FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 22, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2002-441-M
Petitioner	:	A.C. No. 26-00789-05528
v.	:	
	:	
PAIUTE AGGREGATES INC.,	:	Mine: Paiute Aggregates
Respondent	:	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This case is before me on a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). Respondent has moved that the petition be dismissed on grounds that the Secretary did not notify it of the proposed civil penalties within a reasonable time after completion of the investigation. The Secretary has opposed the motion, relying in part on an affidavit of MSHA's Director of Assessments describing a number of factors that affected the processing of penalty assessments during the relevant time period. Respondent does not assert a colorable claim prejudice resulting from the alleged delay. For the reasons set forth below, Respondent's Motion to Dismiss is denied.

Facts

On February 16, 2001, a fatal accident occurred at Respondent's mine in Wadsworth, Nevada. MSHA commenced an investigation of the accident that day. On March 20, 2001, MSHA issued eight citations and orders, three of which are the subject of this penalty proceeding.[1] Respondent filed Notices of Contest as to the alleged violations on April 19, 2001. Those cases were stayed, with Respondent's consent, pending the filing of civil penalty proceedings. MSHA issued its final investigative report on April 12, 2001. The citations and orders were transmitted to MSHA's Special Assessments Section on May 29, 2001. A related special investigation to determine whether enforcement proceedings would be initiated against individual agents of Respondent pursuant to section 110(c) of the Act was completed by August 2, 2001. MSHA issued its proposed penalty assessments for the three alleged violations at issue here on May 31, 2002.

The time consumed by MSHA in issuing the proposed assessments, over 13 months from

[1] Two other alleged violations are at issue in Commission Docket No. WEST 2002-269-M. A similar motion to dismiss, filed in that case, was denied by Order dated, October 18, 2002.

the completion of the initial investigation and almost 10 months after the closure of the special investigation, was the result of a number of factors that the Secretary describes as "staffing constraints of an Agency with too much work for too few employees." Opposition, at p. 3. MSHA's Director of Assessments, executed an affidavit citing MSHA's policy program manual, which specifies that penalty proposals in cases involving a fatality be issued within eighteen months after the investigation report is issued, and noting that the office's goal is to issue such penalty assessments within 180 days. He explained that from March 2001 to May 2002, of the four people employed to process all special assessment cases, one was on extended leave and another was involved in training for much of 2001. In addition, the supervisor of the special assessments group was heavily involved in the development of MSHA's Standardized Information System, a multi-year project. In calendar year 2001, the office considered 2,153 citations and orders for "routine" special assessments, 217 fatal/serious injury-related special assessments and 204 assessments for section 110(c) violations. In the first nine months of calendar year 2002, 1,949 citations and orders were considered for routine special assessments, 183 fatal/serious injury-related special assessments and 158 assessments for 110(c) violation were considered. Over 2,500 special assessment referrals were processed in 2001 and it is projected that 3,000 such requests will be processed in 2002.

Applicable Law

Section 105(a) of the Act, 30 U.S.C. § 815(a), provides, in pertinent part:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104 [814], he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed . . . .

The Commission addressed the Secretary's obligation to issue proposed assessments in *Steele Branch Mining*, 18 FMSHRC 6, 14 (Jan. 1996)[2], stating that:

> Section 105(a) does not establish a limitations period within which the Secretary must issue penalty proposals. *See Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089, 2092-93 (October 1993), *aff'd*, 57 F.3d 982 (10th Cir. 1995); *Salt Lake County Rd. Dept.*, 3 FMSHRC 1714 (July 1981); and *Medicine Bow Coal Co.*, 4 FMSHRC 882 (May 1982). In commenting on the Secretary's statutory responsibility to act "within a reasonable time," the key Senate Committee that drafted the bill enacted as the Mine Act observed 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." S. Rep. No. 181,

[2] While *Steele Branch Mining* was a split decision, all four Commissioners who participated agreed on this issue.

> 95th Cong. 1st Sess. 34 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978). Accordingly, in cases of delay in the Secretary's notification of proposed penalties, we examine the same factors that we consider in the closely related context of the Secretary's delay in filing his penalty proposal with the Commission: the reason for the delay and whether the delay prejudiced the operator.

Steele Branch Mining involved a period of 11 months between termination of the citation and issuance of the proposed penalty assessment. The Secretary did not offer any explanation for the time that elapsed. Nevertheless, the Commission took "official notice" of the fact that the Secretary had an unusually high case load in 1992, and found that to be an "adequate reason for the delay." *Id*. *Rhone Poulenc*, and *Salt Lake County* involved failures by the Secretary to comply with the 45-day time limit for filing a petition for assessment of civil penalties established by Commission Procedural Rules. In *Salt Lake County*, the Commission was critical of the Secretary's reliance on high case loads and limited clerical help as a justification for untimely filing. Nevertheless, the Commission reversed the dismissal that had been entered in that case, holding that "effectuation of the Mine Act's substantive scheme, in furtherance of the public interest" precluded automatic dismissal of an untimely filed petition. 3 FMSHRC at 1716. It established the "adequate cause" test for justifying a late filing and recognized that "procedural fairness" could dictate dismissal where an operator could establish that it had suffered prejudice as a result of any delay. The Commission concluded its analysis with the following language: "Allowing * * * an objection [based on prejudice] comports with the basic principle of administrative law that substantive agency proceedings, and effectuation of a statute's purpose, are not to be overturned because of a procedural error, absent a showing of prejudice." (citations omitted). *Id*.

