FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 17, 2002

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2001-379-M
Petitioner	:	A. C. No. 41-00009-05554
v.	:	
	:	Mine: Fairland Plant & Quarries
CACTUS CANYON QUARRIES OF	:	
TEXAS INCORPORATED,	:	
Respondent	:	

ORDER DENYING MOTION TO DISMISS
ORDER OF ASSIGNMENT

Before: Judge Barbour

This case is before me pursuant to an order of the Commission dated March 28, 2002, directing me to consider whether the operator, Cactus Canyon Quarries ("Cactus Canyon") was prejudiced by the Secretary of Labor's ("Secretary") 364-day delay in assessing the proposed penalties for the citation and order at issue in this case in addition to her 15-day delay in filing her penalty petition. In my December 13, 2001 order, I rejected Cactus Canyon's assertion that the 15-day delay was prejudicial and accepted the Secretary's late-filed petition.

The Mine Safety and Health Administration ("MSHA") issued the order and citation that are the subject of this case on August 14, 2000. Order No. 7896162 was issued because it is alleged that an employee, observed in the raised bed of a tractor trailer, was not wearing a safety belt and line. Citation No 7896127 was issued because it is alleged that the handrail on the walkway next to the Jam Crusher had been removed. The Secretary did not assess proposed penalties until August 13, 2001.[1]

For the reasons articulated below, and in light of the Commission's order, I conclude the Secretary's delay in assessing the proposed penalties was reasonable, and Cactus Canyon was not prejudiced by the delay.

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[1]/ Cactus Canyon contends the penalty assessment was postmarked August 20, 2001, 7 days after the date of assessment. Assuming the company is covert, the 7 day period between August 13, 2001 and August 20, 2001 does not effect the outcome of this order.

Discussion

1. Reasonableness of the Delay

Section 105(a) of the Mine Act ("the Act") requires the Secretary to notify an operator of a proposed civil penalty "within a reasonable time after the termination of such inspection or investigation." 30 U.S.C. § 815(a). Although the Act gives no guidance regarding the duration of "a reasonable time," MSHA has provided some direction in its Program Policy Manual, defining "reasonable time" as "normally . . . within 18 months of the issuance of a citation or order." The manual further provides, however, that "[c]itations and orders not associated with a serious accident, fatality, or other special circumstance should be assessed within 31 days of the issuance date." *Program Policy Manual*, Part 100, at 6(f) (2002).

Cactus Canyon argues that MSHA's delay in assessing the penalties was unreasonable, and, in fact, the penalties should have been assessed within 31 days of the issuance of the citation and order. Resp. Suppl. To Mot. to Dis. at 1. In support of it's argument, Cactus Canyon cites a decision in which Administrative Law Judge August Cetti ruled a 15-month delay unreasonable where the case was "uncomplicated." *United Metro Materials*, 23 FMSHRC 1085, 1088 (Sept. 2001)(ALJ). Judge Cetti concluded the Secretary had failed to demonstrate adequate cause for the delay because her explanation was general and vague, and she failed to expound upon the specific circumstances which caused the delay. *Id*. Cactus Canyon further contends the Secretary offered no reason for the delay in response to discovery requests. Resp. Suppl. To Mot. to Dis. at 1; *see also* Resp. Exhibits A, B, and C.

There is no strict definition for "reasonable time" within the meaning of Section 105(a) of the Mine Act. The "31-day" stipulation in the PPM is not a hard and fast rule, as evidenced by the language "*should* be assessed within 31 days." Moreover, the Senate Committee, when drafting the Mine Act, commented on the broad concept of "reasonable time" when it stated, "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, 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) (emphasis added). In light of the Senate Committee's reluctance to establish a specific time frame for notifying the operator of the proposed penalties, the Commission has stated that Section 105(a) does not prescribe time periods within which the Secretary must issue penalty proposals. *Steele Branch Mining*, 18 FMSHRC 6, 14 (Jan. 1996). Rather, if a proposal is delayed, the judge must consider: (1) the reason for the delay, and (2) whether the operator is prejudiced by the delay, the identical test used when scrutinizing the Secretary's delay in filing the penalty petition. *Id*.

