FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
303-844-3577/FAX 303-844-5268

July 23, 2009

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2008-939
Petitioner	:	A.C. No. 42-01715-145920-01
	:	
v.	:	Docket No. WEST 2008-940
	:	A.C. No. 42-01715-145920-02
GENWAL RESOURCES, INC.,	:	
Respondent	:	Crandall Canyon Mine

ORDER DENYING MOTION TO DISMISS
AMENDED PREHEARING ORDER

On July 16, 2008, the Secretary of Labor filed petitions for assessment of civil penalty in these cases under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq*. ("Mine Act"). She also filed a motion to file these petitions out of time. Genwal Resources, Inc, filed its answer to the petition within 30 days. In its answer, Genwal opposed the Secretary's motion to file the petitions for penalty out of time and asked that the cases be dismissed on several grounds. The cases were assigned to me on March 19, 2009, without a resolution of these issues. Genwal filed another motion to dismiss on June 29, 2009, and the Secretary filed an opposition.

These cases involve three citations issued under section 104(a) of the Mine Act, a citation issued under section 104(d)(1) and an order issued under section 104(d)(2). The citations were issued in July 2006 and the order was issued in July 2007. The total proposed penalty is $11,080.00. In her motion to file the petitions for penalty late, the Secretary states that Genwal's notice of contest of the proposed penalties was filed on April 30, 2008. Commission Procedural Rule 28(a) required the Secretary to file the petitions for penalty within 45 days after Genwal contested the penalties, which would be no later than June 16, 2008. 29 C.F.R. § 2700.28(a). She attributes the late filing of her penalty petition to "an increased workload and administrative oversight by the [MSHA] field office." She argues that the time limit in the Commission's rule does not impose a jurisdictional limitation and that, because the Mine Act states that petitions for penalty must be filed "within a reasonable time," the court should examine whether reasonable cause existed for the Secretary's delay. A declaration of Price, Utah, Field Office Supervisor William M. Taylor was submitted in support of her motion.

Genwal's motion to dismiss raises a number of additional issues. It states that the cases should be dismissed "because the citations were written while the mine was under its previous ownership and because of the extreme prejudice that has been created by the passage of time and the events that have occurred since these citations were written on July 27, 2006." (Motion, p.

1). The mine was purchased by its current owner on August 9, 2006. Genwal states that as part of the purchase agreement, outstanding penalties and fines were addressed and the parties agreed that the former owner would be responsible for all MSHA penalties that had not yet been assessed during its period of ownership. In negotiating these terms, Genwal represents that neither the current owner nor the former owner of the company could have foreseen that "MSHA penalties would take in excess of two (2) years to be assessed, and therefore, extreme prejudice has been created by the passing of time." *Id.* 1-2. Genwal also maintains that the information contained in the declaration of MSHA's field office supervisor is not relevant because the Secretary had "one full year to assess the penalties for the citations at issue prior to the occurrence of the events referenced in the declaration. . . ." *Id.* 2.

In addition, Genwal states that the citations were served on the company's safety director, Jim Pruitt. Because Mr. Pruitt is now an MSHA inspector, Genwal argues that it "will undoubtedly face obstacles in attempting to interview Mr. Pruitt for discovery purposes . . . ." *Id.* 2.

Section 105(a) of the Mine Act provides:

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

(30 U.S.C. §815(a); emphasis added). This statutory provision requires the Secretary to propose penalties within a reasonable period of time after a citation or order of withdrawal has been terminated.

The Secretary states that Genwal contested the penalties on or about April 30, 2008. Commission Procedural Rule 26, 29 C.F.R. § 2700.26, provides that a mine operator must notify the Secretary that it wishes to contest a proposed penalty assessment within 30 days of its receipt. Consequently, it can be estimated that Genwal received the Secretary's proposed penalty assessment on or about March 31, 2008. The citations at issue were terminated on or about August 7, 2006. Thus, it took the Secretary more than a year and a half to propose penalties for these citations. The Commission's procedural rules do not set forth a time limit for the Secretary to propose penalties. Rule 25 simply states that the Secretary "shall notify the operator . . . of the violation alleged [and] the amount of the proposed penalty assessment. . . ." 29 U.S.C. § 2700.25.

The record reveals that the Secretary filed her petition for assessment of penalty about 77 days after Genwal filed its notice of contest of the penalties. As stated above, Commission Procedural Rule 29 provides that the Secretary shall file her petition for assessment of penalty within 45 days of receipt of a mine operator's contest of a proposed assessment.

