

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 PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 2008-589
Petitioner	:	A.C. No. 12-02249-156265
	:	
v.	:	
	:	
FIVE STAR MINING, INC.,	:	Mine: Prosperity Mine
Respondent	:	

ORDER DENYING RESPONDENT’S MOTION TO DISMISS

This civil penalty proceeding concerns one alleged violation of Part 77 of the Secretary’s regulations. This violation was designated as non-significant and substantial in nature to reflect that it was unlikely that the violation 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 \$207.00 in this matter.

Five Star Mining, Inc., (Five Star) has filed a Motion to Dismiss this case based on its assertion, in essence, that the Secretary failed to file the underlying Petition 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 Five Star’s motion.

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 petition on January 23, 2009, more than four months after the end of the 45 day filing period provided in Rule 28. Consequently, Five Star contends the citation at issue must be dismissed because the Secretary failed to act reasonably when she filed her petition 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 of Appeals for the District of Columbia Circuit 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. *Secretary of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 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, there are currently 12,880 contest and civil penalty cases, the vast majority of which 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 four month delay by the Secretary has, in any way, prejudiced Five Star. On balance, in the absence of a showing of prejudice, the Secretary's four month delay does not provide an adequate basis for imposing the harsh sanction of dismissal. Accordingly, **IT IS ORDERED** that Five Star's Motion to Dismiss **IS DENIED**.

Robert J. Lesnick
Chief Administrative Law Judge

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