The Secretary contends the penalty assessment was delayed for two reasons. First, the citation and order were not assessed until after a Safety and Health Conference was held, which resulted in the modification of both the citation and order. The conference was held 1 month after the citation and order were issued. Sec. Response to Resp. Suppl. to Mot. to Dis. at 4. Second, due to a backlog of cases and a personnel shortage, necessary information regarding the citation and order was not entered into MSHA's Management Information System ("MIS") and forwarded to the Assessments Office until May of 2001. *Id.* at 5. Between May 2001 and August 14, 2001, the Secretary further submits, the office was short staffed and concentrating on a high caseload involving fatalities. *Id.* The Secretary cites to a decision, also by Judge Cetti, in which Judge Cetti found an unusually high caseload and lack of clerical personnel adequate cause for the delay. *Art Beavers Const. Co.*, 16 FMSHRC 2361, 2365-66 (Nov. 1994)(ALJ).

I conclude the Secretary has demonstrated adequate cause for the delay. MSHA's guidelines suggest that penalties not be assessed until after the Safety and Health Conference. *PPM,* Part 100, at 6 (2002). If Cactus Canyon requested a conference - and it does not deny having done so - the conference delayed the assessment of penalty until after any alterations were made to the citation and order as a result of the conference. However, it is the Secretary's case load and personnel shortage that I find most persuasive. An unusually high caseload and shortage of clerical personnel have been considered adequate cause for late-filed penalty petitions and in my view they are, likewise, sufficient reasons for the late assessment of civil penalties. *See Salt Lake Co. Road Dep't.*, 7 FMSHRC 1714 (Jul. 1981); *Medicine Bow Coal*, 4 FMSHRC 882 May (1982); and *Rhone-Poulenc of Wyoming Co.*, 15 FMSHRC 2089 (Oct. 1993), *aff'd* 57 F.3rd 92 (10th cir. 1995). Moreover, while administrative law judge decisions and orders are not binding precedent, I note that the present matter is more analogous to *Art Beavers* than to *United Metro*. In *United Metro*, Judge Cetti observed that the Secretary did not offer specific reasons for the delay, while, in *Art Beavers*, she did. In the present matter, she, likewise, has offered specific reasons, which I have concluded, constitute adequate cause.

2. Prejudice

Even though the Secretary has demonstrated adequate cause, Cactus Canyon still could prevail if she was prejudiced by the delay. The company asserts the delay has hindered its case because witnesses' memories have faded and witnesses have moved beyond subpoena range and to unknown locations. Resp. Suppl. to. Mot. to Dis. at 2. It further contends that the "inspectors have no independent recollection of the citations." *Id.*

The Secretary, to the contrarily, notes that when this case was before me originally, Cactus Canyon did not claim prejudice from the 365-day delay. Sec. Response to Resp. Suppl. to Mot. to Dis. at 3. Hence, the Secretary suggest, the company's claim of prejudice is more one of convenience than substance. *Id.*

I find Cactus Canyon's contentions unconvincing. The inspection was not so long ago that memory of the events have faded irretrievably. Moreover, Cactus Canyon yet has time to find witnesses and, if necessary, to memorialize their testimony.

Further, although Cactus Canyon claims the inspectors have no independent recollection of the events in question, Inspector Danny Ellis stated in a deposition taken in December of 2001 - a portion of which was submitted by Cactus Canyon - that he does have an independent recollection of the inspection. Resp. Exhibit E at 35. However, even if he does not have a recollection of the events independent from his notes, as Inspector Ralph Rodriguez asserts in his deposition, the purpose of an inspector taking notes and photographs of an inspection is to memorialize the event and to jog the memory of the inspector in any future proceeding. *See* Resp. Exhibit E at 23.

Accordingly, Cactus Canyon's Motion to Dismiss is **DENIED**.

ORDER OF ASSIGNMENT

This case is hereby assigned to Administrative Law Judge Irwin Schroeder, who will rule on all pending motions relating to the actual adjudication of this case.

All future communications regarding this case should be addressed to Judge Schroeder at the following address:

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David Barbour
Chief Administrative Law Judge

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