The declaration of Field Office Supervisor Taylor states that the field office was not able to process and submit to the Office of the Solicitor the "packets" necessary for the petition for assessment of penalty until early July 2008. He states that the Price, Utah, field office was "diligently involved" in providing information to investigative panels and the public following the entrapment of miners at the Crandall Canyon Mine starting in August 2007. All available office personnel were involved in this effort. The declaration also states that, at about the same time, the number of penalty contests drastically increased both nationwide and in Utah. He states that the delay in processing Genwal's penalty contest was not "due to any dilatory intent on the part of the agency."

It is well settled that the Secretary's failure to meet time deadlines when filing penalty proposals and petitions for assessment of penalty is not jurisdictional. The statutory processing deadlines 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 256, 261 (D.C. Cir. 2005).

The key events can be summarized as follows:

July 27, 2006	Citations issued
August 7, 2006	Citations terminated
March 31, 2008	Penalty proposed under Procedural Rule 25
April 30, 2008	Penalty contested by Genwal under Procedural Rule 26
July 16, 2008	Petition for Assessment Penalty filed under Procedural Rule 28
August 15, 2008	Answer filed by Genwal

There can be no dispute that the citations were issued about three years ago. Almost one year of the delay in these cases can be attributed to this Commission. The Commission's caseload increased significantly during this period. The Secretary's petition for assessment of penalty was filed only about 30 days after the due date. The biggest delay was at the Price field office and MSHA's Office of Assessments. Although the citations were terminated on August 7, 2006, the Secretary did not propose penalties until March 31, 2008.

Dismissal is a harsh remedy. Genwal alleges that it has been prejudiced by this delay, but it does not set forth any specifics. It argues that the length of time establishes prejudice. Genwal also relies on the transfer of ownership of the company because neither party to the sale "could have foreseen that MSHA penalties would take in excess of two (2) years to be assessed." (Motion, 1- 2). It is well established that the mere passage of time is not sufficient to establish prejudice. Indeed, it often takes the Office of Assessments nine to twelve months to propose a penalty. Section 105(a) of the Mine Act was written to encourage compliance with the Secretary's safety and health standards rather than to create an avenue for respondents to limit the scope of the Secretary's authority. Genwal admitted that arrangements were made in the purchase agreement for the payment of outstanding penalties assessed for citations issued prior to

the purchase date. Genwal knew that it had been issued the subject citations and that penalties had not yet been proposed.

The Senate committee that was instrumental in drafting the Mine Act specifically stated in its report that the committee "does not expect that the failure to propose a penalty with promptness shall vitiate any proposed penalty proceeding." S. Rep. No. 95-181, at 34 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 622 (1978). I accept the Secretary's explanation for her delay and find that it was reasonable under the circumstances. Other administrative law judges have reached similar conclusions in other cases. *See, Wabash Mine Holding Co.*, 27 FMSHRC 672, 685-88 (October 2005) (15 month delay); *Mountain Coal Co.,* 31 FMSHRC ____, No WEST 2009-189 (June 30, 2009) (2 year delay).[1]

If these cases do not settle and Genwal is able to establish at a hearing that the delay prejudiced its ability to offer evidence in its defense with respect to specific citations, then I will consider whether an equitable remedy is appropriate. For the reasons set forth above, Genwal's motion to dismiss these cases is **DENIED** and the Secretary's motion to file late petitions for the assessment of civil penalty is **GRANTED.**

In order to encourage the parties to settle these cases, counsel for the Secretary shall contact Respondent to discuss settlement. If a settlement is reached, a motion for its approval shall be filed by the Secretary no later than **August 19, 2009**. If the parties are not able to settle the cases, counsel for the Secretary shall, on or before **August 20, 2009**, initiate a conference call with me to discuss the status of the cases and potential hearing dates.

Richard W. Manning
Administrative Law Judge

Distribution:

Matthew B. Finnigan, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202 (Fax and First Class Mail)

[1] The issue raised concerning Mr. Pruitt is irrelevant. Mr. Pruitt could have taken a position with MSHA even if there had not been a delay in proposing a penalty. There has been no showing that Mr. Pruitt's departure will create any prejudice to Genwal.

Jason D. Witt, Esq., Assistant General Counsel, Coal Services Group, 56854 Pleasant Ridge Road, Alledonia, OH 43902 (Fax and First Class Mail)

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