed assessment. The Secretary filed the subject petitions on January 9, 2009, more than eight months after the end of the 45 day filing period provided in Rule 28. Consequently, Solar contends the citations in issue must be dismissed because the Secretary failed to act reasonably when she filed her petitions for civil penalty considerably later than the 45 days specified in Rule 28.

It is well settled that the Secretary's late filing of a civil penalty petition is not jurisdictional. In this regard, the Court has noted that statutory processing guidelines generally are intended to "spur the Secretary to action" rather than to confer rights on litigants that limit the scope of the Secretary's authority. *Sec'y of Labor v. Twentymile Coal Co.*, 411 F.3d 261 (D.C. Cir. 2005). The 45 day filing guideline in Rule 28 was deemed reasonable at a time when the Commission's caseload averaged approximately 2,200 contest and civil penalty cases. In contrast, the Commission currently has 12,880 contest and civil penalty cases that involve petitions that have been filed by the Secretary. Consequently, strict adherence to a 45 day filing guideline in the face of this unprecedented workload presently is not warranted.

Significantly, it has neither been contended, nor shown, that the eight month delay by the Secretary has, in any way, prejudiced Solar. On balance, in the absence of a showing of prejudice, the Secretary's eight month delay does not provide an adequate basis for imposing the harsh sanction of dismissal. Accordingly, **IT IS ORDERED** that Solar's Motion to Dismiss **IS DENIED**.

Having denied Solar's Motion to Dismiss, in accordance with the provisions of section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 **et seq.**, the above proceedings will be called for hearing on the merits at a time and place to be selected.

1. On or before **September 4, 2009**, the parties shall confer for the purpose of discussing settlement and stipulating as to matters not in dispute. If settlement is reached, a motion for its approval shall be filed by the Secretary of Labor no later than **September 4, 2009**.

2. If settlement is not agreed upon, the parties shall send to each other and to me no later than **September 4, 2009**, synopses of their expected legal arguments, expected proof, lists of exhibits that may be introduced in evidence, and matters to which they can stipulate at the hearing. Each party shall also state its best estimate of the time necessary to present its case at the hearing, as well as hearing location preference.

Jerold Feldman
Administrative Law Judge

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