Analysis

The statute's term "within a reasonable time" has not been further defined by Commission Rule. The Secretary's interpretation, as reflected in MSHA's program policy manual, is that assessments issued within 18 months of the completion of an investigation satisfy the "reasonable time" standard. However, the Commission, in *Steele Branch Mining*, characterized as "delay" an 11 month period between termination of a citation and issuance of a proposed penalty assessment. Here more than 13 months elapsed between completion of the investigation and the assessment. Because Respondent does not make a colorable claim of prejudice, the issue to be decided is whether the Secretary has established adequate cause for the delay.

While claims of excessive work load have often been found to satisfy the adequate cause requirement, the Commission has made clear that such claims will not receive blanket approval. *Steele Branch Mining*, 18 FMSHRC at 14; *Salt Lake County Rd. Dept.*, 3 FMSHRC at 1717. The "excessive work load" argument advanced here is substantially different from that found to have justified delays in *Steele Branch* and *Rhone-Poulenc*. In the 1991-92 time period involved

in those cases, there was an almost 300% increase in cases, coupled with an "unusually high volume of penalty reassessments." *Rhone-Poulenc*, 15 FMSHRC at 2094. The increase in special assessments during the time period pertinent here was considerably more modest, approximately 20%. While two of the four employees assigned to the special assessments office were unavailable for significant portions of the period, the reason for one's extended leave was not explained and the absence of another for training purposes appears to have been a voluntary staffing decision by MSHA. The Secretary has also not disclosed whether efforts were made to transfer or detail other MSHA staff to remedy these staffing shortages and/or why any such efforts were unsuccessful.

Despite these shortcomings in the Secretary's explanation of the delay, I find that adequate cause has been established. The incident that triggered the investigation, a fatal accident, was extremely serious, and several citations and orders were referred for special assessment. Careful scrutiny of the facts and consideration of the factors statutorily required to be considered in the formulation of a penalty assessment and the processing of the recommendation for final approval were appropriately part of a deliberative process that consumed considerable time.[3] The special assessments office handles a large volume of cases, each of which must be considered on its own merits. Staff resources in the office were significantly reduced during the pertinent time period, and the supervisor's ability to assist was considerably reduced by involvement in a comprehensive multi-year project.

Respondent made no claim of prejudice in its motion. However, in its reply, Respondent asserted that the delay was inherently prejudicial to its ability to defend the Secretary's allegations, and speculated that witnesses' memories made have faded and/or that witnesses may have become unavailable. Respondent was, no doubt, involved in the investigation, and was served with the citations and orders a little over a month after the accident occurred. It was on notice that it was alleged to have committed several violations of mandatory health and safety standards and, because of the seriousness of the incident, could and should have anticipated that significant civil penalties would be proposed. Respondent was free to take whatever steps it desired to preserve witnesses' recollections and/or testimony and there is no indication that it failed to do so. The parties have engaged in discovery during the pendency of the contest proceedings. Respondent's assertions of possible prejudice to its case fall far short of establishing that it has suffered actual prejudice because of the delay in issuance of the penalty assessments.

Respondent has pointed out some of the deficiencies in the Secretary's explanation of the delay, and I agree that the Secretary's explanation does not establish that every week or day of the nearly 14 month period was necessitated by factors beyond the Secretary's control.

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[3] A related special investigation was completed almost 4 months after issuance of the investigative report as to these alleged violations against the operator. The Secretary has not claimed that the assessment process was justifiably suspended pending completion of that investigation, though it may have been reasonable to do so.

However, Congress clearly intended that delays in proposing penalties should not nullify penalty proceedings and the Commission's decision in *Salt Lake County* was premised, in part, on the "basic principle of administrative law that substantive agency proceedings, and effectuation of a statute's purpose, are not to be overturned because of procedural error, absent a showing or prejudice." 3 FMSHRC at 1716. On the facts of this case, the Secretary's explanation of the reasons for the delay satisfies the adequate cause portion of the test. A showing that the delay resulted in actual material prejudice to Respondent's ability to defend against the allegations could justify dismissal of the case. Respondent has failed to make such a demonstration.

The facts in this case are comparable to those in other cases decided by Commission Administrative Law Judges where essentially the same justification has been found to establish adequate cause. *See BGS Const., Inc.*, 24 FMSHRC 787 (May 2002) (ALJ) (over 14 months, fatality); *Cactus Canyon Quarries of Texas, Inc.*, 24 FMSHRC 604 (June 2002) (ALJ) (12 months, no serious accident involved). While these decisions do not constitute Commission precedent, I note that this case is more comparable to *BGS Construction* than other cases relied upon by Respondent.

ORDER

On the facts of this case, I find that the Secretary has fulfilled her burden of showing adequate cause for the delay in issuing the proposed penalty assessment. Respondent has not demonstrated that it has suffered prejudice attributable to the delay. Accordingly, Respondent's Motion to Dismiss is **Denied**.

Michael E. Zielinski
Administrative Law Judge
202-434-9981

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